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NEGATIVE IMPLICATIONS OF THE PRESIDENT'S SIGNING STATEMENT ON THE SUDAN ACCOUNTABILITY AND DIVESTMENT ACT

HEARING

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

FEBRUARY 8, 2008

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NEGATIVE IMPLICATIONS OF THE PRESIDENT'S SIGNING STATEMENT ON THE SUDAN ACCOUNTABILITY AND DIVESTMENT ACT

Friday, February 8, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 10:04 a.m., in room 2128, Rayburn House Office Building, Hon. Barney Frank [chairman of the committee] presiding.

Members present: Representatives Frank, Watt, Capuano, Green, Cleaver; and Bachus.

Also present: Representative Lee.

The CHAIRMAN. This hearing of the Committee on Financial Services will come to order.

This is a hearing on the implementation of legislation passed, I believe unanimously, by both the House and the Senate. It was passed unanimously over the objections of the Bush Administration. And there are, of course, in the Constitution, ways for the President to fight legislation to which he is opposed. He is free, obviously, to have members of his Administration argue against it, and he in fact ultimately has a veto, which could require a two-thirds vote of both Houses.

The legislation, of course, is legislation intended to enhance the ability of people in the United States to take action expressing their horror at the genocide that is taking place in the Darfur region of Sudan. We think it is important for the American government to oppose that in various ways.

We believe it is also important to remove any obstacles from others in this country—States, economic entities, and individuals—from joining in. And indeed, there is an argument in favor of that, which I believe is very powerful.

It is often the case that governments who have engaged in atrocious behavior, when the United States government opposes them—we don't do that as consistently as I would like, but in those cases where we do, there is a tendency for those governments to say, oh, well, that is just the Administration. It is particularly the case now, and it has become easy to argue in some places to people who aren't terribly sophisticated about America's internal politics, that this Administration does not speak for the majority of the country in a number of areas.

In the case of Sudan, it is clear that the Administration's expressed opposition to the genocide represents an overwhelming intense feeling from the American people. And what we do in this legislation, which was originally conceived by our colleague, the gentlewoman from California who sits with us today, we are giving people a chance to repudiate that argument.

Now, one of the things the Administration doesn't like is the notion that State legislatures might take positions, elected State officials might take positions expressing their abhorrence of genocide and not just expressing their abhorrence but putting their money where their mouths are. I do not understand why the Administration is opposed to that.

Let's be clear: This is not a bill that generally allows that to happen, although I would be in favor of such legislation. It is a very narrowly crafted one that deals only with the issues of Darfur in the Sudan. And why this Administration would oppose our efforts to allow a broad range of Americans to join the Administration in its stated policy of opposing this is puzzling to me.

Apparently we have an Administration so wedded to the notion of ever-increasing executive power that it is willing to put its interest in enhanced executive power and diminished ability for others in this country to speak out ahead of its commitment to ending the genocide in Darfur because what they tell us is that they would rather not have that help; they don't want States interfering in foreign policy.

I would ask unanimous consent to put into the record now a letter dated October 22, 2007, from Jeffrey Bergner, the Assistant Secretary of Legislative Affairs for the Department of State. And it says here in part—it is a letter to Senator McConnell, and there is also one to Senator Reid opposing the bill.

I want to make this point: the President tried to stop this bill from passing. He lobbied against it. He lost. Indeed, there were no votes on it because he did not have a lot of support among members of the House or the Senate. So it went through.

The President was entitled to oppose the bill. The President was entitled to have the State Department lobby against it. He was even entitled to veto it. What he is not entitled to do is, having failed in those efforts and having declined to veto it, to then unilaterally undermine it by a signing statement which will vitiate its intended effect.

And what they say is, "First and foremost, we oppose the bill's affirmative authorization for State and local governments to divest from foreign companies doing business in named sectors in Sudan, Darfur. These provisions could be seen (however incorrectly), they say parenthetically, "as effectively converting State actions which States are already taking into federally protected privileges, thereby undercutting the supremacy clause and the President's powers thereunder. We do not believe that either the interests of either the Article I or Article II branches of government are served by such legislation, especially in this situation where divestment actions are currently proceeding without Federal intervention. Such authorizations would set a dangerous precedent."

Well, first of all, the silliness of the constitutional argument is important. I am going to give myself extra time. I will give it to

others as well. How does it violate the supremacy clause for the Congress of the United States to pass a law, signed by the President, albeit reluctantly, authorizing something?

The supremacy clause says that if there is a conflict between the Federal Government and the States, the Federal Government wins. It is a position I will ask Judge Wald to correct me on if I have stated it incorrectly. The supremacy clause is fairly clear-cut. It says if the Federal Government makes a decision, it countermands a contrary State decision.

How could anyone argue rationally that the Federal Government undermines the supremacy clause by a decision it takes authorizing actions? What is the undercutting of the supremacy clause? But again, understand, the right of the executive to do this preempts the interest in enhancing the effectiveness of action to express our distaste for what happens in Sudan.

They also come to the defense of the fund managers. Now, what we had is State pension funds that are afraid of being sued. And the Administration says, well, they are proceeding anyway. Yes, but they are proceeding under the threat of a lawsuit.

The purpose of this bill—you know, we thought we had people here who said, there is too much litigation in this society. Well, we took an action to try and prevent litigation, to allow these things to go forward. And the Administration objects to our doing that, and they say, well, some people are doing it anyway. Yes, but we believe more would if they weren't threatened with litigation. And certainly no harm is done, certainly not to the supremacy clause by the Congress passing a law.

We then have the argument also on behalf of the fund managers. Now, we have had situations where people have wanted to have their mutual funds or the money that they have owned or invested—they want divestiture. And they have been told by some of the third party fund managers, oh, we can't do that. We owe you the duty of maximizing the income.

Now, I must say that some of the fund managers who have claimed to be restrained here welcome the restraints. There is a device that we in Congress, in politics, sometimes use which I think is in play here. It is what I call the "reverse Houdini."

Harry Houdini had an act in which he would have other people tie him up in very firm knots and then he would get out of the knots. That was his act. It is common in politics, and apparently in the fund management area, to do the reverse. You tie yourself up in knots. You impose restraints on yourself. And then, when you are asked to do something, you say, "Oh, I can't do that. I am all tied up in knots."

Because we are here untying them, and the Administration objects to that. Here is what the Administration said: "By affirming that fund managers may avoid their fiduciary responsibility in stated cases, these provisions weaken essential legal protections for investors, including workers, retirees, and their families, and set a dangerous precedent for extending such immunity."

I wish that this zeal on behalf of the right of people to bring lawsuits in defense of investors had been present when the Administration refused to allow the Securities and Exchange Commission to file a lawsuit in the Stoneridge case vindicating the rights of in-

vestors who wanted to bring a lawsuit. It is a rare example of this Administration worrying about the right of investors to sue not being infringed.

Those are the merits. So here is where we are. I got a letter. We then, by the way, asked the Justice and State Departments to come and testify. The State Department wrote a letter expressing its opposition to the bill, so it seemed natural then to say, "Well, will you come and talk about this signing statement?" They refused to do it. The State Department and the Justice Department refused to do it. And essentially they said, frankly, "Hey, go talk to the White House because this is their signing statement."

So then we have the letter that I received earlier this week from the counsel to the President: "While we appreciate the interest the committee may have in the signing statement, there are constitutionally based concerns about providing direct testimony that will touch on communications to or with the President, and particularly those in the nature of legal advice."

We asked the White House to come and explain the public policy and the legal arguments here. They refused to do it. The White House counsel is not some private attorney. In fact, I think it was established during the disputes during the Clinton Administration that the relationship between the President and official counsel was not the same as a purely private attorney.

We are not talking about somebody up on a misdemeanor or felony rap, and we are not trying to interfere with the attorney-client privilege. We are asking the President's lawyers to justify the constitutionality of an argument that, having failed to defeat a bill through the normal legislative process and having not had the courage to veto the bill, although they wished obviously that they could have because they didn't want to put their members, I guess, through the choice of having to vote to override them, to come and tell us by what right they now announce that they, having signed the bill, will tell people when it is okay and when it isn't okay. Because that is what the signing statement does.

And that is particularly relevant here because we are talking about encouraging people to not be deterred by a lawsuit. And now we have people saying, okay, Congress says I won't be sued, but the President says I can be sued. I mean, it is a clear blow at the core of this bill because what it says is, hey, the White House says that if I am sued and I plead this congressional act, the President who signed it may intervene and say, no, no. The act was unconstitutional in that regard. I signed it because why not sign an act that is unconstitutional if I have reserved to myself the right unilaterally to get rid of it or to tell people when they can enforce it and when not?

So they refused to testify. And here is the next paragraph: "It is the policy of the Administration to cooperate with the legitimate inquiries of Congress to the fullest extent possible. In that spirit and toward that goal, we are prepared to provide an informal briefing to your committee presented by subject matter experts within the Executive Branch if that is desired by you."

No, it is not. We will not accept some back door, informal chat on a matter of overwhelming constitutional importance as opposed to testimony by them openly. Also, by the way, they say "subject

matter experts." They mean that they will tell us again why they didn't like the bill, why they tried to kill it, and why he wished he could have vetoed it, but he knew it wouldn't be sustained. They apparently don't plan to discuss why they have the right to sign a bill and then tell people to ignore it. And they then called my attention to these letters which I just read.

We have a situation in which, expressing the deep outrage of the American people at genocide, frustrated by our inability to do more, we passed a bill that my colleague from California initiated which said that those Americans whose sense of decency drives them to say that they do not wish to be financially complicit in one of the greatest crimes now going on in the world, that the people to whom I have entrusted my money can honor my outrage and not face a lawsuit, and allow States and cities and others to join in expressing to the government of the Sudan how outraged we are.

And this Administration said, "No, that might set a bad precedent for our powers." No, the American people have no role in this other than having voted every 4 years for us. And we will unilaterally, not having been able to kill the bill, tell people, feel free to ignore it.

And as I said, in the nature of this case, since it is meant to encourage people not to be deterred by the threat of lawsuit, vitiating that really affects the law. So it is a signing statement that is intended to give, through that unilateral assertion of executive power, the right to undercut a bill that they could not defeat.

It is bad for the efforts against the Sudan, and it is wrong as a matter of constitutional principle. And it is compounded by the arrogant refusal to discuss this in public. So I hope that this hearing proceeding, and I must say it is my intention at some point we will be thinking about whether the House ought to pass a resolution repudiating this effort by the President to take back, in this unilateral fashion, what he could not do through constitutional processes.

Before I recognize the ranking member, I would ask unanimous consent that our colleague from California, an alumna of this committee, be allowed to participate in the hearing, showing the great spirit of charity on the part of this committee and overlooking the fact that she left us. Is there any objection?

[No response]

The CHAIRMAN. Hearing none, the gentlewoman will be allowed to participate. Under the rules, the full members of the committee will come first, and she will come at the end.

The gentleman from Alabama.

Mr. BACHUS. Thank you, Mr. Chairman.

Mr. Chairman, I thank you for continuing to hold these hearings focusing on Sudan and the genocide and Darfur. It is a cause I believe in strongly, and you and I and Ms. Lee and others have worked for years to try to have some positive influence on the slaughter there. I welcome the Congresswoman from California to the hearing, and I welcome her work in this regard.

The Sudan Accountability and Divestment Act that we passed in this Congress had overwhelming bipartisan support. As you know, it became law on the last day of last year. We cannot rewrite history or save lives that are already lost in Darfur. However, we can and must resolve to do things better going forward.

This law has the potential to give hundreds of thousands of peaceful men, women, and children in Darfur an increased chance of surviving the genocide. Economic and financial considerations have been used to both block and water down our Sudan capital markets legislation in the past. Economic and financial considerations are important. But in a loving nation, such considerations can never be used as a justification for turning a blind eye to genocide.

Closing our financial markets to those who participate directly or indirectly in the slaughter of innocent human beings is well within our ability, and ought to be our bedrock principle. America is a loving nation, and allowing our financial markets to be utilized by an evil regime that conducts religious and racial genocide is inconsistent with our values and principles.

This new law puts strong pressure on a government that has consistently engaged in genocidal actions, both directly and as an enabler of paramilitary factions that are harassing and killing people in Darfur and elsewhere in Sudan. It is vital to keep pressure on the Khartoum government because of the bait-and-switch game it has played with the rest of the world for years, pretending to make strides to end the genocide and then going back on its word when the world's outrage is temporarily spent or focused elsewhere.

Even now, in neighboring Chad, efforts to overthrow the current government are believed to be an attempt to frustrate international efforts to intervene in Sudan. The upheaval in Chad is widely believed to be supported by the Khartoum government. The rebels have even entered Chad from Sudan.

President Deby's cooperation is essential for the deployment of peacekeepers in Darfur, and efforts to overthrow him starkly illuminate the intentions of the Khartoum government. Such destabilizing actions and violent forays make it clear that pressure on the Khartoum government must be unrelenting.

The objectives of this law are ones I wholly embrace. Shutting off Khartoum's financial pipeline will bring us closer to the goal of halting the atrocities. It is a goal that I do believe is shared by the Administration.

In regard to the signing statement, let me first say that communications between this White House and the Congress have been problematic on many issues. Obviously, this is an additional one. I am disappointed by the State Department and what appears on its face to be arrogance and also an ignorance of the duties and obligations, as well as the powers vested in the Legislative Branch by the Constitution.

Mr. Chairman, once again let me thank you for this important hearing. As I conclude, I would like to read a few passages from the prayer breakfast message yesterday. It is the President's prayer breakfast. The President was there, and Members of Congress were there, from both the Senate and the House. Over 4,000 people attended throughout the world. Members of the cabinet were also present.

The message was from Ward Breen, who heads up the African Development Fund. Here is something that I think applies very di-

rectly to the efforts that Ms. Lee and others in this Congress have made to address the genocide in Africa.

He says, and I quote, "The question I have been asked by most of my American friends"—this is also a question I have been asked—"is why cross an ocean to help people when you need only cross the street to help your own?" It is a great question, and the answer, of course, is that we need to do both. Solzhenitsyn said that disaster is defined by two things, magnitude and distance. So a small disaster close to home or a huge disaster far away results in what he describes as bearable disasters of bearable proportions.

"We have become too good at bearing. Our hearts should be broken by the things that break the heart of God. Specifically in Africa, there are many far-away disasters of epic proportions." He lists Rwanda as one. He goes on to say, "Today in Darfur, Sudan, 1.5 million homeless and thousands terrorized by raping and killing." He concludes by talking about AIDS. Epic disasters of epic proportions, far from home for most of us.

Mr. Chairman, I thank you for your hearing, and I only hope that the Administration will take a more helpful, more cooperative role in this process. Thank you.

The CHAIRMAN. I thank the gentleman. Before turning to the gentleman from North Carolina, I just want to express my appreciation. And people should know that the gentleman from Alabama now, and previously when he was chairman of the Subcommittee on Financial Institutions, has been one of the leading members of this Congress in trying to deal with the terrible problems that have afflicted people in Africa, from debt relief to now.

This was a sign of a genuine passion that he has honestly and courageously articulated, and we will continue to work together on a number of these issues.

Mr. BACHUS. Could I introduce into the record the entire speech?

The CHAIRMAN. Yes.

Mr. BACHUS. I would also like to add another thing he said that I had underlined: "Proverbs, the Book of Wisdom, says, 'Speak up for those who can't speak for themselves, and defend the rights of the poor and destitute.' If there are any people that can't defend themselves, it is the people of Darfur."

The CHAIRMAN. I thank the gentleman, and that will be made part of the record without objection.

The gentleman from North Carolina is now recognized. I should note that he is also a member of the Judiciary Committee, and one of the leading legal scholars of this Congress.

Mr. WATT. Thank you, Mr. Chairman. I won't take 4 or 5 minutes, but I do think it is important to make two points.

The first point is that I was not here in Congress during the lead-up to the actions that were taken with respect to South Africa. But in many respects, from what I have read about those steps leading to it, the White House and Presidents of the United States were just as reluctant to take any kind of affirmative, positive step until they were basically forced to do so.

And this strikes me as yet another example of that, in which if this works out well, which really there is no good method to make it work out well retrospectively but it might work out well prospectively, I suspect this President will be bragging about all of the

good things that he did to end the genocide in Darfur, including this legislation that we passed.

The difference there, I think, was that signing statements were not the order of the day. And as the chairman has noted, we have found in the Judiciary Committee that this President has just, in a virtual dictatorial fashion, decided that he can ignore the laws that Congress passes, even those that he signs into law, by writing these signing statements that have the effect of watering them down or minimizing the impact of them.

So this is not new, but it is new in the sense that signing statements have become such a precedent for this Administration, being used in so many different areas that it is unbelievable.

The second point is, this is a particular disappointment because a number of us work with our local States to try to get them to pass divestment legislation. Many of them had reluctances, based on the uncertainty of the law and various and sundry other concerns that they were expressing, but they passed those laws anyway.

To the extent that the signing statement that the President has attached to this bill muddies the water about whether States have the authority and what authority they have, it basically sets us back substantially, I think, in some of those States that were kind of concerned about what the standards were and concerned about what they could do at the State level not only with their government funds but with pension plans and other funds that were potentially being divested or were being invested in Darfur and Sudan.

So this is a real concern, and I join the chairman in expressing that concern. And I am glad that we are having the hearing about it to try to minimize it as much as we can.

I will yield back the balance of my time.

The CHAIRMAN. I thank the gentleman. And I do want to note that we did get a letter from the Department of Justice as well which made similar arguments, which we will put in the record. And again, they declined to come and discuss it.

But we did get a letter from the Department of the Treasury. They had one objection about their role in providing the specifics of the list, and we acceded to that. So on the procedural question, an important question but a question about how you did this, when Treasury raised an objection about how do to this better, we acceded to that. So it is not as if they were totally stonewalling.

Now I am going to call on my colleague and neighbor from Massachusetts, who has been one of the leaders in the Congress in the effort to mobilize against the Darfur genocide. My colleague, Mr. Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman. Mr. Chairman, I really just came to kind of express my outrage at what is going on here, and to thank people at this panel for standing up.

The easiest thing that I have seen anybody do is not—nobody is for genocide, but to just remain silent, to just let things slide, to worry about other issues. And the truth is, let's be serious. I mean, if there is a complete and utter genocide and everybody in Darfur were killed, most of our lives will not be personally individually changed.

Yet that is not why any of us ever ran for public office. That is not why you are here. And I would argue that anybody who feels that way or allows those feelings to consume them are less human than they should be. And I just want to thank the chairman and the ranking member for keeping this issue alive and moving it forward.

And there are days that—I have been involved with this now for several years, and there are days that I, and I am sure that any of us who watch this, feel powerless, helpless, and that maybe nobody cares except a handful of us. I don't know.

But I will tell you that those are the days that get me angry. I feel things that I don't generally feel when I am in public office. And those are days that make me remember that there have been people before us that have had better things to say than I will ever say.

And there is one quote that I actually keep on my wall in the office from Nobel Prize winner Elie Wiesel that says, "There may be times we are powerless to prevent injustice. But there must never be times that we fail to protest." And if nothing else, I am here today to protest.

I don't know that this will change anything. I don't know that we can get the President to actually do the things he should be doing. I don't know that we can get the world to do what they should be doing. But I do know one thing, that I am not going to stop. And I know that the people at this table and the people on this committee won't stop. If it doesn't save one life, do what we can do.

And I will tell you that I don't know what we are going to do next. I don't know if this government will do anything next. But every day that goes by, I am looking for things that we can do, that we can take action on, little as they might be, hoping that someone will come up with a better idea than me.

I mean, right now I am reduced to the fact that right now I have no intention of watching one minute of the Olympics. Not one minute will I turn that TV on. Now, I hope that changes. I want to watch the Olympics. I want to root for American athletes. But I won't.

And I won't because we can't get China, the leading protector of the Sudanese government, to do anything. To do anything. To put their arms around their friends and say, guys, stop. Not only are they not doing that—and the world isn't, either. But the rest of the world is probably powerless to do it.

The United States Government seems powerless to do it. All we have to offer here is military might and economic might. We seem at the moment to be unwilling to use our economic might, and certainly unwilling to use our military might. There are others who can, yet they refuse to do it. They talk a good game. The U.N. has talked a good game. But in the final analysis, people are still dying. The horrors are expanding, and they may well consume the entire region.

You all know this. I am telling you things you already know. I am kind of doing this for the three people who might be watching this. At the same time, we do what we can do. I know that you are each doing what you can do.

And I just want to say thank you for your leadership, for your courage, and more importantly, your commitment, your stick-to-itiveness on an issue that again, for all of us, each and every one of us, it would be just easier to focus on other things and to worry about other things and to spend our time doing other things that maybe we could change a little more easily.

But there is nothing more important, in my opinion, than as a human being standing up for the lives and wellbeing of other human beings that are being so oppressed and so unnecessarily victimized. So I just want to say thank you.

The CHAIRMAN. Next we will hear from another one of the legal experts on this committee, a former judge who brought his legal learning and his passion to our deliberations. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. And I thank my colleague, Ms. Lee, for returning to the committee and continuing to stay the course. She has been a stellar, supreme example, if you will, for many of us. When we were neophytes, she was there to lead the way and to in fact show us the way over to the jailhouse. Some of us were involved in protest with her, and we were quite pleased to make a sacrifice for this cause.

I am as disturbed as anyone with the behavior of the President. I think the comments of the chairman are most appropriate with reference to a resolution. I will gladly join the chairman in presenting a resolution such that we can at least express our deep desire to have the President understand the import of his actions.

This President has put us in a position now where we have announced to the world, the United States of America has announced to the world, that genocide is taking place. But we are also saying to the world that we will watch the very thing that we have denounced continue when we had the power to make a difference.

It is one thing to witness something when you are powerless, but an entirely different thing to sit silently by when you have the power to make a difference. History will not be kind to those who had the power and who refused to use it. History will not be kind to this President.

We should not be kind. We should impose a resolution, the strongest possible resolution, denouncing his actions. I thank you, Mr. Chairman, and I yield back the balance of my time.

The CHAIRMAN. And next another member of the committee—

Mr. BACHUS. Mr. Chairman?

The CHAIRMAN. I will yield to the gentleman.

Mr. BACHUS. If I could, I would like to respond. I would like to think—I know the President has a dedication to Africa. He has quadrupled the funding for AIDS. I have to believe that this is a disconnect between the President and the State Department or some of his advisors. So I would hope that at least some opportunity is afforded—

The CHAIRMAN. Well, the gentleman has certainly earned the right—I mean, in general that would be a courtesy we would give the President. But the gentleman from Alabama is certainly in the right. We won't take any action pending whatever conversation would happen.

Mr. BACHUS. But I do—Mr. Green, I do understand your passion for Africa that I share, the genocide. Let me just emphasize, I know the President is concerned about the genocide, so that I am puzzled why the State Department—

The CHAIRMAN. Let me say to the gentleman, look. We are not—

Mr. BACHUS. —is not any more responsive.

The CHAIRMAN. This is much too important an issue for point-scoring. I don't denigrate point-scoring, but we can do that in another context. What I am concerned about is the extent to which this may undercut. And if there could be some conversations that could diminish that effect, then there wouldn't be a need for further action. So we will work with the gentleman and be glad to do that.

Mr. BACHUS. You know, as has been said here, the President did sign the legislation. He did attach a signing statement. And there needs to be open discussion of this.

The CHAIRMAN. We will look forward to that.

Mr. BACHUS. And as you read the letters, I think maybe the—I am sorry that they didn't see fit to be here.

The CHAIRMAN. I appreciate it.

Let me—finally, another perspective. Our colleague from Missouri who is also, of course, a minister, and I am a great believer in the separation of church and state, but when we talk about a great moral evil such as this genocide, there is a perspective that the gentleman from Missouri brings that we have frequently found useful.

And so I am glad to recognize Mr. Cleaver.

Mr. CLEAVER. Thank you, Mr. Chairman. I rarely ever miss our committee hearings, and I don't like to be late when I am here. I changed my flight schedule today because I needed for my own psychological wellbeing to at least come to express my concern.

In my real life, as the chairman mentioned, I am a United Methodist pastor, and 5 years ago, we adopted 20 young men referred to by the media as the "Lost Boys." These are young men who were able to get out of the Sudan. They left during their early teen years, and we provided housing for them, and now most of them are in the University of Missouri.

They have no connection with their families at all. They don't know where their mothers, their fathers, their sisters, and their brothers are, and thus the name the Lost Boys. And they immigrated here in this country, and I wish the people of the Congress and the State Department and the White House could spend one hour listening to these young men tell of what they saw.

It is a tragedy that a 12-year-old could stand behind a tree and watch people he has known all of his life be machete'd to death. I tremble. I tremble at the thought that our country could act and fails to do so.

My hope is that some kind of transformation will occur, whether it is in the State Department or in the White House, that would allow this country to do what it ought to do in the face of almost unparalleled agonies experienced by people.

It seems to me that the signing statement that trumps all signing statements is the United States Constitution. It has already been signed. And that cancels out anybody signing anything that

cancels it out. I am concerned that when we have these signing statements, it undermines the moral integrity of our Nation and it tarnishes our image as we stand on the world stage.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Finally, joining us today is our colleague who was the author and guiding spirit of this legislation. She combined a passion with an understanding of the process. I worked patiently with her, and very well staffed as she was so that we were able to deal with legitimate concerns that the Administration raised, as I said, when the Treasury had some arguments about how best to do it.

But her combination of discipline and passion is the reason that this bill became law. The gentlewoman from California, Ms. Lee.

Ms. LEE. Thank you very much, Mr. Chairman. And first, let me just say to you this never could have happened without your leadership, your intellect, and your understanding of what we had to do in terms of making sure that the legislative processes worked in this body.

But also I want to thank you for your moral and ethical commitment, and your understanding of really America's role in the world and how this committee, under your leadership as chairman, can really address and become once again a leader in setting a new moral standard. So thank you, Mr. Chairman, for your leadership.

I also thank Mr. Bachus for his commitment and his willingness and understanding to work in a bipartisan fashion. And I know that this stems not for political reasons, but for moral reasons. It comes from his heart. He understands that this is necessary in terms of how we address many of these moral crises. And yes, genocide is a great moral and humanitarian crisis.

I have to thank him and this entire committee for stepping up to the plate and for taking this on head-on. And I think Mr. Watt mentioned the South Africa model. Well, my predecessor, now Mayor Ron Dellums, carried the divestment legislation. And as I remember it, President Reagan vetoed that legislation. But you know what? The Congress overrode that veto and finally put the United States on the right side of history as it related to the brutal, oppressive regime of apartheid in South Africa. And the rest is history.

And so now we are at another moment when we have another great crisis, and that is the genocide that is occurring in Darfur. This Congress, in a bipartisan way, passed the toughest, most reasonable divestment legislation which we are talking about today. And the President, I guess, knew that he could not override—that he could not veto this bill because, once again, we would have overridden the veto.

And so I think this is very cynical what took place, Mr. Chairman, because this is really where the rubber meets the road. The President declared genocide as taking place in Darfur, and indicated several years ago that he would take all measures to address this genocide.

And so here now we have a bill that would begin to put the squeeze on Khartoum, would allow our people in this country, our universities, pension funds, States, to begin to do what they needed to do to address this genocide, and he issues a signing statement

that in essence would try to send a signal that this is not something that he would approve. And so I think it is very contradictory. It is very cynical. And I am pleased that we are holding the hearings today.

I want to thank our panel for being here and for your leadership, and all of our young people, the faith community, all of the groups that have really been the wind beneath our wings throughout the country, who have insisted that we do this.

Finally, let me just say that the President also has issued a signing statement on our bipartisan effort on the defense authorization bill, where we insisted that there should be no permanent military bases built in Iraq. Once again, subverting the law, issued a signing statement saying that this is something that, in essence, the Administration is not going to comply with.

This governmental lawlessness that we see is unbelievably wrong. It is unconstitutional. And again, Mr. Frank, I want to thank you for your leadership and for helping us try to figure out how we can move forward to make sure that the law is complied with. We cannot allow another Rwanda to occur, where one million people died and our country did much of nothing except, after the fact, apologize.

So thank you again.

The CHAIRMAN. Thank you. And let me just note she called out the example of the South Africa sanctions bill. We are told sometimes by analysts that sanctions never work. One of the greatest moments I have had as a Member of Congress was to stand in Statuary Hall with a large number of other members and listen to one of the great men of this time or any time, I believe, Nelson Mandela, thank the Congress of the United States for passing the sanctions bill, and telling us that the passage of the sanctions bill by the United States over Ronald Reagan's veto was a very important part of the effort to get rid of apartheid. Anyone who tends to dismiss sanctions has to confront the argument to the contrary of Nelson Mandela.

We will now begin the testimony. We will start with Mr. Jerry Fowler, the executive director of the Save Darfur Coalition, with whom we worked. I have to say a lot of work went into this. It was not some simple statement, as it appeared at the first. But the staff on this committee, Ms. Lee's staff and others, worked very hard to get this done.

I would also make explicit what should be clear. This is a one-sided panel because the other side of the argument refused to show up. We invited the Justice Department. We invited the State Department. We invited the White House. They refused to come.

So this was the bipartisan effort to produce a panel that we think is representative of the argument, and we regret that those who we thought might have defended the position of the Administration declined to do so.

Mr. Fowler, please.

STATEMENT OF JERRY FOWLER, EXECUTIVE DIRECTOR, SAVE DARFUR COALITION

Mr. FOWLER. Thank you very much, Chairman Frank, distinguished members of the committee, and Ms. Lee. Thank you for

this opportunity to speak to you today about this issue, and thank you especially for your continuing leadership on it.

As the president of the Save Darfur Coalition, I would like to ground our discussion today in the human reality of the crisis in Darfur, which this law was designed to help change. Ultimately, we can't lose sight of the fact that it is human lives that have been destroyed and human lives that remain at risk.

And I want to put a human face on it by telling a story from the first time that I went to the region. I traveled to Chad in May of 2004, to the Sudanese border where refugees were coming across the border every day.

And one day, near the end of that trip, after I had talked to dozens of refugees and heard their stories, I met a woman named Hawa. And you have to understand that the daily temperature there was 115 to 120 degrees. There were sandstorms. It was an incredibly harsh environment.

I had heard all of these stories of suffering, and I met Hawa in her little hut, a little makeshift hut that she was living in with her four children.

She told me about the day her village was attacked. On that day, her father was killed and her brother was killed. A cousin was killed. Thirty people in her village were killed, and her mother disappeared. And I have to admit that I suddenly felt overwhelmed by that suffering, by her suffering, and I wanted to get out of that hut and just get out of the oppressive atmosphere in there.

And I started to back out of the hut, and she started speaking in a low voice. And I looked over at her, and tears were coming down her cheeks. And she was saying, "What about my mother? What about my mother? I don't know where my mother is. I don't know if she is dead or alive." And I felt as though she was asking me to give her an answer, which I couldn't possibly give.

And the only thing that I could think to say was to ask her for her mother's name and to tell her that I would bring her mother's name back to America and tell Americans her mother's name. And her mother's name is Khadiya Ahmed. Khadiya Ahmed.

And so now I am telling you that name, and I am telling you that as vast as this catastrophe is, it ultimately comes down to one woman who doesn't know where her mother is and probably won't know where she is until there is peace and security in Darfur.

We are nearly 5 years into this conflict, and lives still hang in the balance even as we speak today. Over two million people remain displaced inside Darfur, and another couple of hundred thousand across the border in Chad. The best chance for improved security for civilians in Darfur is the full and effective deployment of a 26,000-strong United Nations/African Union civilian protection force. Yet more than 6 months after the Security Council unanimously authorized that force, only a third of it is on the ground, and those are ineffective African Union troops who simply switch their hats from green to blue.

The primary reason that this force has not been deployed is that the Sudanese government is successfully impeding its deployment by stalling on basic technical issues. Then last month, its army brazenly went a step further and ambushed a clearly marked U.N. convoy. Lives will continue to be lost if the United States and the

international community do not act more vigorously to impose swift and strong consequences on Sudan.

While the United States had led international efforts to impose sanctions on the Sudanese regime, existing sanctions have not been enough to bring about the necessary change in the regime's behavior. The legislation that we are discussing today, which was unanimously passed by this Congress, called SADA, the Sudanese Accountability and Divestment Act, was carefully crafted as another tool to generate concerted economic pressure on the government of Sudan.

Its successful passage was the product of a vibrant partnership between House and Senate leaders, including the leaders here today, and a broad constituency of conscience that brings together a diverse group of civil society organizations, religious groups, and grassroots activists.

By signing the bill, President Bush has enacted the extra legal protection offered to States that decide that their tax dollars shall no longer be invested in companies that help fund the genocide in Darfur. In my mind, the real negative impact of the signing statement so far has been the ambiguous message it sends to Khartoum and to the business interests that are contributing to Khartoum's ability to carry out genocide in Darfur.

Each day of delay in imposing real economic and political consequences on Sudan is another day that refugees will suffer, that girls and women will be exposed to rape while gathering firewood, and that Hawa, the woman I met in 2004, will wait to find her mother and return home. We ask for your continued help and leadership in ensuring that their days of suffering and waiting will be numbered. Thank you very much.

[The prepared statement of Mr. Fowler can be found on page 39 of the appendix.]

The CHAIRMAN. Next, I am delighted to be joined by one of our leading scholars, the former chief judge of the District of Columbia Circuit Court, Judge Wald.

STATEMENT OF THE HONORABLE PATRICIA M. WALD, FORMER JUDGE AND CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Judge WALD. Thank you, Chairman Frank. And thank you, other members of the committee, Ranking Member Bachus, and Representatives Lee, Watt, and Green for inviting me to testify here today.

I might say before I begin my testimony, which will focus on the signing statements aspect and put this signing statement hopefully in the context of the larger dispute about signing statements, I would like to put on the record the fact that I, too, have had some personal relationships with genocide.

As you may know, I sat for several years—2 years—on the International Criminal Tribunal for the former Yugoslavia. And during that time, I sat on a genocide trial, in fact, the first genocide trial there, dealing with the notorious massacre of 7,000 to 8,000 young Bosnian men in one week at Srebrenica, called at that point the worst massacre since World War II. Hopefully Darfur will not reach that title.

So I have seen firsthand the witnesses, hundreds of witnesses, testifying. I will cite only one woman witness in this genocide, who said, "In one week I lost my father, my husband, my son, and 20 male relatives," gone in one week in that genocide.

The second point, and then I will move on to the focus of my testimony, is that I have done work since leaving both courts with international foundations that deal with some of these problems of atrocities and genocide abroad. And I have come to know how important is the role of finance in these genocides.

For instance, even the Bosnian genocide was financed, in a sense, by the government of Yugoslavia. I mean, all of the soldiers were being paid out of Belgrade. But even more relevant here, I am sure you are aware of the pending prosecution of Charles Taylor, the former president of Liberia, who has been indicted by the Sierra Leone court for his role in financing the terrible civil war and the atrocities attendant thereto, the blood diamonds, etc., in Sierra Leone.

So I think this bill is especially important, as the last speaker noted, because of the arrogance with which the current government in Sudan and Darfur has defied international law, for instance, the International Criminal Court. And in this one instance, as I am sure you are aware, despite Administration opposition to the International Criminal Court, the United States did not veto in the Security Council the Security Council resolution to refer the Darfur case to the International Criminal Court, which has already brought down two arrest warrants against two high government officials in Darfur.

Unfortunately, the premier has more or less thumbed his nose at those, has refused to give up the indictees, but not only that, with one of them he has appointed that particular indictee to oversee the deployment of humanitarian aid and the situations in the refugee camps in that country, which is sort of the ultimate thumb your nose. So I do think that financial sanctions are important. I will now go on to the main business.

In terms of signing statements, I will make five points briefly about signing statements in general.

The CHAIRMAN. Let me just say, we have—although for a Friday with no votes it is a big turnout, we are not under a time constraint, so the 5-minute rule is pretty flexible.

Judge WALD. All right. Well, I will try to stay within it anyway.

The CHAIRMAN. Well, if you did, Judge, you would have 46 seconds.

[Laughter]

The CHAIRMAN. I mean, I am no Rehnquist. But you go ahead and take your time.

Judge WALD. All right. Okay.

Mr. BACHUS. Yes. Actually, we are asking you to take longer.

Judge WALD. Okay. I accept.

As one of the speakers has already pointed out, the Constitution says nothing about signing statements. The Constitution is very clear in Article I, Section 7, that when a bill that has passed both Houses of Congress is presented to the President, quote from the Constitution, "If he approves, he shall sign it. But if not, he shall return it with his objections." And it goes on to say, of course, that

if both Houses re-pass it by a two-thirds vote, again a quote from the Constitution, "It shall become a law."

Now, this would seem to be relatively clear about the process by which a bill becomes law. Yet I would have to acknowledge that since the early 1800's, Presidents of both parties have appended signing statements to bills that they have approved.

Now, in most cases those signing statements are noncontroversial. They say, this is a great bill. I want to thank "X" and I want to thank "Y" for helping to pass it. Or even in cases of ambiguity, if a provision in a bill is ambiguous, nobody has appeared to controvert the President's right to say, well, I want you to know that in construing this ambiguous provision, I am going to construe it in the following way.

Now, what has caused controversy is where the President has said, I am not going to enforce this particular provision because I think it is unconstitutional, or what we call the constitutional avoidance interpretation, in which he says, if I interpret it in a certain way, then I will consider it unconstitutional. So I am not going to interpret it in that way regardless of how clear the congressional intent is that it should be interpreted in a particular way.

Now, one of the scholars who studied this at much greater depth than I have, certainly, has said that up to 1981, there were 100 such provisions which had been challenged constitutionally by the whole number of Presidents up to that time. But actually, in only 12 cases had the President gone on not to enforce the law afterwards, after complaining.

And again, candor acknowledges that even in recent times, some of our Presidents, Democratic as well as Republican, have used this device. For instance, President Carter refused to abide by the rider to an appropriations bill that prohibited his using funds to put in effect his amnesty plan. He went ahead and used them. Somebody attempted to sue, and the court threw the case out and said there was no standing. And so his program went ahead.

Now, President Reagan began using the constitutionally objecting signing statements much more plentifully than had prior Presidents. He also advanced, through his Attorney General, Edwin Meese, the notion that courts in construing a statute ought to look at presidential signing statements, and got them reproduced along with legislative history in the U.S. Code and Congressional Service.

However, I stop here to point out there have been very few instances in which courts have actually cited signing statements. There have been a few, but not very many. And also, they have generally used them in a confirmatory way to say, well, we arrive at this conclusion by ourselves, according to the other evidence, but the signing statement goes along with them. I know of no instance in which a court has said, well, I am going to depend on this signing statement as some kind of controlling evidence to say that the law is unconstitutional.

Now, up until the second President Bush, again relying on some of the scholars, 600 provisions since the beginning of our history had been objected to constitutionally by all of the Presidents combined. As of the near end of President Bush, the second President Bush's term—and I don't have the exact number because, to my knowledge, it hasn't been compiled—but it is well over 800 sepa-

rate provisions in his two terms have been constitutionally objected to in a way either that says, I will not enforce, but usually somewhat similar to the one in this particular signing statement, which says, I will interpret it in a way that meets my constitutional objections to it, and I will enforce it in that way only.

The CHAIRMAN. Judge, let me ask you so I get it right. You are saying prior to January 20, 2001, it was 600, and since then it has been 800? Is that—

Judge WALD. Over 800, but I don't have the exact.

The CHAIRMAN. 600 total entire before?

Judge WALD. Provisions. Provisions. The numbers get sometimes confusing because some people talk about the number of statements—

The CHAIRMAN. You are talking about provisions. Yes.

Judge WALD. —but one statement can have a lot of different provisions. And I am taking my numbers from the American Bar Association task force report.

Mr. BACHUS. Mr. Chairman, if I could add to that.

Judge WALD. Go ahead.

Mr. BACHUS. The signing statements, as you have said, they started under President Reagan—

Judge WALD. Well, they—

Mr. BACHUS. —and I think actually before that.

Judge WALD. Yes.

Mr. BACHUS. But, I mean, I think the first common—

Judge WALD. They escalated. They escalated.

Mr. BACHUS. And I agree with your statement that most of them do not challenge—or a growing number. For instance, President Clinton, 18 percent actually challenged.

Judge WALD. Right.

Mr. BACHUS. The rest were supportive of the legislation.

Judge WALD. Right.

Mr. BACHUS. The distinction between that and this Administration is that 78 percent of them through September of last year were objecting to the bill or saying they were going to enforce it in only a certain way. So there is a growing tendency not so much to have signing statements but to say that they are not going to enforce it or that they object to the—or that they will enforce it in a certain way.

Judge WALD. Yes. You are absolutely right, Representative Bachus. And the numbers that are in my more formal statement point out that those numbers have gone up. And President Clinton stayed with that trend. He had, I think the number was 105 provisions that he objected to constitutionally. But the numbers since—I think all experts agree that the numbers since President Bush II have gone up exponentially.

But the other difference about the current use of them is, in the past, it is pretty well been confined sometimes to a particular provision that has come up here or a particular provision that has come up there.

But the repeated use in the Bush II signing statements of mechanical, ritualistic, boilerplate—those are what some of the scholars call them—designations which don't tie down any specifics as to the reasoning, as indeed this one doesn't, but use terms like

"unitary executive" or "commander in chief powers" or "the President's exclusive power in foreign relations"—for instance, the unitary executive has been used, that term, "This is in violation of principles of the unitary executive," 82 times.

And I might add here that although I have no notion that there is a connection, in past signing statements, very often "unitary executive" has been used to constitutionally object to provisions in congressional enactments that required subordinate members of the cabinet or the agencies to report directly to Congress.

I don't know if that has any relationship to why you got a negative response to your pleas for a government witness here. But I know that it is a recurrent theme that the President says, no, my people can't go directly to Congress. It has to come up through me.

Now, the American Bar Association task force on which I served as a member, and many other scholars, say there really is no constitutionally valid justification for signing a statement by the President and then saying, I am not going to enforce it, or I am only going to enforce it in a way that is contrary to the clear congressional intent.

This, ironically, is a fairly strict constructionist theory. But in the Supreme Court case of *Clinton* v. *New York,* the Supreme Court did say that even when Congress authorized a line item veto, it was not constitutional. Justice Stevens wrote the opinion, saying, look, the Constitution says how a bill becomes law. And maybe it is hard sometimes. Maybe it means tough choices. But the Founding Fathers meant there to be tough choices, and that is the way it is.

Now, again, I have to point out that this is not a unanimous theory. As I am sure you are well aware, during President Clinton's term, Walter Dellinger, who is a much respected colleague, legal colleague, did write a memorandum which said that under Article III, the President has the duty to see that the laws are faithfully executed, and he therefore has the right to refuse to execute a law that he believes unconstitutional if he also believes that the Supreme Court will uphold his view, even if the Supreme Court has not yet done so. I don't buy into that theory, but it certainly does have—

The CHAIRMAN. Just so we can—what was his official position at the time he wrote that, Judge?

Judge WALD. At the time of that, I believe he was head of the Office of Legal Counsel.

The CHAIRMAN. Of Legal Counsel?

Judge WALD. Right. And he wrote it—there were two memorandas. One was to Ab Mikva, who was White House Counsel. I don't remember who the other one—

The CHAIRMAN. But it was in his official capacity in the Justice Department?

Judge WALD. Yes. It was in—oh, yes. Absolutely.

The CHAIRMAN. I just wanted to make that clear.

Judge WALD. It is in the official records.

Mr. BACHUS. And Judge, let me ask. The case you referred to, that is the 1998 Supreme Court case?

Judge WALD. The *Clinton* v. *New York.*

Mr. BACHUS. On the line item veto?

Judge WALD. Yes. I have it here someplace, but I am pretty sure that is the right date.

Mr. BACHUS. Yes. Thank you.

Judge WALD. But there was a follow-up, I mean, in all fairness to the Dellinger memo. The follow-up said, but the President ought to use any such power very cautiously, and in using it, he ought to take account of three things: one, its likely effects on individuals or entities; two, its effect upon the constitutional prerogatives of the President; but three, the likelihood of judicial resolution of the issue coming about.

The CHAIRMAN. Judge, we should wrap up now because we have already started questioning you.

Judge WALD. All right. I am—let me make four points about this signing statement. Just to conclude the other, no court has yet ruled which of those interpretations is correct.

All right. As to this particular signing statement, four brief notes. One, it uses the same kind of cryptic, non-detailed reasoning as to why the President says that he will enforce it only in a manner that doesn't conflict with his authority. In other words, even in the Department of Justice letter which preceded the passage, which I have a copy of, they never—they say there are laws, treaties, etc., etc., on the book that may conflict. They never cite one.

I was trying myself to think about it. I can't even speculate as to what kind of treaty or law on the books that they refer to but never tell us what they are. It does seem, and the ABA task force said, that if the President is going to do something as important as say, I am not going to enforce this law the way Congress meant to, he really needs to be specific in terms of what he thinks it conflicts with or what kind of situation he thinks could cause a problem.

Okay. Secondly, in most cases where even President Bush has used these unitary executive signing statements in the past, he has been defending, in his own view, his own turf, namely, the executive power versus congressional encroachment upon that. Here we have a very enigmatic role that he is taking on because he has to admit that the preeminent role given by the Constitution is to the Federal Government. It is not to the executive alone.

Certainly within the Federal Government under Article I, Section 8, the primary role is given to Congress in regulating foreign commerce. So in effect, he is taking on a role of defending Congress against Congress's own action, which is somewhat strange. And I point only to the steel seizure case in which Justice Jackson's famous soliloquy said that even where there is any acknowledged shared power between the executive and Congress, the executive power is at its lowest ebb, where Congress has already legislated. And that is certainly true in this case.

The third point is: It is unclear whether there can be a judicial resolution here. Theoretically, the President would have to move against the State if a State went ahead and divested, and he thought that that was interfering with his power. But it is very unclear in present law whether there would be standing, who would have standing, whether the courts would take such a case or not. So we don't have any clear case where it will be settled by the courts.

And my last point is: Some people have said, well, signing statements are not the problem. I mean, the President could go out and make a speech tomorrow night at the Hilton and say the same thing and it wouldn't be any constitutional problem. It is the non-enforcement itself which poses the constitutional dilemma.

Whether or not that is true, I want to point out that I believe, having worked in the Federal Government, that as a practical matter, signing statements do have real world effects. They may, as some people have alluded, have a deterrent effect because States don't want to have a lawsuit even if they would win it eventually. Or we all know executive officials in the Administration have many areas in which they interact with the States and in which their "benign-ness" or their antipathy could be very important in other areas. There are all sorts of ways of leveraging power, and so the States might have reason to worry about that.

I will conclude there.

[The prepared statement of Judge Wald can be found on page 53 of the appendix.]

The CHAIRMAN. Thank you very much, Judge. And we obviously had a hard time restraining ourselves, so we will get back to it.

We are also very pleased to be joined by Paul Schwartz, who is a partner in Cooley Godward Kronish. People will note the witnesses were put together so we have people who have been primarily concerned with the specific subject, some legal experts, and then a State official who is the intended target of both our action and the signing statement.

Mr. Schwartz, please go ahead.

STATEMENT OF PAUL H. SCHWARTZ, ESQ., PARTNER, COOLEY GODWARD KRONISH, LLP

Mr. SCHWARTZ. Thank you, Mr. Chairman, Ranking Member Bachus, members of the committee, and Representative Lee. I am proud to be, in addition to a partner in Cooley Godward Kronish, counsel to the Sudan Divestment Task Force. And I am grateful for the opportunity to testify today concerning the constitutionality of State and local divestment measures authorized by SADA in light of the President's signing statement.

Many people believe, Mr. Chairman, that targeted divestment from foreign companies that provide the most direct support for the government of Sudan is an essential tool in the fight to end the genocide in Darfur and to protect the financial and reputational interests of U.S. pensioners.

SADA serves the important function of ensuring that those measures rest on solid constitutional ground. It does that by giving State and local divestment measures that comply with the terms of the statute the blessing of Federal law, thereby making them part of the Federal Government's own policy response to the genocide.

Despite signing the legislation, the President has tried to unsettle the constitutional ground by suggesting that even State measures explicitly authorized by Federal law might "interfere with implementation of national foreign policy," and thus conflict with the Constitution's vesting with the Federal Government of the exclusive authority to conduct foreign relations.

In my view, the Administration's argument is without any legal merit. Nevertheless, a risk exists that the signing statement could create a misimpression among States and local governments that are considering targeted Sudan divestment that SADA does not effectively protect their actions. I hope, therefore, that this hearing will reaffirm the solid constitutional ground on which State and local measures authorized by SADA rest.

The constitutional analysis, in my view, really is straightforward. When the Federal Government properly enacts a law, that law embodies policy of the United States. It is policy of the United States. Consequently, when a law authorizes State measures that touch on foreign affairs, the Federal Government has expressed a judgment that the measures do not impede Federal foreign policy but rather complement that policy, are part of that policy. Accordingly, such measures cannot violate the constitutional principle that States may not unduly interfere with Federal foreign policy.

And that is particularly so, I submit, when, as here, the President actually signs the legislation. As Judge Wald explained, Article I, Section 7 of the Constitution, the presentment clause, tells the President exactly what he must do when Congress passes a bill. If he approves it—"approve" is the word that the Constitution uses—he shall sign it. But if not, he shall return it, in other words, veto it.

By signing SADA, therefore, the President, in the words of the Constitution, approved it. It is especially difficult to see how a State action can be an unconstitutional interference with Federal foreign policy when it has been approved not only by Congress but by the President as well.

In neither the Zschernig case nor the Garamendi case from the Supreme Court, two cases that the Justice Department has cited in a letter for the Administration's position—in neither one of those cases did the Supreme Court hold that State measures authorized by Federal law could somehow constitute an unconstitutional interference with U.S. foreign policy.

The Administration again in this Justice Department letter from October 2007 seems to take the position that because Article II of the Constitution confers on the President certain powers to conduct foreign affairs, that Executive Branch policies with respect to foreign relations somehow can trump even properly enacted Federal law like SADA.

That is not so. In our constitutional system, Congress, too, plays an important role in foreign affairs, especially when, as with investments in and divestment from foreign companies, it involves the regulation of foreign commerce.

The President's signing statement does nothing to change this constitutional analysis. Presidential signing statements do not have the force of law. They are simply statements of opinion. In my view, in this case, that opinion is wrong.

Because SADA reflects the explicit policy judgment of the Federal Government, articulated by Congress and approved by the President, State and local divestment measures that comport with the statute also comport with U.S. policy regarding Sudan and the genocide, States and local governments should feel confident that

their actions are fully consistent with the United States Constitution.

Once again, I thank the committee, and I look forward to answering your questions.

[The prepared statement of Mr. Schwartz can be found on page 43 of the appendix.]

The CHAIRMAN. Thank you, Mr. Schwartz.

And finally, a very important witness, my new neighbor, Frank Caprio, who is the general treasurer of the State of Rhode Island, and very much in the forefront of this movement, and is one of the State officials who has really been put in the vortex of this by whatever conflict might have arisen from the signing statement.

Treasurer Caprio, please.

STATEMENT OF THE HONORABLE FRANK T. CAPRIO, GENERAL TREASURER, OFFICE OF THE RHODE ISLAND GENERAL TREASURER

Mr. CAPRIO. Thank you, Chairman Frank, and I hope you are over the loss of the Patriots on Super Bowl Sunday. We are still suffering the effects in Rhode Island.

The CHAIRMAN. I know. But I have regained the ability to go up and down Route 1, so that is a compensation.

Mr. CAPRIO. Chairman Frank, Ranking Member Bachus, and Representatives Lee, Watts, and Green, it is an honor to be here today with you.

Chairman Frank, I especially liked your reverse Houdini story today. I grew up in a household where I was one of five children, and my mom—her affectionate nickname from my dad was Houdini because whenever there was any extra money in the household, it disappeared. My dad would say she pulled a Houdini. But really, she was spending it on the kids. She wasn't spending it on herself. But it was a very common discussion in the household of how Houdini made the money disappear.

My name is Frank Caprio, and I am chairman of the State Investment Commission of Rhode Island and the elected General Treasurer of Rhode Island. As a fiduciary of a State that successfully passed divestment legislation in June of 2007, I am here before you today to thank you for passing the Sudan Accountability and Divestment Act, and to highlight the aspects of the Act that are important to the States, Federal authorization of divestment and protection from litigation.

In the most basic sense, divestment from Sudan represents a choice by the State to invest its money in concert with the value of its citizens. Accordingly, States possess both the right and the capacity to invest based on social, humanitarian, and financial values, as long as those decisions are consistent with prudent investment standards. The targeted approach to divestment followed successfully in Rhode Island and in other States addresses these concerns while upholding rigorous financial standards.

Having passed this recent act, Congress is well aware that targeted divestment works. To see proof, you need not look further than the recent withdrawal from the Sudan of European-headquartered powerhouses ABB and Siemens, who cited divestment as their motivation. And last spring, while we in Rhode Is-

land were considering our State act, which was signed into law, Rolls Royce, PLC withdrew from the Sudan.

It is becoming obvious that investment in a regime committing genocide carries too high a risk to justify the pursuit of doing business in such a region. These companies' actions are tremendous victories, and a call for the States to continue on this course. The passage of this Act serves to create a divestment framework, end ambiguity, and galvanize the States' rights to act in their own financial as well as humanity's best interests.

The President's murky signing statement reinstates the fear of legal action that this Act was intended to remove. It is counterintuitive that an Act which intends to end ambiguity on the issue of Sudan divestment would be accompanied by a presidential statement that opens the very door to the ambiguity by placing the Act at the President's potential discretion.

If we truly seek to protect commerce in the face of divestment, then we must uphold the tenets of this Act to its highest degree, ensuring the enforcement of a uniform procedure. We cannot afford to take an ambiguous stand on the genocide in Darfur.

In conclusion, Mr. Chairman, the Sudan Accountability and Divestment Act of 2007 displays the Federal Government's power to enable States to join a collaborative movement, allowing even the smallest State in our Nation like Rhode Island, even though our pension fund is over $8 billion, to leverage the collective strength of this great union to put an end to one of the generation's greatest genocides.

Thank you for your time.

[The prepared statement of Mr. Caprio can be found on page 36 of the appendix.]

The CHAIRMAN. Thank you, Treasurer Caprio.

I just want to say this bill, it seemed like a simple idea, even to me. And it took a lot of work to get it into this form.

And I just want to acknowledge the staff—on Congresswoman Lee's staff, Christos Tsentas, as they began the bill; Jim Segel, Dan McGlinchey, and Deb Silberman of the Democratic side on the Financial Services Committee; and Joe Pinder and Anthony Cimino on the Republican side. I think one of the reasons we got a signing statement is that the bill was pretty unassailable in any other way. So we take some pride in that.

I am now going to begin with our colleague from California, who has a plane to catch. And so the author of the bill, the gentlewoman from California, is recognized for 5 minutes for questioning.

Ms. LEE. Thank you very much, Mr. Chairman. And I appreciate you allowing me to ask this question because I do have to leave for California. But this was such an important hearing today. And I want to thank you again, and Mr. Bachus, for holding this. This is so important in oversight and in making sure that the people of Darfur somehow, someday, hopefully sooner rather than later, are able to live their lives, and those who are still alive return home.

First, let me just say, Judge Wald, you mentioned the signing statement dealing with the tax money as it relates to establishing permanent bases in the National Defense Authorization Act, which I mentioned in my opening statement. I hate to say, I really could take this personally but I won't for the present.

These are both my provisions, one, my "no permanent bases," which we have been working on for years. It has been written into, I think, the law at least 8 times, into appropriations and authorization bills. And we have worked in a bipartisan way to make sure that the President understands the will of the American people. And he—again, a signing statement on that, and now here on SADA.

So it is quite amazing to me. And I wanted to just ask you, or Mr. Schwartz, or both of you: Mr. Schwartz, you mentioned that you believe that this had no force of law but was a statement of opinion, in terms of the signing statements.

But I guess how do we ensure that the statements of opinion don't begin to subvert the law? And as I said in my opening statement, I think this is a very cynical attempt to undermine and subvert the law. But how do we make sure that doesn't happen, or do you think that is the reason for some signing statements, especially this one?

Mr. SCHWARTZ. Well, I think that is a very difficult question, Representative Lee. I can't speak for the Administration. I certainly would not attempt to speak for—

The CHAIRMAN. But we might as well try. They refused.

[Laughter]

Mr. SCHWARTZ. I will pass. But the only way to get true resolution of the legal issue, the constitutional issue, is litigation and a resolution by the courts. I think that would be unfortunate. I think that is unnecessary. And I think perhaps that is one of the reasons that the Administration is not here today defending their legal position. In my view, the position is indefensible.

What you are really asking is: How can we protect against the practical—not the legal so much, but the practical—consequences, if any, of the signing statement? I don't have the answer to that. I am not sure that the ABA task force has the answer to that, although the ABA task force has recommendations. And perhaps Judge Wald will speak about that.

I do think that proceedings like these, statements by the Congress making clear that the President's view of the constitutionality, or purported view of the constitutional issues, is not the view of Congress and not the view of the House and not the view of the committee with respect to these constitutional issues, may help.

But ultimately, in the case of SADA, I believe that the constitutional analysis sort of will stand on its own and should stand on its own. And that is why I am hopeful and I am confident that States and local governments considering divestment measures who might be deterred by the President's signing statement will look at the analysis, and it will be sufficiently clear to them that the President is wrong. And if they have any questions, I am happy to help explain it.

Judge WALD. I certainly agree with my colleague here that, as Learned Hand once said, litigation is to be eschewed at all costs if possible. However, I do think—I am sure that the members of the committee are aware that there are several pending bills in both houses—I don't know how far they have gone along—which would allow the Congress to litigate the signing statement itself be-

fore the President has attempted to carry it out in any way. How far they will go and whether or not the courts will say that they in turn are constitutional as presenting a case in controversy remains to be seen.

I do agree that one of the really tricky and unfortunate things about the signing statement is that when the President, as the chief executive, says something and says, this is a terrible law; I signed it, but it is unconstitutional and I am not going to enforce it, that does send a message down through the bureaucracy and through the executive officials. And that is really the unfortunate thing about signing statements.

So the only way to combat that short of getting actually a court to say no, it is constitutional is, I think, through the reinforcement you suggested of your own resolutions, perhaps many of the States, such as the prior witness, reaffirming their belief that Congress has laid down the law. And I might say that this signing statement, as with most of the other constitutionally based signing statements, is an attempt by the executive to empower itself in those areas to pick and choose, cherry pick in a law, when they will enforce it, when they will not, and not to tell you about that beforehand.

I think that goes against certainly the spirit as well as the letter of the Constitution because this has arisen, as you well know, with the FISA legislation, with several other pieces of legislation that Congress passes where the executive says, "Ah-hah, you can pass a law, but I have this residual power back there. So I will decide when to enforce it or not, and I won't tell you ahead of time when that is likely to be."

So I think that this current experience with 800 of these in two terms should galvanize both the legal profession, the States in this case and Congress itself, to reinforce their belief that is not the way the Founding Fathers meant to run the government under the Constitution.

The CHAIRMAN. Thank you very much. What you were saying, Judge Wald and Mr. Schwartz, in your answers completely summarizes. That is exactly where we are. We didn't have this hearing idly. We had it because we are worried about the signing statement's impact because we are talking here about encouraging people and not discouraging people. And it may be our move.

The gentleman from Alabama.

Mr. BACHUS. Thank you. This question is for the whole panel. There was a Reuters article yesterday that OFAC, Office of Foreign Assets Control, had announced they are going to institute civil actions against many companies they say have breached U.S. sanctions against doing business with the Sudanese government. And they are going to be able to impose fines up to $2 million. Prior to the legislation, I think the limit was $50,000.

I have two questions. Number one, do you think that will be an effective tool against companies doing business with Sudan?

Well, and the second one you can comment at the same time. It is my impression that the United States has really been in a leadership role of applying sanctions. I know other countries have been aggressive, too. And then other countries have not been at all, including China. But how do you see number one, OFAC's actions,

as being a positive? And number two, how is the rest of the world responding to the genocide?

Mr. CAPRIO. I could respond to that as chair of a fund, an institutional investor. The more exposure that is given to the entities that are doing business in the Sudan, the better. Right now the legislation that we passed in our State and the Federal legislation is going after the worst offenders.

But if we can highlight across the board companies that are materially doing business there, maybe not to the level of some of the goliath multinational entities, but now those entities will shift from—the entities that you are citing will shift now into a different category that will allow institutions like us to then take action. So I welcome the scrutiny that they are going to receive.

Mr. BACHUS. And I didn't know if the panel was aware of OFAC's actions. Treasury has actually taken action. I hadn't seen any encouragement or participation of the State Department. But it seems almost as if even the two departments of the executive branch are going in two different directions.

But are there any other comments?

Mr. SCHWARTZ. I would just make two points, Ranking Member Bachus. One is that the genocide obviously is an extraordinary horror that requires extraordinary measures, as I understand it. The Sudan Accountability and Divestment Act was not intended to be a replacement for existing Federal sanctions but a supplement to it. So any enforcement of sanctions and ratcheting up of sanctions is a positive development.

Secondly, although this is not my area of expertise, I do know that my client, the Sudan Divestment Task Force, has been very active in moving its efforts overseas as well, or I should say expanding its efforts overseas. And there is a lot of work going on in Europe now.

I would say they are probably behind where we are in the United States in terms of the divestment movement. But the divestment movement is ratcheting up and moving with our European allies. As well, there have been statements made by, I believe, the European parliament in the last year supporting targeted divestment. And so it does need to be a worldwide effort.

Mr. FOWLER. If I could just add a couple of things to that. I think as important as divestment is, and it is very important, it has got to be part of concerted economic pressure against the government of Sudan. And sanctions are one part of that. So vigorous enforcement of the unilateral sanctions that the United States already has announced is very, very important. And civil actions would be part of that.

The second thing that I would want to say is that, as you point out, other countries have lagged behind the United States. And that is one of the things that is so negative about the signing statement, as I mentioned in my opening remarks, is the ambiguous signal that it sends to the rest of the world for the President to sign the legislation and then cast doubt on it at the same time.

And the irony of it is, and my friend Adam Sterling, who is here behind me from the Sudan Divestment Task Force, has said this many times, is that before this legislation was passed, the Administration never suggested it was going to act against States or mu-

nicipalities for divesting. So it is implausible to think that they will do it now. And in that sense, the signing statement is unnecessary damage to the whole cause.

Then the final point I would make, which picks up on what Paul just said, is that internationally, there is a growing movement. More diplomacy is needed by the United States. But in terms of civil society, the Save Darfur Coalition and other groups here in the United States are working with partners in other countries to bring more pressure to bear on their governments. And that is going to be a very, very important part of the effort going forward.

Judge WALD. The only additional comment I would make is that I think the financial is going to be increasingly important because according to what I hear and read in the papers, the U.N. attempt to set up the military force, a multinational military force, has faltered.

Here the Americans have been better than most of the other countries. They have actually been willing to contribute and have contributed, not only manpower but equipment. But it has been a very slow process trying to get the other countries to contribute the helicopters or any equipment.

So it may be that the burden, at least for a while, is going to lie on the financial end.

Mr. BACHUS. Thank you.

The CHAIRMAN. I am going to call on my colleague, Mr. Green. But let me say I appreciate the gentleman's calling our attention to this article. I asked for a copy of the article. It is just an interesting timing issue here.

"U.S. Prepares to Act Against Sanction Busters." And this is an announcement that they plan to take some action in a month or two. I am sure they do. I am also sure that the fact that they now decided in a month or two was not entirely unrelated to the fact that we are here this morning.

So I welcome that, and maybe we will have some more hearings, and maybe they will do more things. But it is clear as you read this that they are waiting for the regs, and in a month or two they are going to do some things.

The gentleman from Texas.

Mr. GREEN. Thank you, Mr. Chairman. I, of course, thank you and the ranking member for having this hearing.

And I would like to make it as clear as possible, conspicuously so: I do not question the motives of the President. I think that people with the best of intentions can do bad things. I don't think that this was done with malice aforethought. But I do know this: If a person pulls out a gun and he kills me, whether it is by accident or design, I am still dead.

We are dealing with life and death in Sudan. Because you have the right to do it doesn't mean that it is the right thing to do. It was morally wrong. Whether it was legally right is debatable. It was morally wrong for the President to obfuscate this issue with this signing statement when lives are at risk.

Constitutional scholars can debate these issues ad infinitum. But the moral question is what I contend the President will have to answer for, the morality of, at a time of death, when people—I have been to Sudan—when people are literally living on the ground in

villages where they don't have water, where they don't have the necessary cover from the elements, and where people are being raped—it is morally wrong for the President to do this.

And I stand by what I said. He really is not going to be judged kindly by history. And I appreciate all those who have contrary views, and their friendship is still valued. I still love the President, as a matter of fact. He is a friend. This will not change how I feel about him. It will change how I feel about what he has done here.

I condemn the actions, not the man. His actions are going to create a circumstance that we need not have to deal with. And I yield back the balance of my time.

The CHAIRMAN. I thank the gentleman. We don't know whether it will interfere with the way he feels about the gentleman, but that is the nature of this business.

I am going to take some more time here. I appreciate very much this testimony. I have two sets of questions. One, of course, deals with the specificity of the impact of the signing statement on this cause, and then on the broader constitutional question.

Let me say, in furtherance toward what the gentleman said, I do not believe that this indicates any less interest in the Administration's view in trying to combat the genocide, taken by itself. And indeed, the fact that we got a statement today from the Treasury Department, from OFAC, announcing that in a month or two they are going to take further action, without question that was generated by the need to offset any negative impression that this hearing would cause.

And I accept that fact. They continue to care a lot about that. The problem is the order of priorities. This is an Administration that cares more about enhancing executive power than about the specific issue. And the problem is, judged in the abstract, yes. They are very concerned about the genocide. But when it comes to protecting the supremacy not of the Federal Government but of the presidency, then everything else gets subordinated. That is what is involved here.

And if you read this, it is clear. And this goes to the point I think Mr. Fowler made that, well, why didn't they object when some States did this on their own? Because that did not codify what they saw as a threat to executive power in the United States. It is when we recognize that—and of course, States on their own can't immunize themselves from Federal lawsuits.

And again, I have to stress the irony of some of the Administration papers here saying, oh, but you don't want to take the rights away from the poor investors. I will tell you because this committee has jurisdiction over that, in the time that I have been ranking member and chairman, this is the first time that I can remember this Administration asserting any concern for anything that might diminish investor rights to protect themselves. They have been on the opposite side of every such issue.

But what is clear is—and Mr. Fowler's point makes it very well. They don't object to the States doing that on their own because no real harm is being done. But they interfere with this bill's effectiveness because the passage by this Act—and it is not—and I think this is the other important point I want to make, and Mr. Fowler's point,I think, carries this out.

Their arguments conflate the federalism argument versus the executive versus legislative argument. Judge Wald correctly pointed out that they are using the unitary executive argument really to argue against Congress, not within the Administration.

If this bill gave the head of OFAC the statutory power to make these decisions, then there would be a unitary executive argument. It would be an argument that we had lodged power in an inferior officer, and that undercut the President's ability to make that decision.

But obviously we don't do that. So I think this is very clear. This is concern about presidential power because—and this notion that it violates the supremacy clause is just mind-boggling. How can it violate the supremacy clause, which protects the supremacy of laws passed by the United States, when we have passed a law and when we have done this delegation? So we are clearly talking here about executive versus legislative. This is what is at stake. And that sadly has trumped the genocide issue.

So let me just ask again to Mr. Fowler and Mr. Caprio. And again, I want to stress to people, this is no minor quibble. As we in our frustration as a Nation search for ways more effectively to try to save the innocent victims in Darfur from murder and torture in huge numbers, we listen to the people who have been in the forefront, the people in the coalition.

Mr. Fowler, am I correct that this was as high a priority that your group had for Congress to act on this past year?

Mr. FOWLER. Well, yes. For congressional action, SADA was a priority.

The CHAIRMAN. Yes. For us. Right. Obviously, there are other things the executive can do.

But in fact, that underscores the point. This still leaves the executive in major control of this operation. This does not empower us. We don't have delusions of grandeur here that by passing this Act, we have suddenly run rushing to the rescue. We wish we could. So it is a fairly minor addition to the arsenal, but it was the best we could do.

And let me just ask again to Mr. Caprio, to make it explicit. You have talked about this. Clearly, when—well, let me ask: When you worked with your colleagues in the Rhode Island legislature to pass the divestment bill, what kind of opposition did you get?

Mr. CAPRIO. Minimal if any opposition. It was unanimously passed on both sides of the legislature and signed by the governor.

The CHAIRMAN. Were there any arguments aimed at you? Did you hear from anybody who said, well, you have these fiduciary responsibilities?

Mr. CAPRIO. No. We had widespread support in the community and—

The CHAIRMAN. Well, that is encouraging. We have heard from others, though, for instance in the mutual fund area, that they are concerned. And Mr. Schwartz and Judge Wald summarized this well.

The purpose of this bill is to encourage people not to be intimidated by the threat of lawsuit. That is all the bill does. And so when the Administration asserts its right to undercut it, it undercuts the heart of the bill, which is the protection against lawsuits.

And as I said, I think it is clear that it is this Administration's relentless insistence on enhancing executive power beyond any conception that has previously been here. And Judge Wald is right. She said the unitary theory of the executive.

I was debating on the Floor when we were talking about whether or not, if Congress passed a law requiring search warrants for wiretaps of Americans, whether that would be binding on the President. I must say, when I first came here, the notion that we would be debating whether an act of Congress signed into law was binding on the President seemed kind of remote.

And I was told by one of my Republican colleagues that it did violate the Constitution, our effort to bind the President, because it violated the unitary theory of the executive. And I thought I knew the Constitution pretty well, but I couldn't remember what that was.

So I asked. I asked him, well, where in the Constitution is this unitary executive? He didn't know. They had not briefed him appropriately. And they were all whispering in his ear, which never helps when you are trying to say something. They are whispering in your ear. You better know it before then.

So I was standing at the podium, and I said to a page, would you bring me a copy of the Constitution? We have it in Jefferson's manual. And I looked it up, and there it was. And it says, the executive powers of the United States shall be lodged in the President. That is from which all this comes.

And as Judge Wald made clear, that has no logical, conceivable argument about the right of the President vis-a-vis anybody else—vis-a-vis the States, vis-a-vis the Congress, or the courts.

And so out of that very common, very sort of commonplace, the executive powers shall be lodged in the President, we get this very broad assertion of power. And now we see what it means. It is powerful enough, their insistence on preserving this and diminishing the power of the Congress. And that is what this is aimed at, not so much the States. They want to diminish the powers of the Congress.

So let me ask our two legal representatives here, Judge Wald and Mr. Schwartz: As you read this, am I correct? They make a federalism argument, but they also make a separation of powers argument. My view is that the federalism argument is not the real argument, that in fact that collapses.

And in part I guess what they do is they can make a federalism argument only because they identify the Federal Government with the president, so that—I mean, if the Federal Government consists of, for the law-making powers, the President and Congress together, there is no federalism argument because it is an act of Congress.

But they convert their separation of powers into a federalism argument by the strength of their separation of powers argument. The Federal Government is, for these purposes, only the President, and therefore it becomes the supremacy clause.

I would ask you to comment on that. Judge?

Judge WALD. I agree with your analysis. And I think even if you look at—parse the wording of the signing statement, the last couple of lines, it says, "However, as the Constitution vests the exclusive

authority to conduct foreign relations with the Federal Government." That is—the Federal Government consists of three branches, but relevant here are the two political branches, the President and the Congress.

Then it jumps logically and says, "Because foreign relations is with the Federal Government"—that is the president and Congress—"the Executive Branch shall construe and enforce this legislation so it doesn't conflict with that authority."

So it jumps from the fact that the power is in the Constitution in two branches to one branch shall decide, shall make the decision as to whether or not there is going to be any conflict, both as to federalism and as to the inter-branch between Congress and the President.

So it doesn't logically follow. It is mixed there. But I think the intent is clear. I think you are right. This is a situation where it is another in 801 statements about the plenary—almost plenary power of the executive.

And just one last thought. Perhaps one reason why you are not getting any official representative at this hearing and why they would like to talk to you privately reinforces the notion that you would be doing the right thing by keeping this front and center publicly, both through hearings and through resolution because I think it is probably going to be embarrassing for the Administration to have to come forth and oppose this publicly with reasons, none of which we really have gotten so far.

I think they probably are well aware of the sentiments. Perhaps it will make them rethink, as Representative Green suggests. But if not, it will at least put it out front and center, and there certainly will be public reaction to the fact that they won't debate this out on the merits, whatever their position is.

The CHAIRMAN. Thank you. I appreciate that analysis of the signing statement. That was what I was getting at. I hadn't made that particular connection, but you are very clear.

The signing statement begins by asserting Federal power, and then sub silentio converts that into—

Judge WALD. Into executive.

The CHAIRMAN. —the President. So the federalism argument falls away. It is a presidential supremacy argument. And as somebody mentioned, when we talk about foreign commerce, that is one where Congress in fact is given constitutional powers.

Judge WALD. Preeminently. Right.

The CHAIRMAN. So even the constitutional justification on foreign policy can't bear out.

Mr. Schwartz?

Mr. SCHWARTZ. Yes. I would just add that I think—I certainly agree with the chairman and Judge Wald on this point. I think another place that we see the point is in the Justice Department's October 26, 2007, letter to the Senate, at page 3. This is really the letter where the Administration's legal argument is set forth in somewhat greater detail.

The CHAIRMAN. But actually, if you notice, it is addressed to the Honorable Richard Cheney. I think they persuaded him.

Mr. SCHWARTZ. I understand. It says, "Dear Mr. President," that as well, President of the Senate.

But it goes on to say at page 3—and this I view as to be the heart of the Administration's argument—Section 3 of the bill, which is the State divestment authorization, by its terms, the Department of Justice concedes, "could remove the threat of the direct statutory or Article I foreign commerce clause preemption on which the Supreme Court relied in the Crosby case."

So that really goes to the point that you were making, Mr. Chairman, with respect to ordinary preemption under the supremacy clause. I think you noted that argument was made by the State Department that there is a supremacy clause problem here. This statement by the Justice Department acknowledges that authorization through an act of Congress logically removes any supremacy clause or preemption.

The CHAIRMAN. I am glad you called attention to that because then the following—

Mr. SCHWARTZ. Then the next sentence is really where the rubber meets the road.

The CHAIRMAN. Yes. You want to read that one, too?

Mr. SCHWARTZ. Sure. "But it is by no means clear that Section 3 of the bill would, or that Federal legislation could, remove any Federal preemptive force that flows from the Constitution's grant to the President of certain foreign affairs powers under Article II."

So that is really what this argument is all about. And I submit that there are numerous Supreme Court cases, I count the Steel Seizure cases, in which the Supreme Court held that President Truman, notwithstanding his Article II powers as commander in chief—

The CHAIRMAN. During wartime, in fact, the most powerful.

Mr. SCHWARTZ. Correct—could not trump a Federal statute that was enacted pursuant to—

The CHAIRMAN. What I also appreciate, which I think you mentioned, the foreign commerce power is specifically given to Congress. And we are talking here about commerce. We are not talking about foreign relations in the natural sense. We are not telling them whether they can or can't send an ambassador to Sudan, or how to vote in the U.N. It is regulation of that.

So this is just—I appreciate both of you pointing these things out. It becomes very clear. This is an insistence on enhancing executive power and diminishing Congress posing as federalism when there is no federalism.

And I guess the final question—because they—it is interesting that the State Department cites the supremacy clause and Justice cites some of the other—basically what we gave—maybe I am a little bit reassured. It is State that gets the Constitution blatantly wrong and Justice that gets the foreign policy blatantly wrong. So at least they make their major errors in the other area.

But here is one statement from Justice. And I think it is a red herring, and I would ask the two lawyers to respond to this. It is a reference to—oh, I had it and lost it again. They worry that a State might pass a preemption statute that explicitly conflicts with the Federal statute. If that happened, what would be the clear result? Judge?

Mr. SCHWARTZ. If—

Judge WALD. Go ahead.

The CHAIRMAN. If a State were to pass a divestment statute that specifically contradicted a Federal law, what would happen?

Mr. SCHWARTZ. I believe it would be unconstitutional under the supremacy clause.

Judge WALD. And a court would so hold it, probably.

The CHAIRMAN. Yes. That is the red herring. I mean, one thing they say is, well, suppose under this bill a State passed a law that conflicted. And the answer is, the supremacy clause wins and it is out there. So it is clear this is just about the executive.

Let me just summarize. I was very pleased by my colleague from Alabama, who has been very strong on this. And actually, the gentlewoman from California, Ms. Waters, and I joined him and the former chairman of this committee, Mr. Leach, in frankly opposing the Clinton Administration's Treasury Department in pressing for debt relief when they thought it was imprudent, particularly for Africa. He is, I think, returning that consistency to principle here.

We really do want to say to the Administration, and I know that they are not talking but they are listening: The fight over executive power can really be fought elsewhere. Please, is my plea to the President, do not undercut our effort here to increase our ability to protect the people of Darfur by dragging this bill into that battle.

This is little enough to do. Every one of us is anguished by our inability to do more. But to undercut whatever this bill can do by dragging it into this fight over executive versus congressional power is unseemly. It is simply a refusal to exercise some moral discretion.

There are plenty of areas in which we can fight between us, the Executive Branch and the Legislative Branch, about power. Let's not let the poor people, the victims of murder in Darfur, be dragged into this battle.

And I know my colleague from Alabama intends to have some further conversations with the White House. If necessary, I am in favor of a resolution. Let every member of the House stand up, and our friends from the Save Darfur Coalition will be there, to say: Do not undercut this bill.

But that oughtn't to be necessary. I don't think the Administration was thinking primarily of undercutting the Darfur situation. I think they ignored the fact that it could do it. A clarification that they in no way intended to vitiate the bill could be very helpful, and it could avoid further action. But if we don't get that, then there will be further action.

I thank the panel. This has been very useful. And it is not the last word on this subject, but I hope it is the next to last word because I hope the last word will be from the Administration clearing the thing up.

The hearing is adjourned. And of course, anyone who wishes to submit—any of the members or any of the members of the panel who wish to submit further information may do so.

[Whereupon, at 12:04 p.m., the hearing was adjourned.]

A P P E N D I X

February 8, 2008

Written Statement of Rhode Island General Treasurer Frank T. Caprio

for the House Committee on Financial Services

Respectfully submitted February 5, 2008

Mr. Chairman, Members of the Committee:

My name is Frank T. Caprio and I am the General Treasurer of Rhode Island. In this capacity, I manage Rhode Island's pension fund, which encompasses the pension systems of state employees, teachers and many municipal employees, including police officers and firefighters.

As fiduciary of a State that successfully passed divestment legislation in June 2007, I wholeheartedly support the passage of the Sudan Accountability and Divestment Act of 2007. The President's actions regarding the genocide in Sudan, up to and including the signing of this bill, have been commendable. However, his carefully worded signing statement threatens to undo all of the change that widely varying groups have worked to affect. It is essential to the improvement of the situation in Darfur for this Act to be upheld as it was intended – to authorize the process at the federal level and to remove the fear of litigation against state divestment initiatives.

As the President suggested in his signing statement, the enforcement of the Act could be subject to his administrative discretion, suggesting that he may block state divestment initiatives if they should undermine federal foreign policy. I would like to speak to why this case clearly will not occur. The Sudan Accountability and Divestment Act of 2007, far from undermining foreign policy, actually serves to tighten a loophole that acts as the true culprit of substantive risk to federal policy. Sudan is a country solely dependent on direct foreign investment. Although American companies are barred from conducting business in the country, due to the naming of Sudan as a terrorist state by the U.S. Department of State, foreign multinational companies continue to provide the Sudanese government with the revenue they desperately need to conduct their illicit activities. Indeed, a Human Rights Watch report estimated that 60-80% of the Sudanese government's oil revenue goes directly to the Sudanese military, the very entity perpetrating these crimes.

When U.S. entities make investments into these foreign companies doing business in Sudan, it directly undermines our nation's foreign policy. It is by pursuing the divestment of state funds from these foreign companies that this loophole can ultimately be closed. The passage of targeted divestment policies at the state level supports the original intent of the US sanctions: to cut off monetary support to Sudan's outlaw government. The passage of this Act provides the authorization states need to undergo this process without fear of legal recourse. Free of this concern, more states will be able to pursue divestment, an essential tool in depleting the financial assets that currently enable the Sudanese government.

The Sudan Accountability and Divestment Act of 2007 is a crucial step forward in the effort to end the Sudanese genocide. The Act provides a framework for states to follow that specifically identifies which types of business operations are to be included or excluded from the divestment provisions. The Act's structure prevents states from creating piecemeal policies by instead providing them with a model from which to create a more unified, solid, and lawful stance against the genocide in Darfur. Further, businesses that do not fall under scrutiny, as detailed in the Act, are not subject to divestment. This is an effective and essential specification, thus protecting those investments which are positively helping the people of Sudan (e.g. public infrastructure projects), by developing stability in the region.

The fact that this Act was passed in Congress by unanimous consent and has received overwhelming support at the state level sends an irrefutable message regarding the importance of the divestment movement. As Treasurer of a state that has successfully passed a Sudan divestment policy into law, I can speak to the role that Rhode Island, and all states, can effectively and responsibly assume regarding this issue. I want to reiterate what is not the role of the states – to undermine, in any way, the provisions of federal foreign policy. It is instead essential for states to work in concert with US foreign policy to supplement the goal of divestment - placing economic pressure on companies with business ties to the Sudanese government and ultimately severing the monetary means that facilitate genocide. In keeping with US foreign policy on this issue, it is incumbent upon the states to pursue divestment. Most importantly, it is the state's role to work diligently to protect its own financial interests. When a humanitarian crisis escalates to the point where taking action is not only in humanity's best interest, but also in a society's fiscal best interests, then we must act, as guardians and fiduciaries of our states' financial welfare.

I take my role as the Chairman of Rhode Island's State Investment Commission to be that of a fiduciary, responsible for the protection of the state, teacher, judicial, and municipal state employee pension dollars under my management. Under this structure, all of these funds are commingled as part of a single $8 billion dollar fund which is invested, divested, and administered as an individual participant in the market place. Given the fund's structure, my role with the pension fund is that of an investor, not a regulator. As such I, and other Treasurers, have the ability to direct funds under our management as we see fit. Should we have the foresight to identify risks to our funds, be it the risk of exposure to sub-prime mortgages, or the questionable and reprehensible investments on the other side of the globe, it is our responsibility to act on that foresight, and to eliminate investments that pose an excessive risk to our fund.

At its very basis, divestment from Sudan represents a choice by the state to invest its money in concert with the values of its citizens. Accordingly, states possess both the right and the capacity to invest based on social, humanitarian and financial values, as long as those decisions are consistent with prudent investment standards. The targeted approach to divestment, followed successfully in Rhode Island and in other states, addresses these concerns while upholding rigorous financial standards.

When intelligent policy is found that addresses a humanitarian crisis, while mitigating financial risks, action must be taken. The targeted approach to divestment has proven to be a sound policy, ensuring fiscal responsibility, while upholding standards of humanitarian aid that can effectively help the people of Darfur. This approach targets only scrutinized companies that provide the most financial support to the Sudanese government. Again, by cutting off the monetary support from these companies, the Sudanese government subsequently loses its financial hold over the people of Darfur, taking away the funds for their genocide.

As a measure of the success of the targeted divestment movement, several major companies, including European powerhouses ABB and Siemens, have pulled out of the Sudan, citing divestment as the rationale for their withdrawal. Rhode Island originally had assets invested in two companies - Petronas Capitol LTD, an oil company that provides refined oil to Sudanese aircraft used to bomb the villages of Darfur and Rolls Royce PLC, a provider of engines used in the oil refineries in the Darfur region. However, in April 2007, Rolls Royce responded to the divestment pressure by announcing their gradual withdrawal from business dealings in Sudan, citing humanitarian concerns. It is becoming obvious that investment in Sudan carries too high a risk to justify the pursuit of business in the region. Thus, the divestment movement has influenced large, multinational companies to reconsider this increasing level of risk, by pulling out of Sudan. This is a tremendous victory and a call for states to continue on this course, leading to progress in the fight against genocide.

The passage of this Act serves to create a divestment framework, end ambiguity and galvanize the states' right to act in their own, as well as in humanity's, best interests. The President's signing statement reinstates the fear of legal action for state divestment that this Act was intended to remove. It is counterintuitive that an Act which serves to end ambiguity on the issue of Sudan divestment would be accompanied by a Presidential statement that opens the door to the ambiguity of his potential discretion. If we truly seek to protect commerce in the face of divestment, then we must uphold the tenets of this Act to its highest degree, ensuring the enforcement of a uniform procedure. We cannot afford to take an ambiguous stand on the genocide in Darfur. The Sudan Accountability and Divestment Act of 2007 displays the Federal government's power to enable States to join in a collaborative movement, allowing even the smallest state in our Nation to leverage the collective strength of the Union to put an end to one of this generation's greatest atrocities. Thank you for your time and your work.

Testimony of Jerry Fowler
President, Save Darfur Coalition

Before the Committee on Financial Services
United States House of Representatives

Negative Implications of the President's Signing Statement
on the Sudan Accountability and Divestment Act
February 8, 2008

Chairman Frank, Ranking Member Bachus, distinguished members of the committee, thank you for this opportunity to address the crucial new law which emerged from the Financial Services Committee, and went on to pass the House and Senate unanimously as the Sudan Accountability and Divestment Act, or SADA. Put simply, SADA must be fully and swiftly implemented if we are serious about trying to change the calculations of a regime in Khartoum that has called the international community's bluff even as it continues to terrorize its own citizens in Darfur and destabilize neighboring Chad.

I have the honor of serving as the president of the Save Darfur Coalition, an alliance of more than 180 faith-based, advocacy, and human rights organizations representing over 130 million people of all ages, races, religions, and political affiliations united together to help the people of Darfur. I would like to ground our discussion here today in the realities of the crisis in Darfur which this law was designed to help change.

In May 2004, as the director of the Committee on Conscience at the United States Holocaust Memorial Museum, I went to Chad and traveled along the Chad-Sudan border, meeting refugees, listening to their stories, seeing the incredibly harsh desert into which they had been driven. The daily temperatures at that time of year rose to 115 to 120 degrees. On many days there were sandstorms, cutting visibility to a hundred yards or so and making an already tough existence nearly impossible for the thousands of refugees who at the time lacked even tents to protect them from the harsh conditions.

One day near the end of that trip, I met a woman named Hawa. I interviewed her in the small makeshift hut she had constructed out of sticks and some plastic sheeting that the UN had given her. We were inside this hut along with her four children, an elderly woman, and my translator. Outside it was well over 100 degrees, and inside the atmosphere was oppressive.

She told me about the day her village was attacked. She told me that her father was killed, her brother was killed, a cousin was killed. Thirty people in her village were killed, and her mother disappeared.

I have to admit that I suddenly felt overwhelmed by her suffering, by all the suffering I had been witnessing in those days and felt compelled to get out of that hut. I thanked her for sharing her story and started to crawl out, when she started talking in a low voice. I looked over at her, and tears were streaming down her cheeks. She was asking, "What about my mother? What about my mother? I don't know if she is alive or if she's dead?"

I felt as though was asking me for an answer, which I could not possibly give her. All I could think to do was to ask her her mother's name and promise to bring her name back to Americans. Her mother's name is Khadiya Ahmed – actually a common woman's name in Darfur. So I'm telling you that name, and telling you that as vast as this catastrophe is, as many people as it has affected, it also is about one woman who didn't know where her mother was and probably won't until there is peace and security in Darfur.

In Chad, I encountered more stories like this than I could count, and I returned with them overwhelming my heart and my conscience.

Upon my return, I worked with the American Jewish World Service and others to convene an emergency summit on Darfur, which resulted in the creation of the Save Darfur Coalition. First at the Museum and now at the Save Darfur Coalition, I have worked with an extraordinarily strong and diverse combination of faith leaders, human rights organizations, unions, prestigious civil society organizations of seemingly every background, and a tireless army of students and activists. I have also witnessed the coming together of an ever-growing number of like-minded organizations from overseas – in Europe, Africa, the Middle East, and beyond – as they have linked up to coordinate their efforts with our own. Together, we all became part of an unprecedented movement – a constituency of conscience – demanding action to help end the suffering of our brothers and sisters in the far-away region of Darfur.

Nearly four years after my first visit to Chad, I do not know what has become of Hawa or if she found out what happened to her mother. Almost certainly, she has not been able to return to her home in Darfur in peace. Nearly five years into the conflict, 2.3 million Darfurians remain displaced within their own country. Over two hundred thousand are huddled in refugee camps across the border in Chad. The violence they hoped to leave behind in Darfur has now followed them to Chad, where they face added dangers as a result of the attempted revolt of the Sudanese-government backed rebels.

The security situation in Darfur remains perilous as well. Violence continues, including reported aerial bombardment of villages in west Darfur, resulting in numerous civilian deaths from violence, and additional deaths from privation as the insecurity limits humanitarian services. Health conditions are deteriorating, and malnutrition rates in Darfur are climbing. Humanitarian organizations and U.N. agencies continue to respond valiantly to these emergencies, but they are too often hampered by the insecurity in the region resulting in an inability to deliver aid to many parts of Darfur.

In the short term, the best chance for security for Darfurians and the humanitarian groups who serve them is the full and effective deployment of the 26,000-strong United Nations - African Union Mission in Darfur (UNAMID) as authorized by UN Security Council Resolution 1769. Yet more than six months after the Security Council's unanimous adoption of Resolution 1769, Darfur has seen only the initial elements of UNAMID deploy. Only one-third of the promised UNAMID force is on the ground in Darfur, with full deployment unlikely to finish before the end of 2008 – seventeen months after the force was approved.

The most fundamental cause of this delay is the obstruction and intransigence of the Sudanese government, which continues to demonstrate its utter contempt for the international community. The regime is successfully impeding the force's deployment by stalling on basic technical issues. It has failed to designate acceptable land for peacekeeping bases. It refuses to grant the force permission to conduct flights at night, without which the force will be unable to protect itself, let alone Darfuri civilians, from night attacks by government forces and allied militias. Last month, the Sudanese army brazenly went a step further and ambushed a clearly marked UNAMID convoy, critically wounding a civilian Sudanese driver who was shot seven times. It then had the temerity to blame UNAMID for driving at night without permission.

President al-Bashir and his regime clearly believe they can get away with genocide in Darfur and perhaps forestall indefinitely any meaningful international civilian protection force. The world has not yet proven them wrong. Two weeks ago, al-Bashir appointed Musa Hilal, a militia leader who recruited and mobilized the *janjaweed* militias responsible for the carnage in Darfur, to be a special advisor to the president on ethnic affairs. The current violence in Chad also suggests al-Bashir's belief that he can act as he wishes without consequences.

The Sudanese government will only change its behavior when the political and economic cost of continuing their campaign of destruction and displacement in Darfur becomes greater than the cost of stopping it. Lives will continue to be lost if the United States and international community

do not act more vigorously to impose swift and strong consequences on Sudan. While the U.S. has led international efforts to impose sanctions on the Sudanese regime, existing sanctions are not enough, as they have clearly not brought about the necessary change in the regime's behavior.

The Sudan Accountability and Divestment Act was carefully crafted as another tool to generate concerted economic pressure on the Government of Sudan. One of the most important provisions of the bill authorizes and protects state and local divestment from foreign companies whose business relationship with Sudan helps to fund the genocide. The bill also prohibits federal contracts with foreign companies funding the genocide, and authorizes states to do the same. The bill ensures that States and municipal entities move forward with divestment in a unified and targeted fashion that is consistent with and complimentary to Federal foreign policy. It helps to ensure that all State and local divestment policies expire under the same conditions, benchmarked to Federal actions and statements. And it protects the economic interests of South Sudan and of the humanitarian, agricultural, and medical sectors and exempts companies authorized by the Treasury Department to operate in Sudan.

SADA was the product of a vibrant partnership between House and Senate leaders. I am truly grateful to members of this committee for the bipartisan alliance of support you forged for this bill -- an alliance that guided the bill through both chambers. In addition, the broad constituency of conscience I mentioned earlier played a critical role in the bill's progress. That constituency brings together a diverse group of civil society organizations, religious groups of all creeds, and grassroots activists around the country. Each time a challenge to the bill appeared, that challenge was overcome by overwhelming popular support, including letters to the editor in Nebraska, phone calls in South Carolina, religious communities speaking out in Kentucky, and petitions, letters and emails from every state flooding Senate offices. When SADA was signed into law on December 31, 2007, it was a day of victory for all those who had supported the legislation, a day of progress for the movement of concerned individuals throughout the country and across the world, and a day of hope for the people of Darfur.

For us, the fact that the president signed this bill has a more substantial legal and practical impact than the signing statement. As my colleague Adam Sterling of the Sudan Divestment Task Force has pointed out, the administration did not object to any of the state or municipal divestment bills that passed before SADA became law. Now that those states have explicit authorization from the federal government to divest, and guidance on how to divest in a way that is consistent with Federal policy, it is even less plausible to think that the administration would object to any future state divestment. Indeed, the intent and effect of SADA are in line with what the President has repeatedly stated is one of his most important foreign policy priorities – ending the genocide in Darfur.

The real negative impact of the signing statement, so far, has been the message it sends Khartoum and the business interests that are contributing to the Government of Sudan's ability to carry out genocide in Darfur. The signing statement sends them an ambiguous message, which appears to conflict with the spirit of SADA, and the administration's stated policies toward Sudan. Instead of statements that may appease the regime, the Administration should join with Congress to issue statements – and more important, adopt policies – that increase pressure on Khartoum to comply with international law, and increase consequences for companies that choose to make profits while helping fund a campaign of genocide.

At this time, the administration does not need to take any additional action for the state protection provision of SADA to be enacted; merely by signing the bill, President Bush has enacted the extra legal protection offered to states that decide that their tax dollars shall no longer be invested in companies that help fund the genocide in Darfur. To ensure maximum effectiveness of the bill, the Administration now must also ensure that the Federal Acquisition Regulations include strict guidelines on implementation of the contract ban provision of SADA by the April deadline, and issue the report on sanctions required by Section 10 of SADA.

We have to recognize, of course, that even full implementation of SADA will not, by itself, create sufficient pressure on Sudan to end the genocide. Therefore we call on the Administration to renew its commitment to hastening the end of the genocide by aggressively enforcing the economic sanctions currently on the books, adding new targeted sanctions, working with allies around the world for carefully crafted targeted bilateral and multilateral sanctions, and deploying an effective and well resourced diplomatic team dedicated to ending the violence in Darfur and bringing stability to the whole of Sudan and the region.

Congress has an important role too. In addition to providing oversight for the implementation of the contract ban and reporting requirements of SADA, we ask you to continue to put all the pressure you can on the government of Sudan – working with the administration to strengthen the ability of the Treasury Department to apply existing sanctions, and adding additional targeted sanctions on Sudan and the companies that help fund the genocide. We also ask you to continue generous funding for the urgent peacekeeping and humanitarian efforts.

In the meantime, activists, religious leaders, and state legislators in 23 states are working to pass divestment laws – adding to the 22 that have already divested. SADA gives new energy to these campaigns, and I send a heart felt thank you to every member of the House and Senate for all you have done to craft, support, and pass this important legislation, and for your dedication to supporting the people of Darfur.

Any delays on the part of the President to fully implement this new law would delay critically needed pressure upon the government of Sudan. For the President to do less would not only breach his constitutional responsibilities, it would run counter to his stated goal of ending the genocide in Darfur. In short, any attempt to side-step full implementation of this law would be legally dubious, politically disingenuous, and morally questionable.

Each day of delay in imposing real economic and political consequences on Sudan is another day that refugees will suffer in camps in Chad, that girls and women will be exposed to rape while gathering firewood, and that Hawa, if she is still alive, will wait to find her mother and return home. We ask for your help in ensuring their days of suffering and waiting will be numbered.

WRITTEN TESTIMONY OF PAUL H. SCHWARTZ
BEFORE THE COMMITTEE ON FINANCIAL SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES
FEBRUARY 8, 2008

Chairman Frank, Ranking Member Bachus, Distinguished Members of the Committee:

My name is Paul H. Schwartz. I am a partner in the Colorado office of Cooley Godward Kronish LLP, a national law firm, and counsel to the Sudan Divestment Task Force, a project of the Genocide Intervention Network (the "Task Force"). I have been asked to testify concerning the constitutionality of state and local divestment measures authorized by the Sudan Accountability and Divestment Act of 2007, Pub. Law 110-174 (SADA), in light of President Bush's signing statement accompanying the legislation. SADA permits states and local governments to adopt and enforce measures "to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in," certain companies that support the Government of Sudan, a regime whose atrocities in Darfur both Congress and the President have labeled genocide. SADA § 3(b). I appreciate the opportunity to address this important question.

Summary and Conclusions

In my view, state and local divestment measures that comply with SADA are constitutional regardless of the President's signing statement. The President claims that the measures the law authorizes might "interfere with implementation of national foreign policy" and thus contravene the Constitution's vesting of "exclusive authority to conduct foreign relations with the Federal Government." Statement by the President (Dec. 31, 2007). But properly enacted federal law *is* policy of the United States. In the case of SADA, that policy was

declared by Congress and, pursuant to Article I, § 7 of the Constitution, "approve[d]" by the President by virtue of his signature on the law. SADA, therefore, necessarily reflects the judgment of the federal government that state and local measures that comply with the law do *not* interfere with the nation's policy in respect to Sudan. Indeed, it makes those measures *part of* U.S. policy. Accordingly, such measures cannot violate the constitutional principle that states may not impede federal foreign policy.

Presidential signing statements do not have the force of law. They are merely expressions of opinion. In this case, that opinion is legally insupportable. Nevertheless, the President's signing statement could, as a practical matter, create a false impression among states and local governments considering targeted Sudan divestment that SADA does not effectively protect their actions in the event of a constitutional attack. The risk of states and local governments being misled threatens not only the ongoing Sudan divestment movement, but the fundamental principles of separation of powers and checks and balances that underlie our constitutional system. For if the President can undercut a law he has signed by casting doubt on its legality, he arguably assumes for himself not merely the executive, but also the lawmaking and judicial functions of government. For all these reasons, therefore, I hope these hearings will clarify the solid constitutional ground on which the state and local measures authorized by SADA rest.

Background and Qualifications

By way of introduction and background, I graduated in 1992 with Highest Honors from the University of North Carolina School of Law. From 1992 to 1994 I served as law clerk to Judge Phyllis A. Kravitch of the United States Court of Appeals for the Eleventh Circuit. From

1994 to 1995, I clerked for Associate Justice Stephen Breyer and Associate Justice (Retired) Harry A. Blackmun of the Supreme Court of the United States. Since 1995, I have been in the private practice of law, first in Georgia and now in Colorado. I have litigated cases in federal and state courts throughout the country.

In late 2006, I helped draft the Task Force's model state targeted-divestment statute, to ensure that legislation based on the model (even absent express federal authorization) would comport with all constitutional requirements. Thereafter, I provided advice with respect to the constitutionality of state divestment legislation to legislators and other officials around the country. In addition, for more than a year I have analyzed the constitutional impact that federal statutory authorization would have on state divestment measures. In his floor remarks prior to the Senate's unanimous approval of SADA, Senator Dodd cited my analysis approvingly. I believe it is clear that Congress has constitutional power to authorize divestment from foreign companies, and state measures that comply with the terms of any such authorization likewise are constitutional.

The Relevant Constitutional Framework

The Foreign Commerce Clause of the Constitution says that "Congress shall have Power . . . To regulate Commerce with foreign Nations . . . [and] To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. I, § 8, cl. 3 & 18. Investment in and divestment from equity and debt securities of foreign companies is a quintessential commercial activity. Thus, Congress had clear constitutional power to enact a law governing divestment from foreign companies doing business in Sudan.

To my knowledge, the Administration does not dispute this congressional power emanating from the Foreign Commerce Clause. Nevertheless, it has argued that the state and local divestment measures SADA authorizes themselves might be unconstitutional. *See* Letter from Princ. Dep. Ass't Attorney General Brian A. Benczkowski to Vice-President Richard B. Cheney at 1-4 (Oct. 26, 2007) ("Justice Dep't Letter"). In support of this incongruous position, the Justice Department has cited the "dormant foreign affairs preemption doctrine" articulated in two Supreme Court cases, *Zschernig v. Miller*, 389 U.S. 429 (1968) and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). Simply stated, that doctrine holds that states may not intrude into or interfere with the federal government's conduct of foreign policy even absent conflicting federal law. *See Garamendi*, 539 U.S. at 417; *Zschernig*, 389 U.S. at 432 (cited in Justice Dep't Letter at 3).

The chief flaw with this argument is that neither *Zschernig* nor *Garamendi* suggests that a state would intrude into or interfere with the federal government's conduct of foreign policy when the state's actions are *specifically permitted by federal law*. *Zschernig* involved Oregon's law that precluded certain non-citizens from receiving the benefits of state inheritance laws only if their countries afforded Americans reciprocal inheritance rights. *See* 389 U.S. at 430-31. *Garamendi* invalidated California's law requiring insurance companies to make certain disclosures concerning their Holocaust-era insurance policies. 539 U.S. at 409. In neither situation did federal law authorize the states to take the actions in question. In neither case, therefore, did the Supreme Court hold that state measures *authorized by federal law* could constitute an unconstitutional interference with U.S. foreign policy.

The Constitution expressly recognizes that Congress may consent to state actions that touch on foreign relations. Article I, section 10, for instance, says:

> No State shall, *without the Consent of Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10, cl. 3 (emphasis added). Based on this provision, the Supreme Court has long held that Congress may consent to compacts between states and foreign nations. *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840); *see also* 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1396 (1833) ("[A] state may, *with the consent of congress*, enter into an agreement, or compact with another state, or with a foreign power.") (emphasis in original). If states may, with congressional consent, keep troops and warships in time of peace, enter into compacts with foreign nations, and the like, it is difficult to believe that the Constitution somehow prohibits them, also with consent issued pursuant to Congress's Article I powers, from taking the far more limited step of requiring state pension funds to divest from companies that support a government both Congress and the President have said is perpetrating genocide. This is especially so given the important interest states have in protecting their pension fund beneficiaries and citizens from the financial and reputational risks associated with investments in companies that facilitate genocide. *See* SADA § 3(a) (expressing sense of Congress that states and local governments should be permitted to protect against "financial or reputational risk"); *Garamendi*, 539 U.S. at 420 n.11 (recognizing importance of strength of state concern even absent federal statutory authorization).

"[W]hen the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340-41 (1897). It is only logical, therefore, that when federal law authorizes state measures that touch on foreign relations, the federal government has expressed a judgment that the measures do *not* "intrude" into or

"interfere" with federal foreign policy, but rather complement that policy. That is particularly so when, as here, the President signs the legislation. Article I, § 7 of the Constitution directs the President to sign a bill that Congress has passed "[i]f he approve" it. "[I]f not," it says – that is, he does not approve it – "he shall return it," *i.e.*, veto the bill. By signing SADA, therefore, President Bush has *approved* it. As one leading scholar has said: "It is difficult to believe that the Court would find constitutionally intolerable state intrusions on the conduct of foreign relations that the political branches formally approved or tolerated." Louis Henkin, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 165 (1996).

The premise underlying the President's position seems to be that his general Article II foreign affairs powers can trump an otherwise proper federal statute. *See* Justice Dep't Letter at 3 ("But it is by no means clear that section 3 of the bill would – or that federal legislation could – remove any Federal preemptive force that flows from the Constitution's grant to the President of certain foreign affairs powers under Article II.") The Justice Department implies that only the President can "speak for the Nation with one voice in dealing with other governments." *Id.* (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000)). This premise is false, however, for Congress, too, plays an important role in foreign affairs. And, in the end, mere Executive Branch policies, which do not have the force of law, must yield to a properly enacted federal statute.

In *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), several multinational companies challenged the way California calculated its corporate franchise tax on the ground that it "prevent[ed] the Federal Government from 'speaking with one voice' in international trade." *Id.* at 320. For support, they pointed to Executive Branch statements they said expressed a foreign policy opposed to the state's taxation method. *See id.* at 328-30. The

Supreme Court rejected the argument, however, because "Congress implicitly ha[d] *permitted* the States to use" the challenged method. *Id.* at 326 (emphasis in original). Because "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations,'" the Court explained, that congressional authorization carried the day. For when it comes to "the Nation's ability to speak with one voice" in respect to foreign commercial matters, the Court said, Congress, not the President, is "the preeminent speaker." *Id.* at 329 (citing U.S. CONST. art. I, § 8, cl. 3). Thus, Executive Branch policies relating to foreign commerce which "lack the force of law *cannot render unconstitutional [a state's] otherwise valid, congressionally condoned" actions*. *Id.* at 330 (emphasis added); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (striking down military commissions created by the President that contravened federal law; stating that whatever implicit powers the President might have under Article II, "he may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers").

Investment in and divestment from foreign companies unquestionably fall within Congress's power to regulate foreign commerce. By enacting SADA, Congress sanctioned explicitly, in the clearest possible terms, the state and local divestment measures the act covers. As long as states and local governments comply with SADA's requirements, therefore, the statute's authorization of their divestment measures is constitutionally effective.

The Effect of the President's Signing Statement

The President's signing statement does not alter this constitutional analysis. Presidential signing statements have no legal force. They certainly cannot modify a law Congress has passed. As the Supreme Court has said: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown Sheet & Tube*, 343 U.S. at 587. As noted, in the case of SADA, the President chose not to exercise that veto power.

Presidents, of course, are entitled to their opinions concerning the constitutionality of federal legislation, and signing statements are one way they express those opinions. But the statements are just those - opinions. Ultimately, it is the role of the Judicial Branch, not the President, to determine what the Constitution means. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."). And as evidenced by Supreme Court decisions through the decades, sometimes the Court agrees with the opinions of the Executive Branch and sometimes it does not. *See, e.g.*, *Hamdan*, 126 S. Ct. at 2798 (striking down President's military commissions at Guantanamo Bay, Cuba); *Clinton v. New York*, 524 U.S. 417, 448 (1998) (holding presidential line-item veto unconstitutional); *United States v. Nixon*, 418 U.S. 683, 713-14 (1974) (enforcing subpoena against President); *Youngstown Sheet & Tube*, 343 U.S. at 589 (invalidating President's seizure of steel mills in support of Korean War effort).

That courts are the final arbiters of constitutionality is especially important when considering the effect of the President's signing statement in respect to SADA, because unlike many laws that have been the subject of signing statements in recent years, SADA's

authorization of state and local divestment measures does not require any Executive Branch action. *See generally* T.J. Halstead, *Congressional Research Serv. Report for Congress - Presidential Signing Statements: Constitutional and Institutional Implications* at 2-12 (Sept. 17, 2007) (describing historical usage of presidential signing statements).[1] When Congress passes a law requiring the Executive Branch to take some action the President believes unconstitutionally impinges on his power, he can, as a practical matter, decline to comply, putting the onus on Congress or other interested parties to try to force his hand, say, by seeking judicial review of the matter or exercising the power of the purse. SADA's authorization of state and local divestment measures, however, asks nothing of the President; it is self-executing. To try to blunt that authorization, therefore, the onus would be on *him* affirmatively to act – to challenge such measures in court. In any such case, the Judicial Branch would have the final say.

For the reasons above, in my view, any challenge to the constitutionality of the state and local divestment measures authorized by SADA would be patently meritless and completely unjustified. SADA reflects the explicit policy judgment of the federal government – articulated by Congress and approved by the President through his signature pursuant to Article I, § 7 – that state and local divestment measures that comport with the statute also comport with U.S. foreign policy and should be supported. Accordingly, such measures cannot violate the constitutional rule that states may not interfere with the foreign policy of the United States.

Unfortunately, despite its lack of constitutional grounding, the President's signing statement could have the practical effect of raising doubt in the minds of some state and local legislators who are considering whether to enact targeted Sudan divestment measures. Although

[1] Other parts of SADA – for example, its prohibition on certain federal contracts, *see* SADA § 6 – do require Executive Branch enforcement. The signing statement, however, does not dispute the constitutionality of those provisions.

the fifteen states that already have enacted or implemented targeted Sudan divestment measures should not be affected, active campaigns regarding such measures are ongoing in at least twenty-three others. It would be tragic were erroneous expansive assertions of executive power contained in the signing statement able to derail those states' efforts to protect their beneficiaries and end the genocide. It is my fervent hope, therefore, that this hearing will make clear what should be evident – that the divestment measures SADA permits are constitutional, and that, unfettered by constitutional concerns, states and local governments may make the investment judgments they believe are in the best interests of their beneficiaries and their citizens.

Once again, I thank the Committee for permitting me to testify, and I stand ready to assist it in any way I can.

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.

Press Release

For Immediate Release: January 7, 2008

Frank Statement on President's Signing of the Sudan Divestment Legislation

Washington, DC - Rep. Barney Frank (D-MA), chairman of the House Committee on Financial Services released the following statement today regarding the President's signing of the Sudan divestment bill:

"The President's reluctant signature on the Sudan divestment bill was a welcome—and rare—willingness of his recognition of reality. This is a bill the Bush Administration tried to kill, and I believe he signed it only because it passed unanimously in both houses and Congress would have easily overridden his veto. Unfortunately, his signature came grudgingly and with a signing statement that could undermine the law's effectiveness by including language threatening state and local governments that act according to the law. It is both bad human rights policy and bad constitutional law. The House Financial Services Committee will be pursuing this matter in an effort to counteract the effect of the Presidents statement."

United States Department of State

Washington, D.C. 20520

OCT 22 2007

Dear Senator McConnell:

The Administration shares Congress' deep concern over the continued violence in Darfur perpetrated by the Government of Sudan (GOS), as reflected in the Sudan Accountability and Divestment Act. The Administration welcomes Congress' efforts to focus attention through legislation and other actions on the tragic situation in Darfur. The Administration also appreciates the Senate Banking Committee's willingness to address certain concerns which the original draft of the bill posed for the Administration. However, the Administration would oppose the bill as currently drafted, as it would impede, rather than advance, the President's foreign policy with respect to Sudan.

At this time, and with the support of Congress, the Administration continues unilateral and multilateral sanctions against the GOS. The Administration also strongly supports rapid deployment of the United Nations/African Union Hybrid Mission Darfur peacekeeping force. Recently, the President announced a new round of sanctions against three individuals and thirty-one companies and there are indications that these efforts, and the international support for them, are having an impact on the Government of Sudan.

The Sudan Accountability and Divestment Act, as reported out of the Senate Banking Committee on October 17th, would impose unilateral measures targeted at U.S. allies and diplomatic partners, and would thus shift focus away from the behavior of the GOS, onto differences between the United States and its partners. In doing so, it interferes directly with the President's foreign policy, particularly in its authorization of actions in several areas. First and foremost, we oppose the bill's affirmative authorization for State and local governments to divest from foreign companies doing business in named sectors in Sudan. These provisions

The Honorable
Mitch McConnell,
United States Senate.

could be seen (however incorrectly) as effectively converting State actions – which States are already taking – into federally protected privileges, thereby undercutting the Supremacy Clause and the President's powers thereunder. In fact, we do not believe the interests of either the Article I or Article II branches of Government are served by such legislation – especially in this situation where numerous State divestment actions are currently proceeding without Federal intervention. Such authorization would set a dangerous precedent, making it easier to pass similar legislation in other cases. We believe that the amendment offered and withdrawn by Senator Hagel is absolutely critical to provide the minimal relief needed to address this issue.

We also find unwise the bill's "safe harbor" provision in section 4. This provision removes financial discipline from fund managers and is not useful or necessary, as fund managers may already divest responsibly. By affirming that fund managers may avoid their fiduciary responsibilities in stated cases, these provisions weaken essential legal protections for investors, including workers, retirees and their families, and set a dangerous precedent for extending such immunity. The Committee's revisions to narrow these "safe harbor" provisions effectively acknowledge these dangers, but fall short of fully resolving the underlying problem.

Additionally, while we welcome the Senate Banking Committee's willingness to adopt technical improvements to the provision banning U.S. Government procurement, we also consider this provision ill- advised. Even with its adjustments, this ban still targets companies of our allies, will not meaningfully impact the GOS, and represents an imprudent departure from longstanding United States policy opposing secondary boycotts that could invite retaliation. Finally, we also appreciate the bill's repeal of the prior legislative reporting requirement, as requested.

For these reasons, while we are sympathetic to the desire to address the continuing crisis in Sudan, we cannot support the means adopted in this bill to achieve this end. The Administration is prepared to work with Congress to expand useful authorities which provide a full range of diplomatic and other tools to pressure the GOS.

The international community has affirmed a common goal to alter GOS behavior in Darfur and to this end is supporting efforts by the UN and AU to convene a peace conference October 27 in Libya, in which the GOS and rebel leaders are scheduled to participate. Maintaining focus and consensus on Sudan is critical. To that end, the Administration requests that the Senate defer further consideration of this legislation.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this letter.

Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

United States Department of State

Washington, D.C. 20520

OCT 22 2007

Dear Senator Reid:

The Administration shares Congress' deep concern over the continued violence in Darfur perpetrated by the Government of Sudan (GOS), as reflected in the Sudan Accountability and Divestment Act. The Administration welcomes Congress' efforts to focus attention through legislation and other actions on the tragic situation in Darfur. The Administration also appreciates the Senate Banking Committee's willingness to address certain concerns which the original draft of the bill posed for the Administration. However, the Administration would oppose the bill as currently drafted, as it would impede, rather than advance, the President's foreign policy with respect to Sudan.

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The Honorable
Harry Reid,
United States Senate.

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The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this letter.

Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

THE WHITE HOUSE

WASHINGTON

February 4, 2008

Dear Mr. Chairman:

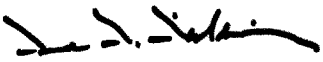
Thank you for your January 31, 2008 letter inviting me or a designee to testify before the House Financial Services Committee on matters relating to the President's Signing Statement on the Sudan Accountability and Divestment Act. While we appreciate the interest the Committee may have in the Signing Statement, there are constitutionally-based concerns about providing direct testimony that will likely touch on communications to or with the President, and particularly those in the nature of legal advice. For those reasons, we must respectfully decline your invitation.

It is, however, the policy of the Administration to cooperate with the legitimate inquiries of Congress to the fullest extent possible. In that spirit and toward that goal, we are prepared to provide an informal briefing to your Committee, presented by subject-matter experts within the Executive Branch, if that is desired by you.

Additionally, permit me to draw your attention to the following letters, which set forth the specific issues within the Act that caused concern to the Administration: October 26, 2007, Letter from the Department of Justice to The Honorable Richard B. Cheney, President of the Senate; October 22, 2007, Letter from the Department of State to the Honorable Harry Reid; October 22, 2007, Letter to the Honorable Mitch McConnell. I believe these will also inform your Committee's work.

With high regards,

Respectfully yours,



Fred F. Fielding
Counsel to the President

The Honorable Barney Frank
Chairman
House Committee on Financial Services
United States House of Representatives
2129 Rayburn House Office Building
Washington, DC 20515

cc: The Honorable Spencer Bachus

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 26, 2007

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

This letter presents the views of the Department of Justice on the Sudan Accountability and Divestment Act as amended on October 16, 2007. The Department shares Congress's concern about the continued violence in Darfur and appreciates the Senate Banking Committee's willingness to discuss our comments on the bill's predecessor, H.R. 180. However, the Department must oppose the current bill, and specifically the portion authorizing State and local divestment, for the same reasons the Administration opposed the divestment authorization in H.R. 180. This aspect of the bill raises grave constitutional questions for a number of reasons, most notably because it purports to immunize from Federal oversight State and local divestment actions that could interfere with national foreign policy under Supreme Court precedent. In so doing, the bill goes far beyond merely acknowledging, or even expressing support for, the divestment activity in which most State and local governments already engage as so-called "market participants." Instead, the bill purports to transfer to State and local governments, in a way that raises both constitutional separation of powers and federalism questions, foreign policy authority that the Constitution places, for very good reasons, with the Federal government. We strongly object to this effort because it raises concerns under a long line of Supreme Court cases and because it could jeopardize, rather than strengthen, the robust and carefully calibrated response to the crisis in Darfur that the Federal government is pursuing under presidential directives and several existing Federal statutes, including but not limited to the Sudan Peace Act of 2001, the Comprehensive Peace in Sudan Act of 2004, the Darfur Peace and Accountability Act of 2006, and the International Emergency Economic Powers Act.

I. Background

The current version of the bill would, among other things, enshrine in Federal law a extraordinarily broad authorization for State and local governments to divest both public *and* private assets from, and prohibit the investment of such assets in, companies that engage in a wide range of business operations with the Government of Sudan ("GOS"). Section 3 of the bill begins by declaring the sense of Congress that the United States Government "should support the decision of any [s]tate or local government to divest from, and to prohibit the investment of assets of the State or local government in, a person that the State or local government determines poses *financial or reputational risk*." (emphasis added). This hortatory provision provides virtually no limits on the State and local divestment the bill says the United States Government

"should support." But the operative divestment authorization that follows it, which contains no limitations on the motivations for the actions covered by the bill, is even broader. Subsection 3(b) of the bill, entitled "Authority to Divest" provides:

> *Notwithstanding any other provision of law*, a State or local government may adopt and enforce measures that meet the requirements of subsection (d) to divest the assets of the State or local government from, or prohibit investment of assets of the State or local government in, persons that the State or local government determines, using credible information available to the public, are conducting or have direct investments in business operations described in subsection (c).[1]

The bill then affirmatively expands the reach of subsection's (b)'s divestment authorization in two remarkable ways: First, it defines "State or local government" as any governmental agency or instrumentality of a State, United States territory, or local subdivision thereof; any agency or instrumentality of any such local subdivision; and any public institution of higher learning within the meaning of the Higher Education Act of 1965. Second, and perhaps most notably, it defines "assets" of "State and local government entities" to include not just "public monies," but also "any pension, retirement, annuity, or endowment fund, or *similar instrument*, that is controlled, directly or *indirectly*, by a State or local government." (emphasis added).

In so doing, section 3 would authorize an extraordinarily broad, and therefore unknowable, universe of State and local divestments of public *and* private assets from, as well as "prohibitions" on investment in, companies that do business with the GOS, including European companies. This authorization applies "notwithstanding any other provision of law," and is accompanied by a "nonpreemption" provision stating that any "measure of a State or local government under subsection (b) is not preempted by any Federal law or regulation."

I. Constitutional Concerns

"The Federal Government ... is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereigns" under the Constitution. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *see Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.") That is no accident. The Framers made this commitment intentionally in response to their "'concern for uniformity in this country's dealings with foreign nations.'" *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n. 25

[1]The subsection (d) requirements referenced in this provision require only that State and local governments provide the targets of divestment measures with notice of, and an opportunity to comment on, impending sanctions against them. Subsection (c) broadly defines "business operations" as operations that "include" "power production activities, mineral extraction activities, oil-related activities, or the production of military equipment" subject to a limited number of exceptions.

(1964)); *see also* The Federalist No. 80, pp. 535-36 (J. Cooke ed. 1961) (explaining that "the peace of the WHOLE ought not be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it") (A. Hamilton).

This principle – the principle that the Nation must speak with "one voice" on issues of foreign policy – is the principle the Supreme Court has cited time and again in concluding that State laws must "give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), and in invaliding State actions that conflict with the foreign policy of the Federal government. *See Garamendi*, 539 U.S. at 413; *Zschernig*, 389 U.S. at 440; *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (striking down, as inconsistent with Federal foreign policy, a Massachusetts statute that prohibited the State government from contracting with companies that did a certain amount of business with the Government of Myanmar).

There is no question that the types of State and local divestment activity authorized by the bill, (particularly divestments, even if some divesting entities call them "reputational," that flow from moral or political opposition to the policies of a foreign government, the GOS) implicate foreign policy under Supreme Court precedent. *See, e.g., Crosby*, 530 U.S. at 380-81. Indeed, one purpose of the bill appears to be to lift the Federal preemption that the Supreme Court and other Federal courts have cited consistently in invalidating State divestment and contracting regimes that interfere with national foreign policy. *See, e.g., Crosby*, 530 U.S. at 380; *Nat'l Foreign Trade Council v. Giannoulias*, No. 06-C-4251, 2007 WL 627630, at *8-*9 (N.D. Ill. Feb. 23, 2007). Section 3 of the bill, by its terms, could remove the threat of the direct statutory, or Article I Foreign Commerce Clause, preemption on which the Supreme Court relied in *Crosby*. But it is by no means clear that section 3 of the bill would – or that federal legislation could – remove any Federal preemptive force that flows from the Constitution's grant to the President of certain foreign affairs powers under Article II.

The Supreme Court decided *Crosby* on statutory preemption grounds because Congress had *not* lifted Article I (Foreign Commerce Clause) preemption in the area in question (Burma sanctions), but instead had passed Federal legislation with which the Massachusetts law conflicted. However, in its opinion, the Supreme Court emphasized that the Massachusetts statute was objectionable "*not* merely [because of] differences between the state and federal Acts in scope and type of sanctions," but *also* because the state statute "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* The Court developed this focus on conflicts between State law and the *President's* ability to conduct foreign policy in *Garamendi*, in which it expressly relied on the President's "independent constitutional authority to act on behalf of the United States on international issues" in striking down a California law that would have conflicted with that policy by "us[ing] an iron fist where the President has consistently chosen kid gloves." 539 U.S. at 424 & n.14, 427 (citing *Crosby*, 530 U.S. at 381).

The foregoing precedents raise the question whether the bill can constitutionally protect from Federal preemption all the State and local divestment and investment schemes it purports to authorize. They also raise a serious question why Congress would want to do so. Wholly apart from raising constitutional (separation of powers and federalism) issues, a legislative attempt to immunize such a broad range of State and local foreign policy action from Federal intervention is wholly inconsistent with the interest and responsibility that both Congress *and* the Executive have in ensuring that State and local government actions do *not* interfere with Federal foreign policy. The justification we have heard most often for the bill is that State and local governments should not be penalized for wanting to take their money away from entities that do business with bad governments. But that is not what the bill protects. It is obvious that the bill's sweeping divestment authorization is *not* necessary for States to engage in certain market-based divestitures. As the Congress is aware, State and local governments are already engaging in a wide range of divestment activities, most of which have *not* given rise to preemption lawsuits, much less Federal judgments invalidating the State schemes on foreign affairs grounds. The divestment portion of the current bill is necessary *only* if State and local governments want to expand their divestment activity to interfere with Federal foreign policy in a way that would merit the Federal intervention the bill seeks to prevent. We do not understand why Congress would want to protect such activity.

State and local governments, like the interest groups supporting this legislation, have neither the obligation nor the ability to consider how the divestments authorized by the bill could affect United States foreign policy. Congress and the Executive branch have both. As a practical matter, only the Federal government has the ability (primarily through its access to intelligence and its knowledge of broader diplomatic strategies) to understand how a particular economic action (here, divestment from, for example, European companies) could affect United States foreign policy with European governments on Darfur and other issues. Put simply, State and local governments lack both the Federal government's ability to know when it is necessary to approach an issue with kid gloves rather than an iron fist, and the Federal government's obligation to ensure that the proper approach is used when necessary to protect national interests. Federal legislation that broadly authorizes States to approach with an "iron fist" foreign policy issues that the President (or Congress) may find to require "kid gloves," now or in the future, is inconsistent with this obligation. Garamendi, 539 U.S. at 424 & n.14, 427. And it is inconsistent with all of the reasons that the Constitution rests foreign affairs authority with Congress and the President – and not the States – in the first place.

There are many ways the bill could avoid or mitigate this problem. An obvious, and highly effective, way is the amendment Senator Hagel proposed in committee. That amendment would provide a critical safety valve that the Federal government could use to limit State and local divestment schemes that threaten United States foreign policy. The Department has discussed this and other alternatives with Committee staff and we would welcome the opportunity to continue to work with Congress on solutions to the current problems with the divestment portion of the bill.

II. Other Legal and Policy Concerns

The bill raises legal concerns beyond those outlined above, because it would not simply authorize States to act in an area in which the Federal government has chosen not to act. The bill would broadly authorize State and local divestitures in an area or field of foreign policy in which both Congress and the Executive branch are extremely active. In so doing, the divestment authorization in section 3 of the bill could call into question the effect of many existing Federal laws, including treaties and Federal statutes.

The bill expressly states that it authorizes the extraordinarily broad range of divestment activity covered by section 3 "notwithstanding any other provision of law." Section 2 of the bill cuts back on this statement by defining "business operations" subject to divestment to exclude certain business activities that the Federal government supports either under existing Federal statutes or, for example, OFAC licenses. But the list of exceptions in section 2 is no match for the broad range of Federal laws, treaties and executive orders that the "notwithstanding" language in section 3 could be interpreted to cover. Accordingly, this language in the bill could create a troubling situation in which State or local governments claim that the Federal government (including the Federal courts) cannot assert the supremacy of Federal laws against State or local regimes that conflict with those laws, or in which certain institutions are subject to comply with Federal requirements or policies that may conflict with the requirements of State or local divestment directives authorized by the bill.

Although the bill's proponents may believe that its divestment authorization is fully consistent with United States foreign policy on Sudan, that may not be the case in the future. It is entirely possible, for example, that a State could enact a divestment law pursuant to the bill's authorization that requires divestment in circumstances directly contrary to specific federal laws, or that simply take an inflexible approach to situations in which existing Federal statutes and Executive Orders provide for presidential flexibility. *See Crosby*, 580 U.S. at 381 (emphasizing that "the differences between the state and federal Acts in scope and type of sanctions ... compromise the very capacity of the President to speak for the Nation with one voice in dealing with other Governments").

The President has flexibility under existing federal laws to ensure that United States sanctions policy is highly targeted and carefully calibrated to account for nuances in relevant political and diplomatic climates. This kind of flexibility is important because, as the State Department testified, and then reiterated in its letter to Senator Reid of October 22, 2007, this is an important time for United States diplomatic engagement in Sudan. *See* Jendayi E. Frazer, Assistant Secretary of State for African Affairs, Testimony before the Senate Committee on Banking, Housing and Urban Affairs at 5 (Oct. 3, 2007) ("Frazer Testimony") (explaining that the GOS has publicly accepted the United Nations African Union/United Nations Hybrid operation in Darfur ("UNAMID"), has recognized the need to negotiate a peace deal, and is expected to participate, along with rebel groups, in peace talks set to take place this month); *see also* Elizabeth Dibble, Acting Assistant Secretary of State, Bureau of Economic, Energy and

Business Affairs, Testimony before the Senate Committee on Banking, Housing and Urban Affairs at 2 (Oct. 3, 2007) ("Timing is everything, and we believe it imperative to preserve the President's flexibility to decide when and how to calibrate the application of sanctions, so they can work to the maximum advantage.")

During this period, it is critical that the Federal government – the President, Congress and, if necessary, the Federal courts – retain the tools the Constitution gives them to ensure that State and local governments do not engage in divestment activity that, however well-intentioned, would jeopardize United States foreign policy on Sudan and potentially other issues. The current bill is inconsistent with this critical goal, and unnecessarily raises a host of constitutional and legal concerns. For all of these reasons, as well as the reasons the State Department and the Administration have cited in opposing the divestment authorization in this and prior bills, we strongly oppose the divestment portion of this legislation.

We appreciate the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Christopher Dodd

The Honorable Richard C. Shelby

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

July 30, 2007

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Dear Senator Reid:

I am writing to communicate the views of the Department of the Treasury with respect to a number of bills pending in the House of Representatives and the Senate that address investment by companies in countries designated as state sponsors of terrorism, such as Iran and Sudan. These bills, including H.R. 180, H.R. 957, H.R. 1400, H.R. 2347, S. 831, and S. 1430, in general would require the President or the Secretary of the Treasury to produce a list of certain companies that conduct business in these countries. Such lists are then intended to be used as a basis for investment and divestment decisions by investors, including state and local governments and mutual fund managers. As legislation is further considered by Congress, we would ask for your consideration of these comments.

There should be no question that the Treasury Department shares Congress' concerns about the actions of state sponsors of terrorism, including the Iranian and Sudanese governments, and agrees that economic pressure is a key component of any comprehensive strategy to alter the behavior of these regimes. Concern about the conduct of these regimes is widespread, and the Departments of the Treasury and State are drawing on all of their resources, influence, and authorities to marshal that concern into international pressure. Imposing meaningful financial pressure requires the cooperation and joint actions of other countries with whom designated state sponsors have significant commercial and financial relationships. In the case of Iran, for example, financial pressure is mounting precisely because the United States is not acting alone. U.S. financial measures against that country, coupled with intense diplomatic efforts, have helped pave the way for multilateral action, including two unanimous U.N. Security Council resolutions. Additionally, the Treasury Department's unprecedented outreach to the international private sector on the risks of doing business with Iran has resulted in a number of major financial institutions scaling back, or terminating altogether, their Iran-related business. Similarly, the United States was actively involved in the adoption of U.N. Security Council resolutions imposing sanctions against Sudan, and the Treasury Department's enhanced efforts with respect to Sudan have included aggressive enforcement of sanctions against those entities violating or attempting to violate United States sanctions against Sudan.

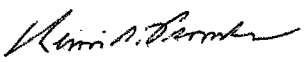
We appreciate your ongoing support of these important efforts. However, we have strong concerns regarding, and cannot support, the current approach of the above referenced bills. Requiring the U.S. government to produce a list targeting the lawful conduct of companies based in allied nations is unhelpful to our multilateral approach. Such a requirement could even be counterproductive, distracting the international coalition from its focus on designated state

sponsors of terrorism, such as Iran and Sudan, and toward economic disputes and retaliatory measures against the United States. This shift in focus could jeopardize the support of our allies for multilateral action against the regimes in these countries and, in turn, weaken existing international pressure on them. That outcome would run counter to our shared objective.

Treasury believes there are alternative approaches that would be consistent with both multilateral actions and Congressional objectives. For example, Treasury could support efforts, including legislation, to improve the current Securities and Exchange Commission disclosure requirements. We understand that the Commission is working to find a more effective way to make publicly disclosed information regarding a company's business interests in designated state sponsors of terrorism readily available to the investing public. We believe the opportunity exists to advance such an approach by our working with you and the Commission to enhance transparency so investors can make informed choices – without the same negative effects that would result from a U.S. government-produced list. In addition, self-disclosure would be a more efficient, timely, and accurate means of identifying those firms engaged in the specified conduct.

The Treasury Department appreciates your consideration of these views and looks forward to continuing to work with you on this important issue.

Sincerely,



Kevin I. Fromer
Assistant Secretary
for Legislative Affairs

Delivered in his capacity as a private citizen

WARD BREHM
NATIONAL PRAYER BREAKFAST REMARKS (updated Friday February 8)

Thank you, Senator Enzi. I am deeply humbled by your introduction and proud to be able to call you my friend.

Most of you were probably surprised when you picked up the program and saw a speaker you've never heard of before. Me too...One month ago, I sent in my registration.... and was just hoping for a good seat! .

My thanks also to the members of the Senate group for this opportunity. A good friend emailed me last night and said that if God was going to speak through me I didn't need to be nervous....

God is the one who should be nervous!

My wife read to me from Scripture last night that Jesus said when two or more gather in His name he will be there.
That's good enough for me!

My work has given me the high privilege of serving you, Mr. President, the American people, and above all, the poor in Africa.

The best way to help the poor is to help them not be poor anymore. The only way I know how to do that is through job creation, and the very best form of sustainable development is a steady paycheck.

It's been said that if you give a man a fish, you feed him for a day; teach a man to fish, and you feed him for a lifetime. But that's not the full story. If you want to eat for a lifetime, you need to own the pond.

So a bit of background...Despite that eloquent introduction, I am a recovering Type-A controlling businessman. I've been described even by people who like me as someone who is often wrong but seldom in doubt. I was a bit of a problem child growing up. In fact, my pastor since childhood, Arthur Rouner, recently referred to me as A Ministerial long shot!

They say that if God wants to get your attention he will toss a pebble into your life. If that doesn't work He'll throw a rock. As a last resort He'll heave a brick!

Africa was my brick.

In 1994, Africa was not on my personal radar screen.

In fact, the only thing on that radar screen was ME!

In the Los Angeles Airport I bought a copy of Stephen Covey's book, *The Seven Habits of Highly Effective People.*

I didn't buy it to learn anything, but just wanted to make sure he got them all right!

I was intrigued by Covey's notion of paradigms: identical sets of facts can mean something totally different because of your world view.

Somalia was in the news at the time, and countless numbers of Africans were dying from starvation. I felt no real connection to this humanitarian crisis. My radar screen was full.

Paradigms usually change because of shock or trauma, but I wondered if it might be possible for someone to change their paradigm on purpose. I supposed that if I were to see people starving, it would change that paradigm and perhaps much more. The thought left me nearly as quickly as it came.

But God sent me a reminder… One week later, I made one of my occasional stops at church…My pastor, out of the blue, took me aside and said, "Ward, I'm going to Africa in two months, and I would like you to go with me."

I told him I couldn't believe the coincidence of his invitation given my recent reflections on Somalia. Then I said…"No!"

He looked at me in a strange way, and he said, "Would you at least pray about it?" I looked at him and said, "You're the pastor; YOU pray about it. I will THINK about it but suspect my answer will still be no."

He must have prayed hard …

because two months later, I found myself in the Minneapolis airport with a ticket to Ethiopia in my hand. I was surrounded (for lack of a better word) by church ladies. And they were hugging me…Then someone suggested we pray before we departed, so I found myself outside Gate 8A, holding hands with a group of strangers. And as I stand here before the National Prayer Breakfast I can honestly say I uttered my first heartfelt and sincere prayer…

"Lord…Don't let any of my clients see me!"

And then we flew. 12,000 miles to Africa, and a million miles from my comfort zone. I had the high privilege of having my heart broken. I saw poverty on an obscene level. Children with flies on their eyes and for the lack of a 50 cent medicine doomed to blindness, the emaciated faces of famine, families shattered by civil war. And in Masaka Uganda I held the hand of a 22 year old Mother as she died of AIDS and then turned and looked directly into the eyes of four brand new orphans.

I was an eyewitness.

It put a face on the statistics. I always believed that those statistics were true, but now they were real. It got personal....

More recently, I took a long walk with a warrior turned pastor friend deep into an unknown wilderness along the northern Rift Valley that divides Northwest Kenya with Uganda. He took me to where they had never seen a person with white skin. When they first spotted me, they thought I was a ghost...a dead man walking. For a while, I thought they'd be right.

I fasted for five days on this walk to experience real hunger, but had brought along protein bars in the case of (as Lodinyo put it) an "emergency,". At the end of the walk, I collapsed in a borrowed sleeping hut, when I awoke 13 hours later, I saw a little boy peeking through the door. While he was initially terrified, curiosity eventually got the best of him, and I noticed he was concentrating more on my stash of power bars than he was on me. He succeeded in snatching a bar, and immediately ran away. "Kids are the same everywhere," I thought, until I stepped outside the hut, and found a little boy kneeling over his two-year old sister with a terribly distended stomach, feeding her tiny pieces of protein...

I found out 3 months later that she had died.... another paradigm shift.

Now after more than 30 trips to Africa, the question I have been asked more than any other by my African friends is "What do you pray for?"

Most of us among the affluent have too many things. Too much food, multiple cars, great health care, retirement plans, insurance...

It's only when things fall completely apart, and we're totally out of control that we feel totally dependent, and thus closest to God. Death, cancer, business failure, addiction, divorce, crises; these are the things that drop us to our knees.

All across the world including America things are continually falling apart for the truly poor...They are always out of control, constantly living in a crises mode, and thus dependent and faithful to God's own commandment that we love Him with all our hearts. God is often all the poor have.

The leaders that God anoints are their only hope. And despite the often-horrific conditions they live in, the poor are thankful for their very existence.

Scripture asks, "Hasn't God chosen those who are poor in the eyes of the world to be rich in faith and inherit the Kingdom?" Yes, He has. I've seen it with my own eyes.

The question I'm asked the most by my American friends is, "Why cross an ocean to help people when you need only cross the street, to help your own?" It's a great question, and the answer is, of course, that we need to do both.

Solzhenitsyn said that disaster is defined by two things: magnitude and distance. So a small disaster close to home or a huge disaster faraway, results in what he describes as "bearable

disasters of bearable proportions." We've become too good at "bearing." Our hearts should be broken by the things that break the heart of God.

Specifically in Africa, there are many faraway disasters of epic proportions. In 1994...In Rwanda, a country the size of Maryland, the political genocide claimed over 800,000 lives. 9000 lives per day for 90 days. That's two World Trade Center disasters per day for 3 months.

Today...in Darfur, Sudan. 1.5 million homeless. Thousands terrorized raped and killed. AIDS is killing 4,400 people per day in Africa, and even more are dying from curable malaria. Epic disasters of epic proportions, far from home for most of us. We have hundreds right here in this room from all around the world our neighbors this morning....who experience these epic disasters close to home.

I do want to say this while I have the chance with the President sitting right here. Very few people are aware that due to President Bush's commitment and the resulting partnership with Congress there has been an absolutely historic four-fold increase in American assistance to fight poverty and AIDS in Africa.

In 2003 there were 50,000 Africans on Anti Viral medication and today there are over 1.5 million. I have not met a SINGLE person who hasn't agreed with this high calling.

Proverbs the book of Wisdom says "speak up for those who can't speak for themselves and defend the rights of the poor and destitute." You have been that voice and on behalf of the "least of these" in Africa as well as the collective American conscience, I want to say ..."Thank you Mr. President."

Do you remember when Jesus was talking to His disciples, and asked them when He was hungry, why they didn't give Him any food, and when He was naked, why they didn't give Him any clothes? And the disciples said something like, "Lord, we never did any of those things to You." I always thought (like most folks) that Jesus replied "Whenever you did this to the least of these, you did this onto Me."

Except He didn't say that. What He said was, "When ever you did this to *one* of the least of these, you did this on to Me."

How often do we forget the word "one."

It changes the meaning of what Jesus said completely. In our quest to be helpful, we can rob the poor of their dignity.
In order to be of any help to the poor, we need to understand them, we need to know them, and we need to Love them. They are not a group. The poor is not a species. They are identical to us in their hopes and dreams. They love their families and long for a better life. The *only* difference is that they are poor.

And people don't suffer and die in groups. It's one at a time.

And each one of those deaths leaves an identical wake of agony to what you and I and our families would experience.

So what are we supposed to do with all of this? How does this fit with our own world, so different and so faraway?
Frankly, I'm not sure, but we do have some clues…Jesus said, "The poor will always be with you." What an odd thing to say……. especially coming from Him!

Jesus also said, "To whom much has been given, much will be expected." So maybe This is a test of sorts. If so … how are we doing?

I have heard stories similar to mine of peoples' lives being changed: from orphanages in Russia to inner-city schools in Minneapolis, from the slums of Calcutta to remote medical clinics in the mountains of Afghanistan, from the streets of Washington, DC, to wretched prisons in East Asia. Indeed, all across the world people are answering Jesus' question, "Who is my neighbor?"

And these people are finding themselves changed, engaged, and discovering meaning and relevance by being involved in things much bigger than themselves….

I believe that, deep down, most people would love to have God change their lives. Here's the thing: If asked, He will, every time, guaranteed. And while these changes may initially seem scary, they ultimately lay a foundation for a life lived on purpose rather than by default.

I will be forever indebted to Africa. Africa awakened me when I didn't even know I was asleep. I pray that everyone who seeks one will find a similar path.

I pray that each of you will find your own Africa…

A few years ago my good friend, Gary Haugen, asked me the most important question of all…

For those four orphans I was with in Uganda who watched their mother die of AIDS and were suddenly completely on their own… For a twelve year old girl kidnapped and sold into slavery in rural India…For a single mom evicted and homeless on the streets of DC…For each one of them:

WHAT IS GOD'S STRATEGY FOR LETTING THEM KNOW THAT HE IS GOOD?

The mother in Ethiopia sees her baby die of malnutrition.
Why would she think God is good? and what is God's strategy For allowing her to know that He loves her?

The answer is astounding. The answer is……US!

Even more astonishing…He has no plan B……..

God bless you One and all.