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THE WHITE HOUSE
WASHINGTON

September 6, 1985

TO: John G. Roberts

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: X _____

COMMENT: _____

ACTION: _____

EXECUTIVE ORDER

PROHIBITING TRADE AND CERTAIN OTHER
TRANSACTIONS INVOLVING SOUTH AFRICA

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergency Act (50 U.S.C. 1601 et seq.), the U.N. Participation Act (22 U.S.C. 287), the Arms Export Control Act (22 U.S.C. 2778), the Export Administration Act (50 U.S.C. App. 2401 et seq.), the Atomic Energy Act (42 U.S.C. 2011 et seq.), the Foreign Service Act (22 U.S.C. 3901, et seq.), the Federal Advisory Committee Act (5 U.S.C. App. I), Section 301 of Title 3 of the United States Code, and considering the measures which the Security Council has decided on or recommended in Security Council Resolutions No. 418 of November 4, 1977, No. 558 of December 14, 1984, and No. 569 of July 26, 1985.

I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

Section 1. The following transactions are prohibited effective October 11, 1985:

(a) The making of any loans by persons in the United States or U.S. nationals abroad to the Government of South Africa or to entities owned or controlled by that Government. This prohibition shall not apply to (i) any loan or extension of credit for any educational, housing, or health facility which is available to all persons on a nondiscriminatory basis and which is located in a geographic area accessible to all population groups without any legal or administrative restriction; or (ii) any loan or extension of credit for which an agreement is entered into before the date of the enactment of this Order.

The Secretary of the Treasury shall promulgate regulations for this purpose. The Secretary of the Treasury may, with the concurrence of the Secretary of State, permit exceptions to this prohibition only if the Secretary of the Treasury determines that the loan or extension of credit will improve the welfare or expand the economic opportunities of persons in South Africa disadvantaged by the apartheid system, provided that no exception may be made for any apartheid enforcing entity.

(b) All exports of computers, computer software, or goods or technology intended to service computers to or for use by any of the following entities of the Government of South Africa:

- (1) The military
- (2) The police
- (3) The prison system .
- (4) The national security agencies
- (5) ARMSCOR and its subsidiaries or the weapons research activities of the Council for Scientific and Industrial Research
- (6) The administering authorities for the black passbook and similar controls
- (7) Any apartheid enforcing agency
- (8) Any local, regional, or homelands government entity which performs any function of any entity described in paragraphs (1) through (7).

The Secretary of Commerce shall implement a system of end use verification to ensure that any computers exported to South Africa will not be used by any entity set forth in this subsection.

(c)(1) Granting any license for the export to South Africa of goods or technology which are to be used in a nuclear production or utilization facility, or which, in the judgment of the Secretary of State, are likely to be diverted for use in such a facility; any authorization to engage, directly or indirectly, in the production of any special nuclear material in South Africa; any license for the export to South Africa of component parts or other items or substances especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes; and any approval of retransfers to South Africa of any goods, technology, special nuclear material, components, items or substances described in this section. The Secretaries of State, Energy, and Commerce shall take action under appropriate legal authority to carry out these prohibitions.

(2) Nothing in this section shall preclude assistance for International Atomic Energy Agency safeguards or IAEA programs generally available to its member states, or for technical programs for the purpose of reducing proliferation risks, such as for reducing the use of highly enriched uranium and activities envisaged by section 223 of the Nuclear Waste Policy Act of 1982 or for exports which the Secretary of State determines are necessary for humanitarian reasons to protect the public health and safety.

(d) The import into the U.S. of any arms, ammunition, and military vehicles produced in South Africa or of any manufacturing data for such articles. The Secretaries of State, Treasury, and Defense shall take any measures necessary for this purpose.

Sec. 2 (a) The great majority of U.S. firms in South Africa have voluntarily adhered to fair labor standards which have benefitted those in South Africa who have been disadvantaged by the apartheid system. It is the policy of the U.S. to strongly encourage all U.S. firms in South Africa to follow this commendable example.

(b) Accordingly, no department or agency of the United States may intercede after December 31, 1985, with any foreign government regarding the export marketing activity in any country of any national of the United States who employs more than 25 persons in South Africa who does not adhere to the principles stated in subsection (c). The Secretary of State shall promulgate procedures to ensure that such nationals may register that they have adhered to the principles.

(c) The principles referred to in subsection (b) are as follows:

(1) Desegregating the races in each employment facility;

(3) Assuring that the pay system is equitably applied to all employees without regard to race or ethnic origin;

(4) Establishing a minimum wage and salary structure based on the appropriate local minimum economic level which takes into account the needs of employees and their families;

(5) Increasing by appropriate means, the number of persons in managerial, supervisory, administrative, clerical, and technical jobs who are disadvantaged by the apartheid system for the purpose of significantly increasing their representation in such jobs;

(6) Taking reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation, and health;

(7) Implementing fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions to self-organization and to form, join, or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity.

(d) U.S. nationals referred to in subsection (b) are encouraged to take reasonable measures to extend the scope of their influence on activities outside the workplace, by measures such as supporting the right of all businesses, regardless of the racial character of their owners or

employees, to locate in urban areas, by influencing other companies in South Africa to follow the standards specified in subsection (c) and by supporting the freedom of mobility of all workers, regardless of race, to seek employment opportunities wherever they exist, and by making provision for adequate housing for families of employees within the proximity of the employee's place of work.

Sec. 3. The Secretary of State and any other head of a department or agency of the United States carrying out activities in South Africa shall promptly take the necessary steps to ensure that the labor practices described in section (2)(c) are applied to their South African employees.

Sec. 4. The Secretary of State and any other head of a department or agency of the United States carrying out activities in South Africa shall, to the maximum extent practicable, in procuring goods or services, make affirmative efforts to assist business enterprises having more than 50 percent beneficial ownership by persons in South Africa disadvantaged by the apartheid system.

Sec. 5. The Secretary of State and the U.S. Trade Representative are directed to consult with other parties to the General Agreement on Tariffs and Trade to consider a prohibition on the import of Krugerrands.

Sec. 6. The Secretary of the Treasury is directed to conduct a study to be completed within sixty days regarding the feasibility of minting and issuing gold coins.

Sec. 7. In carrying out their respective functions and responsibilities under this Order, the Secretary of the Treasury and the Secretary of Commerce shall consult with the Secretary of State. Each such Secretary shall consult, as appropriate, with other government agencies and private persons. Each such Secretary shall issue such regulations, licenses, or other authorizations, and is authorized to enter into such contracts, as the Secretary considers necessary to carry out the purposes of this Order.

Sec. 8. The Secretary of State shall establish, under his chairmanship and pursuant to appropriate legal authority, an Advisory Commission on South Africa to provide recommendations on measures to encourage peaceful change in South Africa. The Advisory Commission shall provide its initial report no later than January 1, 1987.

Sec. 9. The Secretary of State is directed to take the steps necessary pursuant to the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 et seq.), and related legislation to (a) increase the amount of scholarships provided to South Africans disadvantaged by the apartheid system up to \$8 million in Fiscal Year 1986 and (b) increase the amount allocated for South Africa in the Human Rights Fund to \$1.5 million in FY 1986. Appropriate increases will be considered in future fiscal years. At least one third of the latter amount shall be used for legal assistance for South Africans.

This order shall be effective immediately and shall be transmitted to the Congress and published in the Federal Register.

The White House

September __, 1985

TO THE CONGRESS OF THE UNITED STATES:

Pursuant to section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703, I hereby report to the Congress that I have exercised my statutory authority to declare that the policies and actions of the Government of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States and to declare a national emergency to deal with that threat.

Pursuant to this and other legal authorities, I have prohibited certain transactions, including the following:

- (1) the making or approval of bank loans to the South African Government, with certain narrow exceptions;
- (2) the export of all computers and related goods and technology to certain government agencies and any apartheid enforcing entity of the South African Government;
- (3) all nuclear exports to South Africa and related transactions, with certain narrow exceptions;
- (4) the import into the United States of arms, ammunition, or military vehicles produced in South Africa; and
- (5) the extension of export marketing support to U.S. firms employing at least twenty-five persons in South Africa which do not adhere to certain fair labor standards.

In addition, I have directed (6) the Secretary of State and the United States Trade Representative to consult with other parties to the General Agreement on Tariffs and Trade with a view toward adopting a prohibition on the import of Krugerrands; (7) the Secretary of the Treasury to complete a

study within 60 days regarding the feasibility of minting U.S. gold coins; and (8) the Secretary of State to take the steps necessary to increase the amounts provided for scholarships in South Africa for those disadvantaged by the system of apartheid and to increase the amounts allocated for South Africa in the Human Rights Fund; and (9) the Secretary of State to establish an Advisory Committee to provide recommendations on measures to encourage peaceful change in South Africa.

Finally, this Order (10) commends the efforts of U.S. firms in South Africa that have voluntarily adhered to the Sullivan principles and encourages all U.S. firms to do likewise.

I am enclosing a copy of the executive order that I have issued making this declaration and exercising this authority.

1. I have authorized these steps in response to the current situation in South Africa. It is foreign policy of the United States to seek peaceful change in South Africa, and in particular an end to the repugnant practice and policy of apartheid and the establishment of a government based on the consent of the governed. Recent developments in South Africa have serious implications for the prospects for peaceful change and the stability of the region as a whole, a region of strategic importance to the United States. The recent declaration of a state of emergency in 36 magisterial districts by the Government of South Africa, the mass arrests and detentions, and the ensuing financial crisis are of direct concern to the foreign policy and economy of the United

States. The pace of reform in South Africa has not fulfilled the expectations of the world community nor the people of South Africa. Recent government actions regarding negotiations on the participation of all South Africans in the government of that country have not sufficiently diffused tensions and may have indeed exacerbated the situation.

Under these circumstances, I believe that it is necessary for this nation to recognize that our foreign policy of seeking change through peaceful means is seriously threatened. In order for this nation successfully to influence events in that country, it is necessary for the United States to speak with one voice and to demonstrate our opposition to apartheid by taking certain actions directed specifically at key apartheid policies and agencies.

2. The above-described measures, many of which reflect congressional concerns, will immediately demonstrate to the South African Government the seriousness of our concern with the situation in that country. Furthermore, this declaration mobilizes the influence of the private sector to promote an improvement in the economic prosperity, freedom and political influence of blacks and other nonwhites in South Africa.

TO THE CONGRESS OF THE UNITED STATES:

Pursuant to section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703^(b)/ I hereby report to the Congress that I have exercised my statutory authority to declare that the policies and actions of the Government of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States and to declare a national emergency to deal with that threat.

Pursuant to this and other legal authorities, I have prohibited certain transactions, including the following:

(1) the making or approval of bank loans to the South African Government, with certain narrow exceptions; (2) the export of ~~and~~ computers and related goods and technology to certain government agencies and any apartheid enforcing entity of the South African Government; (3) all nuclear exports to South Africa and related transactions, with certain narrow exceptions; (4) the import into the United States of arms, ammunition, or military vehicles produced in South Africa; and (5) the extension of export marketing support to U.S. firms employing at least twenty-five persons in South Africa which do not adhere to certain fair labor standards.

In addition, I have directed (6) the Secretary of State and the United States Trade Representative to consult with other parties to the General Agreement on Tariffs and Trade with a view toward adopting a prohibition on the import of Krugerrands; (7) the Secretary of the Treasury to complete a

study within 60 days regarding the feasibility of minting U.S. gold coins; and (8) the Secretary of State to take the steps necessary to increase the amounts provided for scholarships in South Africa for those disadvantaged by the system of apartheid and to increase the amounts allocated for South Africa in the Human Rights Fund; and (9) the Secretary of State to establish an Advisory Committee to provide recommendations on measures to encourage peaceful change in South Africa.

Finally, this Order (10) commends the efforts of U.S. firms in South Africa that have voluntarily adhered to ~~the (Sullivan)~~ principles and encourages all U.S. firms to do likewise. *fair labor ?*

I am enclosing a copy of the executive order that I have issued making this declaration and exercising this authority. *discrimination*

1. I have authorized these steps in response to the current situation in South Africa. It is ~~the~~ foreign policy of the United States to seek peaceful change in South Africa, and in particular an end to the repugnant practice and policy of apartheid and the establishment of a government based on the consent of the governed. Recent developments in South Africa have serious implications for the prospects for peaceful change and the stability of the region as a whole, a region of strategic importance to the United States. The recent declaration of a state of emergency in 36 magisterial districts by the Government of South Africa, the mass arrests and detentions, and the ensuing financial crisis are of direct concern to the foreign policy and economy of the United *✓*

EXECUTIVE ORDER

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PROHIBITING TRADE AND CERTAIN OTHER
TRANSACTIONS INVOLVING SOUTH AFRICA

By the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), the Foreign Assistance Act (22 U.S.C. 2151 et seq.), the United Nations Participation Act (22 U.S.C. 287), the Arms Export Control Act (22 U.S.C. 2751 et. seq.), the Export Administration Act (50 U.S.C. App. 2401 et seq.), the Atomic Energy Act (42 U.S.C. 2011 et seq.), the Foreign Service Act (22 U.S.C. 3901 et seq.), the Federal Advisory Committee Act (5 U.S.C. App. I), Section 301 of Title 3 of the United States Code, and considering the measures which the United Nations Security Council has decided on or recommended in Security Council Resolutions No. 418 of November 4, 1977, No. 558 of December 13, 1984, and No. 569 of July 26, 1985, and considering that the policy and practice of apartheid are repugnant to the moral and political values of democratic and free societies and run counter to United States policies to promote democratic governments throughout the world and respect for human rights, and the policy of the United States to influence peaceful change in South Africa, as well as the threat posed to United States interests by recent events in that country,

I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government

of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

Section 1. Except as otherwise provided in this section, the following transactions are prohibited effective October 11, 1985:

(a) The making or approval of any loans by financial institutions in the United States to the Government of South Africa or to entities owned or controlled by that Government. This prohibition shall enter into force on November 11, 1985. It shall not apply to (i) any loan or extension of credit for any educational, housing, or health facility which is available to all persons on a nondiscriminatory basis and which is located in a geographic area accessible to all population groups without any legal or administrative restriction; or (ii) any loan or extension of credit for which an agreement is entered into before the date of this Order.

The Secretary of the Treasury is hereby authorized to promulgate such rules and regulations as may be necessary to carry out this subsection. The initial rules and regulations shall be issued within sixty days. The Secretary of the Treasury may, in consultation with the Secretary of State, permit exceptions to this prohibition only if the Secretary of the Treasury determines that the loan or extension of credit will improve the welfare or expand the economic opportunities of persons in South Africa disadvantaged by the apartheid system, provided that no exception may be made for any apartheid enforcing entity.

(b) All exports of computers, computer software, or goods or technology intended to service computers to or for use by any of the following entities of the Government of South Africa:

(1) The military;

(2) The police;

(3) The prison system;

(4) The national security agencies;

(5) ARMSCOR and its subsidiaries or the weapons research activities of the Council for Scientific and Industrial Research;

(6) The administering authorities for the black passbook and similar controls;

(7) Any apartheid enforcing agency;

(8) Any local or regional government or "homeland" entity which performs any function of any entity described in paragraphs (1) through (7).

The Secretary of Commerce is hereby authorized to promulgate such rules and regulations as may be necessary to carry out this subsection and to implement a system of end use verification to ensure that any computers exported directly or indirectly to South Africa will not be used by any entity set forth in this subsection.

(c) (1) Issuance of any license for the export to South Africa of goods or technology which are to be used in a nuclear production or utilization facility, or which, in the judgment of the Secretary of State, are likely to be diverted for use in such a facility; any authorization to engage, directly or indirectly, in the production of any special nuclear material

in South Africa; any license for the export to South Africa of component parts or other items or substances especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes; and any approval of retransfers to South Africa of any goods, technology, special nuclear material, components, items or substances described in this section. The Secretaries of State, Energy, Commerce, and Treasury are hereby authorized to take such actions as may be necessary to carry out this subsection.

(2) Nothing in this section shall preclude assistance for International Atomic Energy Agency safeguards or IAEA programs generally available to its member states, or for technical programs for the purpose of reducing proliferation risks, such as for reducing the use of highly enriched uranium and activities envisaged by section 223 of the Nuclear Waste Policy Act (42 U.S.C. 10203) or for exports which the Secretary of State determines are necessary for humanitarian reasons to protect the public health and safety.

(d) The import into the United States of any arms, ammunition, or military vehicles produced in South Africa or of any manufacturing data for such articles. The Secretaries of State, Treasury, and Defense are hereby authorized to take such actions as may be necessary to carry out this subsection.

Sec. 2. (a) The majority of United States firms in South Africa have voluntarily adhered to fair labor principles which have benefitted those in South Africa who have been disadvantaged by the apartheid system. It is the policy of the United States to encourage strongly all United States firms in South Africa to follow this commendable example.

(b) Accordingly, no department or agency of the United States may intercede after December 31, 1985, with any foreign government regarding the export marketing activity in any country of any national of the United States employing more than 25 individuals in South Africa who does not adhere to the principles stated in subsection (c) with respect to that national's operations in South Africa. The Secretary of State shall promulgate regulations to further define the employers that will be subject to the requirements of this subsection and procedures to ensure that such nationals may register that they have adhered to the principles.

(c) The principles referred to in subsection (b) are as follows:

- (1) Desegregating the races in each employment facility;
- (2) Providing equal employment opportunity for all employees without regard to race or ethnic origin;
- (3) Assuring that the pay system is applied to all employees without regard to race or ethnic origin;
- (4) Establishing a minimum wage and salary structure based on the appropriate local minimum economic level which takes into account the needs of employees and their families;
- (5) Increasing by appropriate means, the number of persons in managerial, supervisory, administrative, clerical, and technical jobs who are disadvantaged by the apartheid system for the purpose of significantly increasing their representation in such jobs;
- (6) Taking reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation, and health;

(7) Implementing fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions, to self-organization and to form, join, or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity.

(d) United States nationals referred to in subsection (b) are encouraged to take reasonable measures to extend the scope of their influence on activities outside the workplace, by measures such as supporting the right of all businesses, regardless of the racial character of their owners or employees, to locate in urban areas, by influencing other companies in South Africa to follow the standards specified in subsection (c) and by supporting the freedom of mobility of all workers, regardless of race, to seek employment opportunities wherever they exist, and by making provision for adequate housing for families of employees within the proximity of the employee's place of work.

Sec. 3. The Secretary of State and the head of any other department or agency of the United States carrying out activities in South Africa shall promptly take, to the extent permitted by law, the necessary steps to ensure that the labor practices described in section (2)(c) are applied to their South African employees.

Sec. 4. The Secretary of State and the head of any other department or agency of the United States carrying out activities in South Africa shall, to the maximum extent practicable and to the extent permitted by law, in procuring

goods or services in South Africa, make affirmative efforts to assist business enterprises having more than 50 percent beneficial ownership by persons in South Africa disadvantaged by the apartheid system.

Sec. 5. (a) The Secretary of State and the United States Trade Representative are directed to consult with other parties to the General Agreement on Tariffs and Trade with a view toward adopting a prohibition on the import of Krugerrands.

(b) The Secretary of the Treasury is directed to conduct a study to be completed within sixty days regarding the feasibility of minting and issuing gold coins with a view toward expeditiously seeking legislative authority to accomplish the goal of issuing such coins.

Sec. 6. In carrying out their respective functions and responsibilities under this Order, the Secretary of the Treasury and the Secretary of Commerce shall consult with the Secretary of State. Each such Secretary shall consult, as appropriate, with other government agencies and private persons.

Sec. 7. The Secretary of State shall establish, pursuant to appropriate legal authority, an Advisory Committee on South Africa to provide recommendations on measures to encourage peaceful change in South Africa. The Advisory Committee shall provide its initial report within twelve months.

Sec. 8. The Secretary of State is directed to take the steps necessary pursuant to the Foreign Assistance Act and related legislation to (a) increase the amount of internal

scholarships provided to South Africans disadvantaged by the apartheid system up to \$8 million from funds made available for Fiscal Year 1986, and (b) increase the amount allocated for South Africa from funds made available for Fiscal Year 1986 in the Human Rights Fund up to \$1.5 million. At least one-third of the latter amount shall be used for legal assistance for South Africans. Appropriate increases in the amounts made available for these purposes will be considered in future fiscal years.

Sec. 9. This Order is intended to express and implement the foreign policy of the United States. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

THE WHITE HOUSE,

THE WHITE HOUSE

WASHINGTON

September 6, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM:

JOHN G. ROBERTS *JGR*

SUBJECT:

Reaction to Preemption of State and
Local Laws by Federal Legislation
Respecting South Africa

Tom Dawson has sent you excerpts from the Congressional Record discussing whether enactment of legislation by Congress on investment by United States companies in South Africa would preempt the wide variety of state and local laws and ordinances that have been enacted on the same subject. Dawson has asked for your reaction.

A colloquy between Senators McConnell and Lugar on July 15, 1985, indicates that Federal legislation in the area would preempt state and local laws on South Africa. This position is supported by a legal analysis by the Library of Congress, made part of the Congressional Record.

A rival colloquy took place four days earlier, on July 11, involving Senators Proxmire, Cranston, and Kennedy. Those Senators clearly stated their view that the proposed Federal legislation would not preempt state and local laws and ordinances. The July 11 colloquy noted that Senator Roth and McConnell proposed an amendment to the pending bill to provide explicitly that the bill would preempt state law. McConnell stated on July 15 that he withdrew the amendment with the understanding that it was not necessary to achieve preemption; Kennedy said it was withdrawn because it would not have passed.

Given the foregoing it is my view that the courts would rule that the pending Federal legislation was not intended to preempt state and local laws and ordinances on South Africa. Certainly any such laws and ordinances that conflicted with the Federal law would be invalid under the Supremacy Clause. The issue, however, concerns state and local laws that do not conflict with the proposed Federal restrictions but simply go further. To take a typical example, a state law prohibiting state funds to be invested in companies doing business in South Africa does not conflict with a provision in Federal law requiring such companies to abide by the so-called Sullivan principles. The question is whether such a state law would nonetheless be preempted by the Federal law.

The question is purely one of Congressional intent. If Congress desires to preempt state and local laws in this area, it possesses the power to do so. A basic respect for Federalism, however, has led courts to require clear manifestation of Congressional intent before finding an intent to preempt state law. As the Supreme Court has noted: "We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (frequently quoted in subsequent opinions). Because of the violence preemption does to Federalism values, courts are reluctant to find preemption in the absence of a clear directive from Congress. This bill will contain no clear directive in the statutory language itself. Nor will the required clear directive be found in the legislative history: Lugar and McConnell have done their best to create a record supporting preemption, but the contrary views of Cranston, Kennedy, and Proxmire are also clearly on record. In other words, a court considering the question could only conclude that it was raised and unresolved. That is hardly evidence of "clear and manifest purpose" to preempt.

The attached memorandum for Dawson embodies the foregoing, appropriately couched with cautionary language to the effect that a definitive opinion must await (1) the final language in the bill, and (2) any additional discussion of the issue in debate or committee reports.

Attachment

THE WHITE HOUSE

WASHINGTON

September 6, 1985

MEMORANDUM FOR THOMAS DAWSON
DEPUTY ASSISTANT TO THE PRESIDENT
EXECUTIVE ASSISTANT TO THE CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Reaction to Preemption of State and
Local Laws by Federal Legislation
Respecting South Africa

You have asked for my views on whether the proposed bill on South Africa pending in Congress would, if enacted, operate to preempt state and local laws and ordinances on South Africa. The question was addressed by Senators Proxmire, Cranston, and Kennedy on July 11, and by Senators McConnell and Lugar on July 15. The former group concluded that the proposed Federal legislation would not preempt state and local law; the latter that it would. Each side introduced in the Congressional Record supportive legal opinions. Senators Roth and McConnell proposed but later withdrew a provision explicitly providing for preemption. The group arguing in favor of preemption contended the provision was withdrawn as unnecessary; the group opposed to preemption contended it was withdrawn because it would not have passed.

In light of the foregoing, and my independent review of the law on preemption, it is my view that courts, if presented with the question, would rule that the Federal legislation does not preempt state and local laws and ordinances dealing with South Africa. Congress certainly possesses the power to preempt state and local laws in this area, but courts will insist that Congress evince a "clear and manifest purpose" to do so. Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). Out of respect for basic principles of Federalism, courts will not find that Congress intended to displace state law unless Congress unambiguously intended that result. The easiest way for Congress to evince such an intent is to state it in the statute. That will not be done in this case. When a court turns to the legislative history, it will find that the preemption question was raised and that contrary views were expressed, each with supporting legal analysis. That is hardly the requisite "clear and manifest purpose" to preempt that is required.

Of course, any state or local laws in direct conflict with the Federal legislation will be invalid, to the extent of the conflict, under the Supremacy Clause. State laws that simply go further than the Federal law -- for example, a state law forbidding investment of state funds in companies doing business in South Africa, while the Federal law simply requires such companies to meet certain standards -- would not, in my view, be preempted. This view is a preliminary one. Definitive guidance must await (1) the precise language of the Federal statute, and (2) any additional discussion of the preemption issue in debate or committee reports.

FFF:JGR:aea 9/6/85

cc: FFFielding
JGRoberts
Subj
Chron

Draft as of
4:00 P.M. Saturday

EXECUTIVE ORDER

PROHIBITING TRADE AND CERTAIN OTHER
TRANSACTIONS INVOLVING SOUTH AFRICA

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergency ^{ics} Act (50 U.S.C. 1601 et seq.), the ~~(Foreign Assistance Act)~~ ^{of 1948?} (22 U.S.C. 2151 et seq.), the ~~(U.N.)~~ ^{of 1945? / 1945?} Participation Act (22 U.S.C. 287), the Arms Export Control Act (22 U.S.C. 2778), the Export Administration Act (50 U.S.C. App. 2401 et seq.), the Atomic Energy Act (42 U.S.C. 2011 et seq.), the Foreign Service Act (22 U.S. 3901, et seq.), the Federal Advisory Committee Act (5 U.S.C. App. I), Section 301 of Title 3 of the United States Code, and considering the measures which the Security Council has decided on or recommended in Security Council Resolutions No. 418 of November 4, 1977, No. 558 of December 14, 1984, and No. 569 of July 26, 1985,) and considering the repugnance of the policy and practice of apartheid and its inconsistency with the values of the United States and basic human rights, and the threat posed

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Lamm

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to United States interests by recent events in South Africa, and the policy of the United States to secure peaceful change in South Africa,

I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of South Africa constitute an unusual and extraordinary threat to the foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

Section 1. Except as otherwise provided in this section, the following transactions are prohibited effective October 11, 1985:

(a) The making or approval of any loans by financial institutions in the United States to the Government of South Africa or to entities owned or controlled by that Government. This prohibition shall enter into force on November 11, 1985. It shall not apply to (i) any loan or extension of credit for any educational, housing, or health facility which is available to all persons on a nondiscriminatory basis and which is located in a geographic area accessible to all population groups without any legal or administrative restriction; or (ii) any loan or extension of credit for which an agreement is entered into before the date of this Order.

The Secretary of the Treasury is hereby authorized to promulgate such rules and regulations as may be necessary to carry out this subsection. The initial rules and regulations shall be issued within sixty days. The Secretary of the Treasury may, in consultation with the Secretary of State, permit exceptions to this prohibition only if the Secretary of the Treasury determines that the loan or extension of credit will improve the welfare or expand the economic opportunities of persons in South Africa disadvantaged by the apartheid system, provided that no exception may be made for any apartheid enforcing entity.

(b) All exports of computers, computer software, or goods or technology intended to service computers to or for use by any of the following entities of the Government of South Africa:

- (1) The military
- (2) The police
- (3) The prison system
- (4) The national security agencies
- (5) ARMSCOR and its subsidiaries or the weapons research activities of the Council for Scientific and Industrial Research
- (6) The administering authorities for the black passbook and similar controls
- (7) Any apartheid enforcing agency

(8) Any local, regional, or "homeland" government entity which performs any function of any entity described in paragraphs (1) through (7).

The Secretary of Commerce is hereby authorized to promulgate rules and regulations as may be necessary to carry out this subsection and to implement a system of end use verification to ensure that any computers exported to South Africa will not be used by any entity set forth in this subsection.

(c)(1) Issuing any license for the export to South Africa of goods or technology which are to be used in a nuclear production or utilization facility, or which, in the judgment of the Secretary of State, are likely to be diverted for use in such a facility; any authorization to engage, directly or indirectly, in the production of any special nuclear material in South Africa; any license for the export to South Africa of component parts or other items or substances especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes; and any approval of retransfers to South Africa of any goods, technology, special nuclear material, components, items or substances described in this section. The Secretaries of State, Energy, Commerce, and Treasury are hereby authorized to take such actions as may be necessary to carry out this subsection.

(2) Nothing in this section shall preclude assistance for International Atomic Energy Agency safeguards or IAEA programs generally available to its member states, or for technical programs for the purpose of reducing proliferation risks, such as for reducing the use of highly enriched uranium and activities envisaged by section 223 of the Nuclear Waste Policy Act of 1982 or for exports which the Secretary of State determines are necessary for humanitarian reasons to protect the public health and safety.

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(*need*
etc)

(d) The import into the U.S. of any arms, ammunition, and military vehicles produced in South Africa or of any manufacturing data for such articles. The Secretaries of State, Treasury, and Defense are hereby authorized to take such actions as may be necessary to carry out this subsection.

Sec. 2 (a) The great majority of U.S. firms in South Africa have voluntarily adhered to fair labor principles which have benefitted those in South Africa who have been disadvantaged by the apartheid system. It is the policy of the U.S. to strongly encourage all U.S. firms in South Africa to follow this commendable example.

(b) Accordingly, no department or agency of the United States may intercede after December 31, 1985, with any foreign government regarding the export marketing activity in any

country of any national of the United States employing more than 25 individuals in South Africa who does not adhere to the principles stated in subsection (c) with respect to that national's operations in South Africa. The Secretary of State shall promulgate procedures to further define the employers that will be subject to the requirements of this subsection and to ensure that such nationals may register that they have adhered to the principles.

(c) The principles referred to in subsection (b) are as follows:

- (1) Desegregating the races in each employment facility;
- (2) Providing equal employment opportunity for all employees without regard to race or ethnic origin;
- (3) Assuring that the pay system is ~~equitably~~ applied to all employees without regard to race or ethnic origin;
- (4) Establishing a minimum wage and salary structure based on the appropriate local minimum economic level which takes into account the needs of employees and their families;
- (5) Increasing by appropriate means, the number of persons in managerial, supervisory, administrative, clerical, and technical jobs who are disadvantaged by the apartheid system for the purpose of significantly increasing their representation in such jobs;

(6) Taking reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation, and health;

(7) Implementing fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions to self-organization and to form, join, or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity.

(d) U.S. nationals referred to in subsection (b) are encouraged to take reasonable measures to extend the scope of their influence on activities outside the workplace, by measures such as supporting the right of all businesses, regardless of the racial character of their owners or employees, to locate in urban areas, by influencing other companies in South Africa to follow the standards specified in subsection (c) and by supporting the freedom of mobility of all workers, regardless of race, to seek employment opportunities wherever they exist, and by making provision for adequate housing for families of employees within the proximity of the employee's place of work.

Sec. 3. The Secretary of State and any other head of a department or agency of the United States carrying out

activities in South Africa shall promptly take the necessary steps to ensure to the extent permitted by law that the labor practices described in section (2)(c) are applied to their South African employees.

Sec. 4. The Secretary of State and any other head of a department or agency of the United States carrying out activities in South Africa shall, to the maximum extent practicable and to the extent permitted by law, in procuring goods or services in South Africa, make affirmative efforts to assist business enterprises having more than 50 percent beneficial ownership by persons in South Africa disadvantaged by the apartheid system.

Sec. 5 (a). The Secretary of State and the U.S. Trade Representative are directed to consult with other parties to the General Agreement on Tariffs and Trade ~~to consider~~ a prohibition on the import of Krugerrands.

with a new fund shortly

(b) The Secretary of the Treasury is directed to conduct a study to be completed within sixty days regarding the feasibility of minting and issuing gold coins.

with a new fund approximately early minting within the next 60 days

Sec. 6. In carrying out their respective functions and responsibilities under this Order, the Secretary of the Treasury and the Secretary of Commerce shall consult with the

Secretary of State. Each such Secretary shall consult, as appropriate, with other government agencies and private persons.

Sec. 7. The Secretary of State shall establish, pursuant to appropriate legal authority, an Advisory Commission on South Africa to provide recommendations on measures to encourage peaceful change in South Africa. The Advisory Commission shall provide its initial report within twelve months.

Sec. 8. The Secretary of State is directed to take the steps necessary pursuant to the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 et seq.), and related legislation to (a) increase the amount of scholarships provided to South Africans disadvantaged by the apartheid system up to \$8 million from funds made available for Fiscal Year 1986 and (b) increase the amount allocated for South Africa from funds made available for Fiscal Year 1986 in the Human Rights Fund up to \$1.5 million. At least one third of the latter amount shall be used for legal assistance for South Africans. Appropriate increases in the amounts made available for these purposes will be considered in future fiscal years.

Sec. 9. This order is intended to express and implement the foreign policy of the United States. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

The White House

September __, 1985