THE WHITE HOUSE

WASHINGTON

September 9, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: South Africa Materials

After our conversation Sunday morning I became involved in drafting and approving as to legality the proposed Executive Order, statutorily required report to Congress, fact sheet, and Presidential remarks. A final version of the Executive Order was formally transmitted, with Office of Legal Counsel approval as to form and legality, at 9:30 p.m. Sunday. Justice also reviewed and cleared the report to Congress required by Section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. § 1703(b). IEEPA also requires the President to consult, "in every possible instance," with Congress before exercising emergency authorities, 50 U.S.C. § 1703(a). Ed Cummings of the State Legal Adviser's office advised me that Secretary Schultz, on behalf of the President, had undertaken such consultation with regard to the President's proposed action.

OMB, State, and Justice determined that the President was authorized to declare a national emergency in this instance. The report to Congress most clearly articulates the justification for this declaration; the President's remarks and the fact sheet, on the other hand, do not focus on the "emergency" situation.

As we discussed Sunday morning, the most difficult legal question was whether the President should follow the procedures of the Export Administration Act as well as IEEPA, or proceed independently under IEEPA. It was the view of Justice and State that IEEPA provided sufficient authority, but the EAA was cited in the Executive Order, not as authority for action but because the export licenses referred to in the Order, that will be prohibited under IEEPA, are issued under the EAA. The EAA establishes a comprehensive system of export controls, but I agree with State and Justice that a strong argument can be made that the EAA system does not displace IEEPA. The consultations and reports required under EAA are required when the President exercises authority under that Act; here he is exercising authority under IEEPA, not EAA.

I nonetheless think we should discuss with Justice and State the possibility of complying with the requirements of the EAA, to the extent possible, to avoid or mute criticism of the President's action.

THE WHITE HOUSE

WASHINGTON

September 6, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

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
Orig. signed by FFF
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

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

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WHITE HOUSE
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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Tom Dawson

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Reaction to Preemption of State and local laws by Federal legislation respecting South Africa

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
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speak with influence within and without the Senate. In this current atmosphere, events both in the U.S. and the Philippines receive media attention that signify the uncertainty of united policies. Some events gain symbolism and cause reactions in both our countries.

Such a symbolic event is a resolution recently adopted by the Senate. Drafted by the junior Senator from Massachusetts, who is a veteran of the Vietnam war, the resolution blends the obvious love and faith in democracy of both Filipinos and Americans with language that is also an intrusion into the affairs of the government of the Philippines. There will be a time for more enlightened Senate debate on the future course of the mutual relationship between our two countries.

Meanwhile there are building blocks to work toward that goal. At the same time the Senate considered the aforementioned resolution, the Senate acted in a positive way in adopting unanimously a resolution stating that the U.S. State Department cease its prevention of U.S. wheat sales to the Philippines. Some of us have also consulted with the U.S. State and Agriculture Departments on expediting a rice shipment to your country to provide additional supplies, since your drought damaged crop may cause a rice shortage. I stand ready to assist with any additional food supplies needed and to expedite the continuation of the cooperative food aid to the unemployed families.

While I seek not to interfere in the election process of your country, I observe that the democratic function of the National Movement for Free Elections (NAMFREL) is a citizen responsibility to which our two countries adhere. We would express in a friendly manner our hope, in recognition of that shared interest, that NAMFREL is accredited.

I have received letters from the Philippines which relate to me specific cases of insurgents who, because they are afraid of the consequences of returning to the status of peaceful citizens, reluctantly continue in their insurgency activities. Several have cited cases of military abuse where peaceful resolution was sought. The letters indicate a general feeling of fairness in General Ramos, but express the fear that he is not in complete authority to correct abuses by some of the military and that efforts of reconciliation by some insurgents have ended tragically.

These are my thoughts. Finally, I wish to emphasize that the courses of our two countries are parallel paths where in if one benefits, we both benefit. I offer this observation in my attempt to serve the best interests of the friendship and progress in the relationship of our two countries. I believe the U.S.-Philippine relationship is the special alliance of culture, trade, and national security that spans the Pacific.

With my best wishes for you, your family, and the Filipino people, and in the warm spirit of the Filipinos, I say "MABUHAY".

Yours sincerely,

JOHN MELCHER.

PREEMPTION OF STATE AND LOCAL LEGISLATION

Mr. MCCONNELL. Mr. President, during the past year, many State and local legislatures have been prompted by public concern to address the issue of the South African Government's abhorrent policy of apartheid. In the absence of Federal legislation, an enormous variety of measures have been drafted, many of which are now either pending consideration by States or have been enacted.

Some bills demand corporations chartered in the State sever any business ties with South Africa. Others require State pension funds to divest holdings in companies investing in South Africa, and still others require companies to comply with the Sullivan code, a voluntary code of fair labor practices. This variance from state to state has caused confusion and concern on the part of small investors, pension fund administrators, and contributors, and corporations with South African business ties. It is clear that we cannot afford 50 or more foreign policy agendas and standards. Congress now has the opportunity to declare its intention to preempt State and local laws which conflict or interfere with the Federal legislation which I hope we pass this week.

In the past, Congress has preempted State action in any number of fields. In some cases, it did so because the State action was an invalid interference with the actual operation of a Federal program, such as the Federal regulation of employee pension plans effected through ERISA, the Employee Retirement Income Security Act. In others, it did so because the State action was an impermissible intrusion upon a field that Congress has validly reserved to the Federal sphere, such as labor-management relations. No field is more clearly suited for Federal control, and for the preemption of burdensome, duplicative, or conflicting State regulation, than that of foreign policy.

The Supreme Court has declared that the Federal Government:

Is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties • • • Our system of government is such that the interests of the cities, counties, and States, no less than the interest of the people of the whole nation, imperatively requires that Federal power in the field affecting foreign relations be left entirely free from local interference.[1]

That is exactly what this amendment will accomplish.

It may well be that further legislative or executive action will be required following enactment of this bill. In fact, the bill itself contemplates the possibility of economic sanctions at a later date if necessary to achieve the purposes of the legislation. But those sanctions would be uniform in their creation and implementation. Clearly, at this point, the emergence of a comprehensive Federal policy and plan for conducting the United States relations with South Africa requires that Congress unmistakably declare the preemption of State and local laws that interfere with or overlap the Federal effort to bring about meaningful, effective, and responsible change in South Africa.

Senator ROTH and I offered an amendment which would have clearly established preemption of State and local laws on this issue. In withdrawing this amendment today, I have been advised that the passage of legislation by the Congress would automatically preempt State and local governmental activities seeking to influence the economic and political relationships between the United States and South Africa. I would like to ask the distinguished chairman of the Senate Foreign Relations Committee whether the advice I have received was correct and whether his understanding that the passage of this legislation exerts Federal authority in this field to the exclusion of State and local authorities?

Mr. LUGAR. Mr. President, the Senator from Kentucky is correct. A number of Members have enquired about the effect of this bill on State and local legislation. It is my intent, as the author of this bill and floor manager of it, to legislate U.S. national policy with respect to the Republic of South Africa. Some of the laws governing the investment of Government funds in companies doing business with South Africa or imposing other forms of sanctions on such companies necessarily interfere with the achievement of the programs mandated by this legislation. Companies which find themselves penalized by the States and localities for conducting their operations in South Africa at all will be less inclined to meet the standards mandated in the legislation. Companies may be reluctant to enter into joint ventures with black South African firms or to participate in Eximbank guaranteed loans if investment and other sanctions are imposed on them by State and local governments. This is clearly unacceptable and contrary to the intent of the legislation.

Mr. President, in my view there are sound reasons for preempting State and local laws on South Africa. This is a matter of foreign policy, and the Nation needs to speak with one voice on foreign policy. To have 50 States and hundreds of municipalities and counties each trying to conduct a different policy or to guide American businesses into different forms of activities in South Africa can only lead to chaos.

The American Law Division of the Library of Congress has prepared a legal memo on this subject. The Library has concluded that absent a legislative intent to the contrary, State and local legislation would be preempted. In replying to the Senator from Kentucky, I have relied upon this memo. I ask unanimous consent that a copy of the memo on preemption be reprinted in the RECORD at this point.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

[1] *Hines v. Davidowitz*, 312 U.S. 52 (1941).

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, July 5, 1985.

To: Senate Committee on Banking. Attention: Patrick Mulloy.
From: American Law Division.
Subject: Preemption of State and local laws by Federal legislation respecting South Africa.

This memorandum responds to your inquiry with regard to the possible preemtive effects of the enactment of legislation pending before Congress upon similar laws or ordinances enacted or which may be enacted by the States and their political subdivisions. The subject matter of both national and local legislation concerns South Africa; specifically, both sets of legislation would impose in various ways restictions upon United States individuals and companies doing business in South Africa and upon South Africa business dealings in this country, so long as the system of apartheid is maintained.

When Congress acts within the scope of its delegated powers and does not act contrary to limitations upon those powers, it may require or permit conduct that state law prohibits or prohibit conduct that state law requires or permits. Under the supremacy clause of the Constitution, "the Laws of the United States . . . shall be the Supreme Law of the Land." Article VI, cl. 2. Laws of the States must yield to the national law. *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824). See *Douglas* v. *Seacoast Products*, 431 U.S. 265 (1977) (reafirming the statutory interpretation in *Gibbons* as ratified by Congress). This issue in any preemptive case is not what Congress has the power to do but what Congress has done. Where Congress has stated in its statute that state laws on the matter are precluded, the courts experience no difficulty in pronouncing the invalidity of challenged state laws, e.g., *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528-532 (1977), athough Congress may create difficulties of interpretation with respect to the degree of preemption or the extent to which it excepts preemption of certain provisions of state and local law. For example, the Employment Retirement Income Security Act of 1974 (ERISA) broadly declares that the statute shall "supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan", but immediately states that noting in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C §§ 1144(a), 1144(b)(2)(A). Courts, must, therefore, determine when a state law "relates to" any employee benefit plan or when a state law regulates insurance, banking, or securities, within the meaning of the savings clause. E.g., *Metropolitan Life Ins. Co.* v. *Massachusetts*, 84-325 (June 3, 1985); *Shaw* v. *Massachusetts*, 84-325 (June 3, 1985); *Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1984).

Congress may provide in any legislation for the preemptive effect of its legislation, with greater or lesser specificity. It may preempt only state or local laws that conflict with the congressional enactment, or as well those state or local laws that complement the federal, or it may occupy the field so as to preclude any state or local law within the subject area, whether any particular state or local law touches upon any provision in the federal. But the question deals with the preemptive effect of federal legislation that maintains silence with regard to preemption.

"[T]he question whether a certain state action is preempted by federal law is one of congressional intent." *Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1910 (1985): "'The purpose of Congress is the ultimate touchstone.'" *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103 (1963). Since preemption cases, when the statute contain no express provision, theoretically turn on statutory construction, generalizations about them can carry us only so far. Each case must construe a different federal statute with a distinct legislative history. Even in the absence of statutory language, the legislative history may provide an answer. E.g., *Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 622-626 (1984). If it does not, the Supreme Court has developed over time general criteria which it purports to utilize in determining the preemptive effect of federal legislation.

The "clear and manifest purpose of Congress" to preempt "may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it [redacted] . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . ." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted and approved in numerous recent cases. E.g., *Pacific Gas & Electric Co.* v. *State Energy Resources Conversation & Development Comm.*, 461 U.S. 190, 203-204 (1983); *Fidelity Federal Savings & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982).

"Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it acually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)." *Pacific Gas & Electric Co.* v. *State Energy Resources Conversation & Development Comm.*, *supra*, 204; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

However, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, 522, quoting *Chicago & Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), and *Florida Line & Avocado Growers* v. *Paul*, *supra*. 142. However, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Brand*, 369 U.S. 633, 666 (1982).

Finally, when one has set out on their various forms the standards to which the Court formally adheres, one must still recognize the highly subjective nature of their application. As Professor Cramton long ago observed, "the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into questions than by metaphorical sign-language of 'occupation of the field.' And it would seem that this is largely unavoidable. The Court, in order to detrermine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor." Cramton, "*Pennsylvania* v. *Nelson*: A Case Study in Federal Preemption," 26 U. Ch. L. Rev. 85, 87-88 (1956).

Nevertheless, some tentative conclusions with respect to the application of the Court's criteria may be hazarded, especially in the context of another principle, the distinction of "interstate commerce" from "foreign commerce", to which we shall presently turn. In advance of that, it can be said that to the extent the legislation which Congress may enact speaks to matters that are the objects of state and local laws—such as, e.g., limitations upon private business having relationships with South Africa and South Africa concerns—it appears evident that federal law would displace state and local law. This result would seem to follow from the principle that the federal legislation would almost certainly conflict with the state and local law or would because of its pervasiveness "occupy" the particular field to which it applied. Difficulty attends the analysis because of the variety of state and local laws which may be "out there" and because it is not clear what may emerge from Congress. But, certainly to the extent that both sets of law coercively affect private conduct, the preeminence of federal law would appear to be assured.

The significant question would appear to be the effect of federal legislation upon the common form of state and local legislation addressed to the South African situation—the barring of investment or other use of public funds in South Africa or South African companies and the barring of public funds through investment, deposit, or otherwise in private companies conducting business in South Africa. For example, it may be that an enacted federal law would mandate that United States companies doing business in South Africa comply with the "Sullian code," with respect to fair labor practices. This mandate could be imposed through denial of some governmental benefits, such as expert aid, to companies not complying, or it could be directly coercive through the imposition of penalties. If the bill contained a coercive provision, the effect upon state or local restrictions upon investments, deposits, or other use of public funds could well be clear, inasmuch as it could be argued that the federal and local provisions were either complementary or superseded; if the bill, on the other hand, denied benefits to companies not in compliance, it could be interpreted as implying permission to the continuation of business by such companies, provided they forego governmental benefits, and a conflict could exist between the federal and the local provision.

Complications may result because of the confluence of several principles of interpretation. First, the principle is that ordinarily preemption is not favored. This principle may be strengthened when the action that one seeks to establish as having been preempted is the state of local governmental decision with respect to the disposition of its funds. Second, a related principle requires precision of congressional expression in order that certain actions of the States be preempted. Exemplifying this principle is *Parker* v. *Brown*, 317 U.S. 341 (1943), which in the absence of a strong showing of congressional intent refused to apply the Sherman Act to state-ordered anticompetitive practices. See also *Hoover* v. *Ronwin*, 104 S. Ct. 1989 (1984). (The principle does not

apply to municipal governments, unless the State has delegated the power with articulated awareness of the anticompetitive usage. *Town of Hallie v. City of Eu Claire*, 105 S. Ct. 1713 (1985)). Third, there is a principle applied by the Court in "dormant commerce clause" cases in which, when a State or a subdivision is itself participating in the marketplace in its proprietary capacity, it may impose restrictions that would be invalid under the commerce clause if it sought legislatively to impose them upon private parties. E.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983). Thus, in *White*, Boston required all construction projects funded in whole or in part by city funds to be performed by a work force at least half of which are *bona fide* residents of the city. While the city could not as a regulator have imposed this requirement on private companies, in its role as a market participant it was held by the Court to be immune to commerce clause attack.

Leaving aside the question of Congress' power to preempt expressly a state or local governmental action in its capacity as a market participant,[1] congressional silence in the light of the criteria discussed above would appear to strongly suggestive of a failure to preempt. However, there is a line of cases to which we must now turn, which may be applicable to this situation and which then would suggest strongly that preemption would occur, provided Congress may regulate a State or subdivision in this manner.

The principle to be now discussed arises from the fact that the commerce clause empowers Congress to regulate both "interstate commerce" and "foreign commerce." Although the delegation of power occurs in the same clause, the Court has treated the two powers somewhat differently, both in respect to the "positive" commerce clause—Congress may regulate commerce—and to the "negative" commerce clause—States even in the absence of congressional action may regulate interstate and foreign only to a limited extent.

With respect to preemption, the Court has frequently cited the seminal case of *Hines v. Davidowitz*, 312 U. S. 52 (1941), as standing for the proposition that "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, *supra*, 230; *Pacific Gas & Electric Co. v. State Energy Resources Conversation & Development Comm.*, *supra*, 204.[2] The case concerned the validity of a state Alien Registration Act, requiring annual registration, extensive reporting, carrying of an identification card, and other matters. The Court held that the federal registration law preempted the state statute and placed great reliance upon the supremacy of national power in the general field of foreign policy and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs. "The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, countries and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. . . . Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens . . . thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one. . . . [W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. . . . Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax." *Hines v. Davidowitz*, *supra*, 63-68. See also *Pennsylvania v. Nelson*, 350 U. S. 497 (1956).

The breadth of *Hines v. Davidowitz* is illustrated by *Zschernig v. Miller*, 389 U.S. 429 (1968), in which, in the absence of a federal law or treaty, the Court held that a state law governing the descent of real and personal property to non-resident aliens unconstitutionally invaded the exclusive foreign policy power of the national government. The state law provided for escheat of property claimed by nonresident aliens unless (1) United States citizens had a reciprocal right to take property on the same terms as the citizen of the foreign nation involved, (2) American citizens had the same right to receive payment here of funds from estates in the foreign country, and (3) foreign heirs had the right to receive the proceeds of such estates without confiscation. The Court acknowledged that state law traditionally regulates the descent and distribution of estates, and that state courts routinely construe and apply laws of foreign nations, but the state law invited and even required state courts to engage in strict scrutiny of foreign nations' practices. "[T]he probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation." *Id.*, 433-434. While recognizing the traditional role of the States in this area, the Court held that "those regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Id.*, 440.

That *Hines v. Davidowitz* and its progeny do not stand for the proposition that all state legislation affecting foreign affairs is ousted is evidenced by *De Canas v. Bica*, 424 U.S. 451 (1976), in which the Court sustained a state law prohibiting employers from knowingly employing undocumented aliens. The Court held that the mere fact that the state law reached aliens did not alone require invalidation, inasmuch as not every such regulation was precluded by Congress' exclusive control over immigration and naturalization, and the State had acted in an area of its traditional police powers. Moreover, nothing in federal laws or their legislative histories indicated a congressional desire to preclude this particular state legislation, and there was some evidence that Congress had desired to permit some state regulation of the employment of illegal aliens. *Hines* and *Nelson* were distinguished because the state laws there were in the "specific field" in which the States were attempting to regulate and because there was some affirmative evidence that Congress had sanctioned concurrent state legislation. "[T]o the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country." *Id.*, 363.

Again, we may recur to the principles developed in the "negative commerce clause" cases for light to be shed upon preemption principles. While the Court has developed elaborate standards to determine when state regulation or taxation of interstate commerce is permissible, in the absence of federal legislation, it has imposed stiffer standards in determining when state regulation or taxation of foreign commerce is concerned. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-451 (1979). "Foreign commerce is preeminently a matter of national concern. '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.'" *Id.*, 448, quoting *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933). The Court here speaks of "an area where federal uniformity is essential", of the necessity of "a uniform national rule", and of the necessity to determine whether a state regulation or tax "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line*, *supra*, 441 U.S., 448, 449, 451. See also *Bowman v. Chicago & N.R. Co.*, 125 U.S. 465, 482 (1888); *Henderson v. Mayor of City of New York*, 92 U.S. 259, 273 (1873).

Application of this principle may be seen by comparing *Colorado Anti-Discrimination Comm. v. Continental Airlines*, 372 U.S. 714 (1963), with *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948). In the former case, the Court easily sustained a state law forbidding denial of employment because of race in interstate commerce against a contention of conflict with the federal Railway Labor Act, while in the latter the Court sustained a state bar on discrimination by a carrier of passengers from Detroit to an amusement park on an island in the Province of Ontario, only after an extensive analysis to determine that the possibility of conflict with any Canadian regulation was "so remote that is was hardly more than

[1] See *Gould, Inc. v. Wisconsin Dept of Industry, Labor and Human Relations*, 750 F.2d 608 (C.A. 7, 1984) (holding preempted by federal law a state statute that blacklisted recidivist violators of labor laws from doing business with the State; market participant cases relevant only to dormant commerce clause issues and not to preemption), *prob. juris. noted* 53 U.S.L.W. 3824 (1985).

[2] As will be noted from the statement of facts, *Hines* was a preemption case under Article I, § 8, cl. 4., the naturalization clause, rather than clause 3, the commerce clause, but the Court has always cited the principle as applicable generally. The same preemption standards apply with respect to all of Congress' powers, although the predominant number of cases arise under the commerce clause.

conceivable." See *Japan Line, supra*, 441 U.S., 456 n. 20.

In light of this principle common to the two lines of cases, it appears probable that, in the absence of any statutory instruction by Congress and in the absence of anything definitive in the legislative history, the courts, ultimately the Supreme Court, would find state and local enactments preempted by a federal law, even though the federal law might not deal with or touch on some or even most of the same matters dealt with by state or local news.[8] The state or local laws concerned are even more than the law at issue in *Hines* v. *Davidowitz* and just like the law at issue in *Zschernig* v. *Miller* in an area directly affecting the conduct of the Nation's foreign policy. They are designed to and intended to work an effect upon the conduct by a foreign nation of its internal affairs. The teaching of *Hines* and of *Zschernig* is that with legislation and action affecting "international relations", federal legislative authority is at its broadest and "any concurrent state power that may exist is restricted to the narrowest of limits." *Hines* v. *Davidowitz, supra*, 68.

The conclusion would seem to follow with respect to any state or local legislation that coercively reaches private individuals and companies through regulation. Federal provisions that conflict with such local provisions would supersede them and it is unlikely that complementary local provisions would be allowed to stand. With respect to local provisions that had no parallel in federal law, it is likely that the Court would follow the principle that Congress had "occupied the field", had, in other words, intended to reach certain practices and had intended to leave other practices unregulated. The Court has on several occasions held preempted state laws on the basis that Congress even while not providing a rule for the conduct reached had thereby manifested an intention that parties should be free to do as they will, unconstrained by either federal or state law. See, e.g., *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976); *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U.S. 519 (1979).

The critical question would again to appear to be the validity under this analysis of state and local laws that forbid the investment or deposit of state or local public funds in either South African concerns or in firms that do business in South Africa. As noted earlier, these provisions could be held to conflict directly with respect to federal rules penalizing United States firms doing business in South Africa that do not comply with the "Sullivan code." But, again as we have noted above, there is line of cases exempting from "negative commerce clause" analysis the actions of States as market participants with respect to interstate commerce. Does the same rule apply with respect to foreign commerce? The same question occurs, for example, when there is considered the validity of state "buy American" laws applied to state purchasing and contracting. Compare *Bethlehem Steel Corp.* v. *Board of Comrs.*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969) (invalid), with *K.S.B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm.*, 75 N.J. 272, 381 A.2d 774 (1977) (valid). The Court has noticed the controversy but has declined yet to venture an opinion, while noting the more rigorous scrutiny required of regulation of foreign commerce. *Reeves, Inc.* v. *Stake, supra*, 437–438 n. 9.

Whatever may be the answer with respect to the application of the "negative commerce clause" to a State as market participant, the authorities discussed above with respect to the scope of the national power over foreign commerce leave little doubt that Congress could supersede the policies of a State as a market participant. "In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could be so limited." *Japan Line, Ltd.* v. *County of Los Angeles, supra*, 448–449 n. 13.[9]

The canons of interpretation when Congress has not made express its intentions, however, create uncertainty about how the Court might proceed in considering whether congressional legislation, where there is no direct conflict, has preempted action of a State as a market participant. On the one hand, the plenary power of Congress in foreign relations and the difficulties that could be raised by a myriad of state and local regulations with an impact on foreign affairs suggest a rule of inference of preemption. On the other hand, the rule that preemption is not preferred, the principle of clear statement when state action is to be overridden, and the role of the State as market participant suggest a contrary approach. The case does on balance suggest that the Court would lean toward preemption, but the variety of considerations that now cannot be factored in favor caution.

Insofar as the analysis to this point has been largely directed to state action, it bears noting that the actions of political subdivisions have not been held entitled to the same deference as are the States. The canons of construction are the same, but the deference is less. For example, one need only consider the different rules with respect to the application of the antitrust laws to anticompetitive actions of the States versus those of political subdivisions. Contrast, however, the fact that the market participant exception in "negative commerce clause" cases applies equally to municipalities. *White* v. *Massachusetts Council of Constr. Employers, supra*. It seems much more likely that local ordinances would be held preempted.

In conclusion, it must be cautioned that much may depend upon the scope and text of any federal legislation in combination with its legislative history. There could well be enough indication of congressional intent revealed therein to obviate the necessity for much of the analysis undertaken here. But if such intent cannot be divined, the rules of construction which we have set out, particularly with respect to state and local legislation with an impact on foreign affairs, suggests, strongly suggests actually, that such state and local legislation would be held preempted.

JOHNNY M. KILLIAN.

[8] A separate issue, of course, is whether under the "negative commerce clause" state or local laws dealing with South Africa are permissible even in the absence of any federal legislation. The issue is a substantial one, but it is beyond the scope of the question presented. The fact that it may be raised, however, may encourage additionally a finding of preempting should Congress act, because of the Court's canon of construction favoring avoidance of constitutional construction through statutory construction.

[9] The overruling of *League of Cities* by *Garcia* v. *San Antonio Metropolitan Trans. Auth.*, 105 S. Ct. 1005 (1985), strengthens this point. A 5-to-4 majority held that save in exceptional circumstances the Court would not adjudicate federalism challenges to congressional actions, remitting the States and their partisans to the political process. Congress may not simply rely on the likelihood that congressional exercises of power would not be subject to judicial review as dispositive of questions of authority, inasmuch as Members of Congress must independently judge whether the exercise is within Congress' power. Article VI, cl. 3.

WHERE HAVE ALL THE WARRIORS GONE?

Mr. GOLDWATER. Mr. President, retired Gen. A.G.B. Metcalf has once again written a very thought-provoking editorial that I think is most appropos for all Members of Congress to read. It grows out of a concern I share with him; namely that the company grade and even some of the field grade officers are beginning to wonder about the services. As he points out in his editorial, a questionnaire, sent to 23,000 randomly selected officers out of the 92,000 in all grades, found half of the 14,000 who answered to be in agreement that "the bold, original, creative officer cannot survive in today's Army."

This, in addition to all the other problems we are discovering in the total organization of the military, the need for drastic changes, only points up the importance of the conference now being held between the House and Senate. This subject is certainly an important one and will come up.

I ask unanimous consent that this editorial be printed in the RECORD at this point in my remarks.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

WHERE HAVE ALL THE WARRIORS GONE?

There is a growing feeling in and out of the military establishment that senior officers have taken on the mentality of business managers rather than being centrally concerned with the nasty business of sending the enemy to his ancestors.

This should surprise no one. After all, not overlooking those no-win conflicts in which our military forces have been obliged to engage, the military leadership has been primarily occupied with running the largest business in the world—the Department of Defense. This appears to have led to a mindset which imagines that the end result sought, namely war deterrence, can somehow be thought of as a mission of the military, when their sole mission must be warwaging or the credible threat to do so: a reality which must undergird all effective diplomacy and foreign policy.

For the military to proclaim that their missions is "deterrence" (almost as bad as "Peace is our profession"), when warfighting is their role, is dangerous talk. Deterrence may well be the objective of diplomacy or the purpose of some other governmental agency, but it is not the mission of the armed forces. It is easy to understand why the public takes to the idea of war avoidance as contrasted with warfighting, but for the armed forces to be permitted to develop that mind-set is to introduce an unnecessary confusion in what is the proper focus for their commitment. The only thing which will deter war is what it takes to prevail in war. The role of the military is too important to be treated as a fuzzy intellectual construct vaguely defined as deterrence as apart from a clear-cut responsibility for the readiness to conduct war.

The military have been co-opted, as well, into giving lip service to arms control. Instead, they should be the first to point out

rectly) more than 50 percent of the outstanding voting securities of the business enterprise;

(B) the United States person beneficially owns or controls (whether directly or indirectly) 25 percent or more of the voting securities of the business enterprise, if no other person owns or controls (whether directly or indirectly) an equal or larger percentage;

(C) the business enterprise is operated by the United States person pursuant to the provisions of an exclusive management contract;

(D) a majority of the members of the board of directors of the business enterprise are also members of the comparable governing body of the United States person;

(E) the United States person has authority to appoint a majority of the members of the board of directors of the business enterprise; or

(F) the United States person has authority to appoint the chief operating officer of the business enterprise.

(6) LOAN.—The term "loan" includes an extension of credit as defined in section 201(h) of the Credit Control Act (12 U.S.C. 1901(h)).

(7) BANK.—The term "bank" means—

(A) any depository institution as defined in section 19(b)(1)(A) of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)),

(B) any corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611 et seq.),

(C) any corporation having an agreement or undertaking with the Federal Reserve Board under section 25 of the Federal Reserve Act (12 U.S.C. 601 et seq.), and

(D) any bank holding company as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(a)).

(8) BUSINESS ENTERPRISE.—The term "business enterprise" means any organization, association, branch, or venture which exists for profitmaking purposes or to otherwise secure economic advantage.

(9) BRANCH.—The term "branch" means the operations or activities conducted by a person in a different location in its own name rather than through a separate incorporated entity.

(10) POLITICAL PRISONER.—The term "political prisoner" means any person in South Africa who is incarcerated or persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion, but the term "political prisoner" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

SEC. 15. APPLICABILITY TO EVASIONS OF ACT.

This Act and the regulations issued to carry out this Act shall apply to any person who undertakes or causes to be undertaken any transaction or activity with the intent to evade this Act or such regulations.

SEC. 16. CONSTRUCTION OF ACT.

Nothing in this Act shall be construed as constituting any recognition by the United States of the homelands referred to in section 14(3)(C) of this Act.

Mr. WALLOP. Mr. President, on behalf of Senator HELMS and myself, I send this amendment to the desk and would state to the Senate that it is the House-passed bill, on which I think the Senate ought to have an opportunity to express itself. It is different, as everyone knows, from the version which the Senate has been working on.

Mr. President, I move to table the amendment which I just offered.

Mr. HELMS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Wyoming. The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Colorado [Mr. ARMSTRONG], the Senator from Arizona [Mr. GOLDWATER], the Senator from Texas [Mr. GRAMM], the Senator from Florida [Mrs. HAWKINS], and the Senator from Alaska [Mr. MURKOWSKI] are necessarily absent.

Mr. CRANSTON. I announce that the Senator from Ohio [Mr. GLENN], the Senator from Illinois [Mr. SIMON], and the Senator from Mississippi [Mr. STENNIS] are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 90, nays 2, as follows:

[Rollcall Vote No. 148 Leg.]

YEAS—90

Abdnor	Ford	McClure
Andrews	Garn	McConnell
Baucus	Gore	Melcher
Bentsen	Gorton	Mitchell
Biden	Grassley	Moynihan
Bingaman	Harkin	Nickles
Boren	Hart	Nunn
Boschwitz	Hatch	Packwood
Bradley	Hatfield	Pell
Bumpers	Hecht	Pressler
Burdick	Heflin	Proxmire
Byrd	Heinz	Pryor
Chafee	Helms	Quayle
Chiles	Hollings	Rockefeller
Cochran	Humphrey	Roth
Cohen	Inouye	Rudman
Cranston	Johnston	Sarbanes
D'Amato	Kassebaum	Sasser
Danforth	Kasten	Simpson
DeConcini	Kennedy	Specter
Denton	Kerry	Stafford
Dixon	Lautenberg	Stevens
Dodd	Laxalt	Symms
Dole	Leahy	Thurmond
Domenici	Levin	Tribble
Durenberger	Long	Wallop
Eagleton	Lugar	Warner
East	Mathias	Weicker
Evans	Matsunaga	Wilson
Exon	Mattingly	Zorinsky

NAYS—2

Metzenbaum	Riegle

NOT VOTING—8

Armstrong	Gramm	Simon
Glenn	Hawkins	Stennis
Goldwater	Murkowski	

So the motion to lay on the table amendment No. 522 was agreed to.

Mr. LUGAR. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

● Mr. PROXMIRE. I have a question for Senator CRANSTON as the floor manager of S. 995.

In recent years opponents of apartheid in this country have sought to compel American firms from doing business with or in South Africa. The movement has taken a variety of forms, including shareholder corporate governance resolutions, consumer boycotts of South African products, and most prominently threats by governments, labor unions, and other prominent institutions to withdraw funds invested in firms or banks doing business in South Africa. The divestiture movement is an important means by which Americans show their opposition to apartheid because American businesses play an important role in South Africa's economy, and those businesses depend upon investments from public and private pension funds.

Divestment from companies doing business in South Africa has been adopted by private organizations as diverse as Yale University, the National Council of Churches, and trade union pension funds. These private actions do not raise the preemption legal issue.

It is divestiture by State and local governments of funds invested in firms doing business in South Africa that has been criticized as unconstitutional by the opponents of such actions. State divestment and in particular State divestiture legislation, critics contend, both violates the foreign commerce clause of article I of the Constitution, and intrudes upon the impliedly exclusive authority of the Federal Government to conduct foreign relations. No suits, however, have been filed to challenge the actions of the several States which have divested in some fashion. These include Connecticut, Iowa, Maryland, Massachusetts, Michigan, Nebraska, and Rhode Island. The Maryland attorney general's office in May 1984, concluded that its State law would survive a constitutional or other legal challenge. The law firm of Caplin & Drysdale also concluded in an April 1985 legal memo that State divestment laws could survive a legal challenge. I would like to insert those opinions in the RECORD. My concern is that some court might find that the legal situation is changed by the passage of S. 995.

The Federal Government has the power to preempt State and local laws under article IV, section 2 of the Constitution which is known as the supremacy clause. This clause provides that the Constitution and laws made pursuant thereto shall be the supreme law of the land—and contrary State laws are invalidated. The issue in any preemptive case is not what the Congress has the power to do, but what Congress has done. Where Congress has stated in its statute that State laws on the matter are precluded, the courts experience no difficulty in pronouncing the invalidity of the challenged State laws.

Although we have no intention of preempting State divestment laws I

am concerned, as noted above, that some court might conclude we meant to do so by passing this bill. Do you know of any intention to preempt State divestment laws?

Mr. CRANSTON. Let me assure the Senator, we have no such intention in this bill otherwise the Senate would have put a preemption provision in the bill.

We have no intention of compelling sovereign States to keep their investment funds in companies that the States acting pursuant to their own constitutional procedures, have decided they do not wish to invest in. Otherwise the Congress is requiring a State, against its will, to be a party to the perpetuation of a government in South Africa that by law mandates the majority of its citizens to be deprived of basic political, social and human rights solely on the basis of race.

Our sovereign States have a right to manage their own finances, and to determine what activities they will subsidize, and choose with whom they wish to deal in the marketplace.

The courts in considering preemption cases have always recognized the distinction between the State as a market participant and the State as a market regulator. While the State should not be permitted to compel companies to get out of South Africa, it should not be prohibited from taking its own investments out of companies doing business there. The State in deciding where to deposit its own funds should be treated as a market participant. It is in the interest of the State as a financier to insure that its investments are conducted in a socially responsible manner. An investor is normally responsible for the use to which his funds are put and the Congress should not prevent the States from acting like other investors in that regard.

Divestiture is purely a proprietary action and involves neither regulation nor any other intrusion by the States into private affairs—and the Federal Government should not interfere with it.

Divestiture is not a matter of the Nation speaking with one voice on foreign policy—but rather with the right of the State, acting as a market participant, to decide where it wants its pension funds invested.

So let me assure my esteemed colleague, the senior Senator from Wisconsin, that the Senate has no intention of preempting such action by State and local governments.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Hon. HARRY HUGHES,
Governor of Maryland,
State House, Annapolis, MD.

DEAR GOVERNOR HUGHES: We have received and hereby approve for constitutionality and legal sufficiency House Bill 1267. That bill prohibits the State Treasurer from depositing State funds in any financial institution unless the financial institution certifies in writing that it does not have any direct loans, or "foreknowledge" of any indirect loans, outstanding to the government of the Republic of South Africa or to any national corporation of the Republic of South Africa.[1] The bill makes an exception for loans made by foreign or out-of-state financial institutions without the participation of the subsidiary or affiliated corporation with which the funds are to be deposited. The bill further provides that it does not apply to loans made prior to the effective date of the Act, which has been delayed until January 1, 1985.

The constitutional issues presented by House Bill 1267 are essentially threefold:

(1) Does the statute conflict with the Commerce Clause, U.S. Constitution, Art. I, § 8?

(2) Does the statute contravene federal law, in violation of the Supremacy Clause, Art. VI, Cl. 2?

(3) Does the statute infringe on the federal foreign affairs powers?

I. THE COMMERCE CLAUSE

While the United States Constitution, Art. I, Sec. 8 empowers Congress to regulate commerce with foreign nations, and among the several states, it is well settled that the states may also regulate commerce except in areas preempted by Congress. In so doing, the State must balance the local interest with the burden on commerce; as well as consider less burdensome alternatives. *Pike v. Bruce Church, Inc.*, 424 U.S. 366 (1976). Furthermore, where the State enters the market place as a participant, it is not subject to the usual Commerce Clause restrictions. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Later cases have confirmed the holding of *Alexandria Scrap*. In *Reeves, Inc. v. State*, 447 U.S. 429 (1980), the court described the distinction between the State as market participant and the State as market regulator was

". . . counseled by considerations of State sovereignty, the role of each state as guardian and trustee for its people, and the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 438–439.

The most recent case in this area is *White v. Massachusetts Council of Const. Employers*, 103 S.Ct. 1042 (1983). In that case the court upheld an executive order of the mayor of Boston that required that work crews on construction projects funded by the city consist of at least half Boston residents. The court found that the city was acting as a market participant, and in light of that finding, declined to consider the impact of the executive order on interstate commerce. This characterization was made despite the fact that the city, in choosing the parties with whom it would deal, had imposed hiring limitations on private firms as a condition of obtaining public construction contracts. *White, supra,* at 1049 (J. Blackmun dissent).

While House Bill 1267 does affect foreign commerce it is clear, under these decisions, that the State, in deciding where to deposit its own funds, should be treated as a market participant and therefore is not subject to commerce clause restrictions. This is true even though the statute results in a limitation being placed on private financial institutions as a condition of acting as a depository for State funds.

II. FEDERAL PREEMPTION

Under the Supremacy Clause, State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. *United States v. Pink*, 315 U.S. 203 (1942). We have examined treaties in force with the Republic of South Africa and find no conflict with House Bill 1267.

We have also considered whether House Bill 1267 would conflict with the Export Administration Act, 50 U.S.C. § 2401 *et seq.* or in particular the provisions of § 2407(c) which preempt certain state laws pertaining to "participation in compliance with, implementation of or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries." Because state investments would not appear to be exports under the Exports Administration Act, we do not believe that Bill 1267 offends the statute. Nor do we believe the state is subject to the foreign boycott prohibitions of § 2407(a) or that this particular legislation was strictly intended to implement or participate in a boycott "fostered or imposed by foreign countries against other countries." This position is supported by Howard Fenton, of the Anti-boycott Division of the Commerce Department, who informs us that the office has reviewed the Connecticut and District of Columbia statutes, and has made an informal determination that such statutes have not been passed in conjunction with boycotts by foreign countries and therefore are not subject to the anti-boycott provisions of the Export Administration Act.

III. THE FOREIGN AFFAIRS POWER

While the Constitution contains no specific grant of power to regulate foreign affairs, it has been recognized that such power, stemming from national sovereignty, rests in the President and the Congress. *Perez v. Brownell*, 356 U.S. 44 (1958). Thus, even though not every state law which has some effect in foreign countries is forbidden, such legislation still may not represent an impermissible intrusion into foreign affairs. *Clark v. Allen*, 331 U.S. 503 (1947); *KSB Technical Sales Corp. v. North Jersey District Water Supply Com'n*, 381 A.2d 884, 898 (N.J. 1977), *appeal dismissed because of settlement*, 435 U.S. 982 (1978) (upholding constitutionality of New Jersey "Buy American" statute, noting that the federal constitution permits certain regulation which does not "demonstrably" result in a direct impact on foreign affairs). And state statutes have been struck down as conflicting with the foreign affairs power. In *Zschernig v. Miller*, 389 U.S. 429, *reh. den.* 390 U.S. 974 (1968) the court invalidated an Oregon probate law conditioning a nonresident alien's right to inherit from Oregon residents on the alien's ability to show that his country would reciprocate as to United States citizens.

In invalidating the law in *Zschernig*, the court voiced two separate concerns. One concern was that application of the statute, and others like it, had involved judicial scrutiny "concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied the right to receive' ". The other was that

[1] Similar legislation has been passed in other jurisdictions, among them Connecticut (Conn. Gen. St. § 3-13f); Massachusetts (Mass. Gen. Laws Ann. Ch. 32 § 23(1)(d)(vi); Michigan (Mich. Res. 462, 2/6/78); Nebraska (Neb. Legis. Res. 42, 86th Legis., 2d Sess. (1980); and the District of Columbia (Prohibition of Investments of Public Funds in Financial Institutions and Companies making loans to or doing business in the Republic of South Africa or Namibia Act of 1983. D.C. Law 5-80 Eff. 3/8/84. Amending D.C. Code Ann. § 47-342). To the best of our knowledge, none of these provisions have been challenged.

the statute as applied had a direct and significant effect on foreign countries, and could lead to repercussion for the entire United States, thus affecting foreign relations.

While House Bill 1267 does, to some extent, represent a determination by the General Assembly with respect to the practices of the government of South Africa, it does not call for the level of State intrusion found repugnant in *Zschernig*. The impact of House Bill 1267 is cushioned to some extent by its prospective effect and by the fact that only certain financial institutions are affected. And, while such legislation, if duplicated in other states, does raise some possibility of retaliatory action which would affect the entire country, that possibility seems no greater than that presented by the "Buy American" law which was upheld in *KSB*. One basis for differentiating *Zschernig* can be found in the differing nature of federal power with regard to the acts involved. While the federal government has traditionally left matters of descent and distribution to the States, it could clearly set standards for inheritance by nonresident aliens. It is more questionable whether the federal government could bar the State from considering given factors when investing its own funds. *Cf. South Carolina v. Regan*, 104 S.Ct. 1107 (1984).

Finally, it is important to note that this bill can be seen as an economic measure, and the State's control over economic matters may justify regulations which, on their face, relate to areas reserved to the federal government. See *Pac. Gas & Elec. v. St. Energy Resources Conserv.*, 103 S.Ct. 1713 (1983).

In our view, these considerations provide support for the constitutionality of this legislation.

Very truly yours,

STEPHEN H. SACHS,
Attorney General.

A REPORT TO THE NEW WORLD FOUNDATION

(By Thomas A. Troyer, Robert A. Boisture, Caplin & Drysdale, Chartered)

C. STATE LEGISLATION

Reacting to the restrictions of traditional trust law, a number of states and cities have enacted legislation barring investment of state funds in South Africa.[1] The forms of legislative action vary widely from the Connecticut adoption of the Sullivan Principles as one of the statutory criteria for investment selection, to the broad exclusion resolution passed by the District of Columbia Council.

State legislation requiring divestment of public pension funds is, if constitutionally valid, a complete defense for the fund managers subject to it. However, claims have been advanced that such legislation is unconstitutional under the state [2] or the federal Constitution.[3] The constitutional arguments against state divestment legislation rely primarily on the federal power in the areas of commerce and foreign affairs.[4] The Commerce Clause[5] limits a state's power to regulate commerce even where Congress has not itself spoken on the issues involved, as is the case with state fund divestment.[6] However, where the state is a participant in the market rather than a regulator, the commerce clause restriction applies, if at all, in a far less restrictive way.[7] The state takes on the status of a private dealer free "to exercise his own independent discretion as to parties with whom he will deal."[8] Since the law on this question appears firmly established, a challenge to state public pension fund divestment legislation on commerce clause grounds seems unlikely to succeed.[9]

Other constitutional challenges purport to rely on the exclusive power of the federal government over foreign policy. State legislation requiring divestment of public pension funds is not claimed to impair any specific United States treaty or agreement involving South Africa, so there is no question of violating the supremacy clause.[10]

Nor is there serious question that such a statute would be invalid on more general grounds as an intrusion into an area of foreign policy reserved conclusively to the federal government.[11] As with the commerce clause, state scope to take action that has some impact on international affairs is greater when the issues concern their own instrumentalities' economic activity than when they purport to act for all their citizens.[12]

To be sure, the Supreme Court has held that, even in traditional areas of state power,[13] state laws may be invalid if they involve detailed state scrutiny of foreign nation's practices and have a direct effect on foreign relations.[14] However, a state does have some power to act on the basis of judgment about a foreign country.[15] Where a state statute has only "some indirect or incidental effect in foreign countries" it will be upheld.[16] On balance, the combination of the limited impact of public employee pension plan divestment on foreign affairs and the fact that it would affect only funds of public origin[17] supports the view that the constitutional arguments against divestment legislation are unlikely to render such legislation invalid.

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[1] Among them, Connecticut: Conn. Gen. Stat. Ann. § 3-13(f) (West. Supp. 1981); Massachusetts: Mass. Gen. Laws Ann. ch. 32 § 23(1)(d)(vi); Michigan: Mich. Comp. Laws §§ 25.145(5); 37. 2402(1)(B); Nebraska: Neb. Legis. Res. 43, 86th Legis. 2d Sess. (Mar. 31, 1980). Cities which have divested include the District of Columbia: Prohibition of Investments of Public Funds in Financial Institutions and Companies Making Loans to or Doing Business in the Republic of South Africa or Namibia Act of 1983, D.C. Law 5-50, eff. 3/8/84, amending D.C. Code Ann. § 47-342; Philadelphia; San Francisco; and Wilmington, Del.

[2] *Scaglione v. Levitt*, 37 N.Y.2d 510, 375 N.Y.S.2d 79 (1975), involved a challenge under the non-impairment clause of the New York Constitution to a state law mandating the trustee of several state employee retirement systems to buy municipal bonds. The court dismissed the claim on the ground that the legislature could "restrict the classes of investments" a trustee could make, a holding that supports state "legal lists" and should support divestment legislation; 375 N.Y.2d at 84.

[3] McCarrol, *supra* p.41 n.1 at 425.

[4] Larry Eig (Legislative Attorney, American Law Div., Congressional Research Service), *Analysis of Whether the District of Columbia South Africa Investment Act (D.C. Act 5-6) Violates the Commerce Clause of the Constitution and the Exclusive Federal Power to Conduct Foreign Relations* (Jan. 31, 1984), hereafter "CRS Memorandum." However, in *Withers*, the Circuit Court dismissed constitutional challenges to the New York legislation authorizing the fund's purchase of the city bonds, under the Equal Protection Clause, the Contract Clause, and the Due Process Clause 447 F. Supp. at 1261.

[5] U.S. Const. art. I, §8, cl. 3. The Constitution empowers Congress "to regulate Commerce with foreign nations, and among the several states. . . ."

[6] State legislation affecting interstate commerce may only serve a "legitimate local purpose" that outweighs the burden it imposes. *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). Clearly, the purpose of divestment is not primarily local, although arguably, state divestment laws do serve the state's interest in the "moral" investment of its funds; Lawyers Committee for Civil Rights Under Law, *The Constitutionality of State and Local Divestiture Legislation*, memorandum, August 1984.

[7] *White v. Massachusetts Council of Construction Employers*, 103 S. Ct. 1042, 752 L.Ed.2d 1 (1983) (involving a Boston city ordinance requiring that city funded construction projects employ at least half Boston residents; the court found that the city had a "proprietary" role in the case, and declined to apply the Commerce Clause); *Reeves Inc. v. Stake*, 447 U.S. 429 (1980); *KSB Technical Sales Corp. v. North Jersey Dist. Water Supply Co.*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (9178) (applying state "proprietary" rule to foreign commerce).

[8] *Reeves Inc. v. Stake*, 447 U.S. 429, 430-39 (1980), quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

[9] *See* for the same argument refuting a commerce clause challenge, Maryland Atty. Gen. Opin. Letter (1984), re *House Bill 1267*.

[10] U.S. Const. art. VI.; Law Comm. Mem., *supra* p. 51 n.4, at 21.

[11] *Zschernig v. Miller*, 389 U.S. 429, *reh. denied* 390 U.S. 974 (1968).

[12] *KSB Technical Sales Corp. v. North Jersey Dist. Water Supply Comm.*, 75 N.J. 272, 381 A.2d 774 (1977). *Reeves v. State*, 447 U.S. at 438-339.

[13] *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (U.S., Feb. 19, 1985).

[14] *Zschernig v. Miller*, 389 U.S. 429 (1968).

[15] *E.g.*, a state court can examine the fairness of the legal process of a foreign country in deciding whether to enforce a judgment rendered in that country. *J. Zeevi & Sons Ltd. v. Grindlay's Bank Ltd.*, 37 N.Y. 2d 220; 371 N.Y. 2d 892, 333 N.E. 2d 168, *cert. denied*, 423 U.S. 866 (1975); Lawyers Comm. Memo, *supra* p. 50, n.4, at 22.

[16] *Clark v. Allen*, 331 U.S. 503 (1947).

[17] *See also Pac. Gas & Elec. v. St. Energy Resources Conserv.*, 103 S. Ct. 1713, 1727-1728 (1983). Unlike the "confiscatory" Oregon statute at issue in *Zschernig v. Miller*, divestment legislation does not intrude on the private property rights of foreign nationals since it concerns only a state's investment of its own funds. Law. Comm. Memo. *supra* p. 50 n.4 at 27.

THE NEED TO RECOGNIZE RELIGIOUS DISCRIMINATION IN NORTHERN IRELAND

Mr. DECONCINI. Mr. President, I congratulate my colleagues who have put so much effort into the consideration of policies and action designed to express the opposition of the United States to the apartheid policies of the Government of South Africa and to encourage South Africa to abandon those policies. I firmly believe that the administration's policy of constructive engagement has not worked. We must try a new and stronger approach, for if South Africa continues to ignore the pleas from the nations of the world to rid itself of apartheid, it will doom itself to chaos and ultimate destruction.

However, Mr. President, I believe that it is also extremely important that our nation face certain other problems of discrimination that are as ingrained in the societies of other nations of the world as they are in South Africa. I speak here today of the nation of Northern Ireland and the religious discrimination that has not only caused Catholics and Protestants to commit violence against one another but which has caused economic hardship for the Catholic minority in all walks of life.

Now, there is no doubt that Northern Ireland does not have the strategic importance to the United States that South Africa does. Northern Ireland is not a pivotal nation in a volatile continent. However, I would like to think that our action here today in support of antiapartheid action is motivated not because of strategic reasons but because of moral principles that our Nation has attempted to follow since its creation. Therefore, just as we are

volves this Government in the internal affairs of another nation—one that is strategically important to the United States because of its global location and vast mineral resources. It is a government friendly to the United States in a troubled and increasingly important area of the world, and this country should take care to ensure that it does nothing that would jeopardize its own security interest in that region.

More important, this measure directly involves the Congress in the formulation and implementation of American foreign policy—a responsibility clearly reserved to the President under our system of Government.

President Reagan, who has also publicly repudiated the policies of apartheid, is working through diplomatic channels in a quiet, but effective, way to bring an end to these injustices. Some progress has been made in reforming South Africa's system of racial separatism, but all of us acknowledge that more must be done to bring an end to this intolerable abridgement of human rights.

Certainly the events of the last several months in that country, where violence has claimed the lives of many persons opposed to apartheid, should be condemned in the strongest possible terms. These events also underscore the need to end apartheid as soon as possible. However, it is not the responsibility of the Congress to dictate American foreign policy—especially one which threatens the economic and political stability of a nation which is so important to the security of the United States.

While we can argue over whether the sanctions included in this bill amount to U.S. disinvestment in South Africa, all of us should realize that a ban on bank loans and a variety of trade embargos can potentially threaten the economy of South Africa and economic opportunities of its citizens—both black and white.

Furthermore, this measure advocates still more retaliatory action in 18 months if significant progress has not been made in ending apartheid.

Mr. President, our own historical experience shows that social change of this magnitude does not occur quickly or with predictable regularity. It also demonstrates that the establishment of economic sanctions, timetables, and political pressure by outside sources is more often than not counterproductive.

I believe that this bill is such an approach, but more importantly, I believe that it is the responsibility and duty of the President, not the Congress, to administer such action if it is warranted.

In this case, it is the judgment of the President, the State Department, and many other respected foreign policy experts that this measure can accomplish little more than destabilizing a Nation of extreme importance to our government, and compounding the wrath of radical elements in South Africa who are bent on the preservation of this brutal system.

Finally, Mr. President, I am concerned about the selective morality of attempting to invoke sanctions against only some governments which abridge fundamental human rights, while we remain silent about wholesale murder and brutality conducted by other regimes which are openly hostile to the United States.

While I do not advocate that the Congress become a foreign policy executor, I believe that we should be consistent in our expressions of moral outrage. Abridgement of human rights is wrong wherever it occurs, and if we are prepared to act against South Africa, then I would hope that we would remember that violence and oppression are routine and well-established practices in the Soviet Union, its Eastern bloc allies, and in other corners of our world.

For these reasons, I urge my colleagues to reject this measure and rally behind a more productive course of action, like that advocated by President Reagan, that will bring an end to apartheid without jeopardizing the security of South Africa or the United States.

Mr. KENNEDY. Mr. President, earlier this week, we learned that efforts would be made to use this legislation as a vehicle to preempt State and local actions against apartheid.

Senators ROTH and MCCONNELL introduced two amendments—No. 433 and 435—which, if enacted, would have set forth the intention of the Senate that this legislation would preempt any law, ordinance, rule or regulation which in any way related to South Africa or to apartheid.

Presumably these amendments were introduced because the sponsors believed that, without them, there would be no preemption.

Those Senators were correct in their assessment that without a specific statement by Congress of an intent to preempt such local legislation, the courts would not infer such an intent, and state statutes would be accorded a presumption of legitimacy.

During the delfberations on this legislation, a series of noncontroversial amendments were accepted by the floor managers on both sides of the aisle. But the Roth-McConnell amendments on preemption were clearly controversial in nature. They would not have been accepted, they were not offered, and they are not in this legislation.

And so, S. 995 will pass the Senate without any statement by the Senate that this law is intended to preempt State and local laws relating to apartheid.

In the absence of any such statement of intent to preempt by Congress, the law is clear that this legislation will not preempt the kind of State and local action against apartheid that has occurred throughout this country over the past 8 months. Certainly that is not the intention of this Senator in voting for this bill.

The legal issue that would be raised by the critics of these local efforts would be whether a state statute dealing with apartheid would in fact be preempted by this Federal statute on the grounds that such a local statute would be an intrusion into an area of foreign policy reserved exclusively to the Federal Government.

It is clear—based on the Supreme Court's decisions in KSB Technical Sales Corp. versus North Jersey District Water Supply Commission, handed down in 1977, and in Reeves Inc. versus State, handed down in 1980, that the freedom of States to take action that has some impact on international affairs is much greater when, as with investment of State moneys or pension funds, the issues concern the States own instrumentalities' economic activity than when the States purport to act for all their citizens.

It is also clear—based on the Supreme Court decision in Clark versus Allen—handed down in 1947—that, where a State statute has only some indirect or incidental effect in foreign countries, that statute will be upheld. on balance, the combination of the limited impact of public employee pension plan divestment on foreign affairs and the fact that such divestment would, affect only funds of public origin supports the conclusion that such plans and statutes would not be preempted by this legislation.

Proponents of preemption claim that the decision of Zschernig versus Miller holds otherwise. But unlike the "confiscatory" Oregon statute that was at issue in that case, divestment legislation does not intrude on the private property rights of foreign nationals since it concerns only a states investment of its own funds.

This judgment is confirmed by a series of legal experts who have looked into this question. Thomas Troyer, a partner in the distinguished Washington, DC, tax firm on Caplin and Drysdale, has written a report which confirms this judgment. The attorney general of the State of Maryland, in response to a request from Governor Hughes, issued an opinion letter that also reaches that conclusion.

Certainly there is no intention by this Senator and I know of many others—that this legislation should preempt or ordinances or regulations that local, municipal and State governments may enact on the issue of apartheid.

Mr. LEVIN. Mr. President, earlier this afternoon I very reluctantly voted to table the Humphrey amendment and against the Wallop amendment. I support their basic thrust and will indeed cosponsor them if they are introduced separately. As a matter of principle and as a matter of record, I have supported sanctions against countries other than South Africa

which violate human rights and deny their citizens full political participation.

However, what we are faced with today in the Senate is the fact that the adoption of these amendments would jeopardize the expeditious passage of a strong underlying bill, which represents the Senate's most definitive effort to date to express disapproval of the heinous policy of apartheid in South Africa. Passage of these amendments today on this bill would run the risk of having this legislation bog down with the effect that it will help no one—not in South Africa or the Soviet Union or anywhere else.

In addition, there has been an agreement reached early today among this bill's supporters to refrain from offering amendments. As I indicated earlier, I respected that agreement by deciding not to offer an amendment of my own which would have provided that the President urge the Government of South Africa to abide by the principle of one person, one vote. In voting as I did on Humphrey and Wallop, I am continuing to respect this agreement, even though in these instances it results in my voting against amendments with which I am in basic agreement and which I can support in separate legislation.

The reason I voted to table the Symms amendment was altogether different. I voted to table that amendment because I share the sentiments expressed by the late Steve Biko who gave his life in the cause and struggle of freedom in South Africa. He said:

> The argument is often made that the loss of foreign investment would hurt blacks the most. But it should be understood in Europe and North America that foreign investment supports the present economic system of political injustice. . . . If Washington is really interested in contributing to the development of a just society in South Africa, it would discourage investment in South Africa. We blacks are perfectly willing to suffer the consequences! We are accustomed to suffering.

NOTICE

Incomplete record of Senate proceedings. Senate proceedings for today will be continued in Part II.

THE WHITE HOUSE

WASHINGTON

September 9, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: South Africa Materials

This will confirm my oral advice of this morning that Counsel's Office has reviewed the final versions of the proposed Executive Order, report to the Congress, fact sheet, and Presidential remarks, and finds no objection to them from a legal perspective. The final versions of all these items incorporate revisions suggested by this office over the weekend. The first two items were submitted with the approval of the Department of Justice as to form and legality. As you have been advised, 50 U.S.C. § 1703(b) requires that the President immediately transmit the report to Congress, along with a copy of the Executive Order, after he issues the Executive Order.

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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. 10~~1~~02~~1~~) 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,

September 9, 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(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 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 fair labor, nondiscrimination 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 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 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.

THE WHITE HOUSE,

September 9, 1985.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 9, 1985

FACT SHEET

PRESIDENT'S DECISION ON SOUTH AFRICA MEASURES

-- President sending a strong signal to South African Government: apartheid must go; time is now for bold action; actions assert his strong leadership on this issue.

-- U.S. policy has long included measures to disassociate ourselves from apartheid.

-- Actions are consistent with President's intent to maintain active presence and influence of American companies, churches, teachers, diplomats, in pushing for change in South Africa.

-- President shares concerns of American people about racism; his action designed to speak for entire Nation and pull American people together on this important issue.

-- President's measures not designed to damage South African economy and hurt those we are trying to help; targeted on specific elements of government apparatus.

-- President wants to work with Congress, on a bipartisan basis, to achieve positive and productive changes in the policies of the South African Government.

-- E.O. commits U.S. to maintain strong presence in South Africa, supports fair employment practices of U.S. companies, increases USG funds for scholarships and human rights activities.

-- E.O. prohibits U.S. banks lending to South African Government, except loans which would promote welfare of all South Africans.

-- E.O. bans all computer exports to military, police, and other apartheid-enforcing agencies.

-- E.O. prohibits U.S. nuclear exports to South Africa except for items needed for health and safety or for IAEA safeguard programs.

-- E.O. requires firms to adhere to principles similar to voluntary Sullivan program; goal is to maintain voluntarism, but those who do not adhere will be denied USG trade assistance.

-- E.O. requires USG to consult with GATT partners on Krugerrand ban.

-- E.O. requires the Secretary of Treasury to study feasibility of minting and issuing gold coins.

-- E.O. directs the Secretary of State to establish advisory committee of distinguished Americans to provide recommendations on measures to encourage peaceful change in South Africa.

-- E.O. will implement U.N. resolution, which U.S. supported, banning imports of South African arms.

# # # # # # #

(STATE/NSC) SEPTEMBER 9, 1985

SOUTH AFRICA

I WANT TO SPEAK THIS MORNING ABOUT SOUTH AFRICA -- ABOUT WHAT AMERICA CAN DO TO HELP PROMOTE PEACE AND JUSTICE IN THAT COUNTRY SO TROUBLED AND TORMENTED BY RACIAL CONFLICT.

THE SYSTEM OF APARTHEID MEANS DELIBERATE, SYSTEMATIC, INSTITUTIONALIZED RACIAL DISCRIMINATION DENYING THE BLACK MAJORITY THEIR GOD-GIVEN RIGHTS. AMERICA's VIEW OF APARTHEID IS SIMPLE AND STRAIGHTFORWARD: WE BELIEVE IT IS WRONG. WE CONDEMN IT. AND WE ARE UNITED IN HOPING FOR THE DAY WHEN APARTHEID WILL BE NO MORE.

OUR INFLUENCE OVER SOUTH AFRICAN SOCIETY IS LIMITED. BUT WE DO HAVE SOME INFLUENCE, AND THE QUESTION IS, HOW TO USE IT. MANY PEOPLE OF GOOD WILL IN THIS COUNTRY HAVE DIFFERING VIEWS.

IN MY VIEW, WE MUST WORK FOR PEACEFUL EVOLUTION AND REFORM. OUR AIM CANNOT BE TO PUNISH SOUTH AFRICA WITH ECONOMIC SANCTIONS THAT WOULD INJURE THE VERY PEOPLE WE ARE TRYING TO HELP.

I BELIEVE WE MUST HELP ALL THOSE WHO PEACEFULLY OPPOSE APARTHEID; AND WE MUST RECOGNIZE THAT THE OPPONENTS OF APARTHEID USING TERRORISM AND VIOLENCE WILL BRING NOT FREEDOM AND SALVATION, BUT GREATER SUFFERING, AND MORE OPPORTUNITIES FOR EXPANDED SOVIET INFLUENCE WITHIN SOUTH AFRICA AND IN THE REGION.

WHAT WE SEE IN SOUTH AFRICA IS A BEGINNING OF A PROCESS OF CHANGE. THE CHANGES IN POLICY SO FAR ARE INADEQUATE -- BUT IRONICALLY THEY HAVE BEEN ENOUGH TO RAISE EXPECTATIONS AND STIMULATE DEMANDS FOR MORE FAR-REACHING, IMMEDIATE CHANGE.

IT IS THE GROWING ECONOMIC POWER OF THE BLACK MAJORITY THAT HAS PUT THEM IN A POSITION TO INSIST ON POLITICAL CHANGE.

SOUTH AFRICA IS NOT A TOTALITARIAN SOCIETY. THERE IS A VIGOROUS OPPOSITION PRESS. EVERY DAY WE SEE EXAMPLES OF OUTSPOKEN PROTEST AND ACCESS TO THE INTERNATIONAL MEDIA THAT WOULD NEVER BE POSSIBLE IN MANY PARTS OF AFRICA, OR IN THE SOVIET UNION FOR THAT MATTER. BUT IT IS OUR ACTIVE ENGAGEMENT -- OUR WILLINGNESS TO TRY -- THAT GIVES US INFLUENCE.

YES, WE IN AMERICA -- BECAUSE OF WHAT WE ARE AND WHAT WE STAND FOR -- HAVE INFLUENCE TO DO GOOD. WE ALSO HAVE IMMENSE POTENTIAL TO MAKE THINGS WORSE. BEFORE TAKING FATEFUL STEPS, WE MUST PONDER THE KEY QUESTION: ARE WE HELPING TO CHANGE THE SYSTEM? OR ARE WE PUNISHING THE BLACKS WHOM WE SEEK TO HELP?

AMERICAN POLICY THROUGH SEVERAL ADMINISTRATIONS HAS BEEN TO USE OUR INFLUENCE AND OUR LEVERAGE AGAINST APARTHEID, NOT AGAINST INNOCENT PEOPLE WHO ARE THE VICTIMS OF APARTHEID.

BEING TRUE TO OUR HERITAGE DOES NOT MEAN QUITTING, BUT REACHING OUT; EXPANDING OUR HELP FOR BLACK EDUCATION AND COMMUNITY DEVELOPMENT, CALLING FOR POLITICAL DIALOGUE; URGING SOUTH AFRICANS OF ALL RACES TO SEIZE THE OPPORTUNITY FOR PEACEFUL ACCOMMODATION BEFORE IT's TOO LATE.

I RESPECT AND SHARE THE GOALS THAT HAVE MOTIVATED MANY IN CONGRESS TO SEND A MESSAGE OF U.S. CONCERN ABOUT APARTHEID. BUT IN DOING SO, WE MUST NOT DAMAGE THE ECONOMIC WELL-BEING OF MILLIONS OF PEOPLE IN SOUTH AND SOUTHERN AFRICA.

IF WE GENUINELY WISH -- AS I DO -- TO DEVELOP A BIPARTISAN BASIS OF CONSENSUS IN SUPPORT OF U.S. POLICIES, THIS IS THE BASIS ON WHICH TO PROCEED.

THEREFORE, I AM SIGNING TODAY AN EXECUTIVE ORDER THAT WILL PUT IN PLACE A SET OF MEASURES DESIGNED AND AIMED AGAINST THE MACHINERY OF APARTHEID, WITHOUT INDISCRIMINATELY PUNISHING THE PEOPLE WHO ARE VICTIMS OF THAT SYSTEM -- MEASURES THAT WILL DISASSOCIATE THE UNITED STATES FROM APARTHEID BUT ASSOCIATE US POSITIVELY WITH PEACEFUL CHANGE.

THESE STEPS INCLUDE:

-- A BAN ON ALL COMPUTER EXPORTS TO AGENCIES INVOLVED IN THE ENFORCEMENT OF APARTHEID AND TO THE SECURITY FORCES.

-- A PROHIBITION ON EXPORTS OF NUCLEAR GOODS OR TECHNOLOGY TO SOUTH AFRICA, EXCEPT AS IS REQUIRED TO IMPLEMENT NUCLEAR PROLIFERATION SAFEGUARDS OF THE INTERNATIONAL ATOMIC ENERGY AGENCY OR THOSE NECESSARY FOR HUMANITARIAN REASONS TO PROTECT HEALTH AND SAFETY.

-- A BAN ON LOANS TO THE SOUTH AFRICAN GOVERNMENT, EXCEPT CERTAIN LOANS WHICH IMPROVE ECONOMIC OPPORTUNITIES, OR EDUCATIONAL, HOUSING, AND HEALTH FACILITIES THAT ARE OPEN AND ACCESSIBLE TO SOUTH AFRICANS OF ALL RACES.

-- I AM DIRECTING THE SECRETARY OF STATE AND THE UNITED STATES TRADE REPRESENTATIVE TO CONSULT WITH OUR MAJOR TRADING PARTNERS REGARDING BANNING THE IMPORTATION OF KRUGERRANDS.

I AM ALSO INSTRUCTING THE SECRETARY OF THE TREASURY TO REPORT TO ME WITHIN 60 DAYS ON THE FEASIBILITY OF MINTING AN AMERICAN GOLD COIN WHICH COULD PROVIDE AN ALTERNATIVE TO THE KRUGERRAND FOR OUR COIN COLLECTORS.

I WANT TO ENCOURAGE ONGOING ACTIONS BY OUR GOVERNMENT AND BY PRIVATE AMERICANS TO IMPROVE THE LIVING STANDARDS OF SOUTH AFRICA's BLACK MAJORITY.

THE SULLIVAN CODE -- DEVISED BY A DISTINGUISHED BLACK MINISTER FROM PHILADELPHIA, THE REVEREND LEON SULLIVAN -- HAS SET THE HIGHEST STANDARDS OF LABOR PRACTICES FOR PROGRESSIVE EMPLOYERS THROUGHOUT SOUTH AFRICA. I URGE ALL AMERICAN COMPANIES TO PARTICIPATE IN IT, AND I AM INSTRUCTING THE AMERICAN AMBASSADOR TO SOUTH AFRICA TO MAKE EVERY EFFORT TO GET COMPANIES WHICH HAVE NOT ADOPTED THEM TO DO SO.

IN ADDITION, MY EXECUTIVE ORDER WILL BAN U.S. GOVERNMENT EXPORT ASSISTANCE TO ANY AMERICAN FIRM IN SOUTH AFRICA, EMPLOYING MORE THAN 25 PERSONS, WHICH DOES NOT ADHERE TO THE COMPREHENSIVE FAIR EMPLOYMENT PRINCIPLES STATED IN THE ORDER BY THE END OF THIS YEAR.

I AM ALSO DIRECTING THE SECRETARY OF STATE TO INCREASE SUBSTANTIALLY THE MONEY WE PROVIDE FOR SCHOLARSHIPS TO SOUTH AFRICANS DISADVANTAGED BY APARTHEID, AND THE MONEY OUR EMBASSY USES TO PROMOTE HUMAN RIGHTS PROGRAMS IN SOUTH AFRICA.

FINALLY, I HAVE DIRECTED SECRETARY SHULTZ TO ESTABLISH AN ADVISORY COMMITTEE OF DISTINGUISHED AMERICANS TO PROVIDE RECOMMENDATIONS ON MEASURES TO ENCOURAGE PEACEFUL CHANGE IN SOUTH AFRICA. THE ADVISORY COMMITTEE SHALL PROVIDE ITS FIRST REPORT WITHIN 12 MONTHS.

I BELIEVE THE MEASURES I AM ANNOUNCING HERE TODAY WILL BEST ADVANCE OUR GOALS. IF THE CONGRESS SENDS ME THE PRESENT BILL AS REPORTED BY THE CONFERENCE COMMITTEE, I WOULD HAVE TO VETO IT. THAT NEED NOT HAPPEN. I WANT TO WORK WITH THE CONGRESS TO ADVANCE BIPARTISAN SUPPORT FOR AMERICA's POLICY TOWARD SOUTH AFRICA. THAT IS WHY I HAVE PUT FORWARD THIS EXECUTIVE ORDER TODAY.

THREE MONTHS AGO, I RECALLED OUR AMBASSADOR IN SOUTH AFRICA FOR CONSULTATIONS SO THAT HE COULD PARTICIPATE IN THE INTENSIVE REVIEW OF THE SOUTHERN AFRICAN SITUATION THAT WE HAVE BEEN ENGAGED IN. I AM NOW SENDING HIM BACK, WITH A MESSAGE TO STATE PRESIDENT BOTHA UNDERLINING OUR GRAVE VIEW OF THE CURRENT CRISIS, AND OUR ASSESSMENT OF WHAT IS NEEDED TO RESTORE CONFIDENCE ABROAD AND MOVE FROM CONFRONTATION TO NEGOTIATION AT HOME.

THE PROBLEMS OF SOUTH AFRICA WERE NOT CREATED OVERNIGHT AND WILL NOT BE SOLVED OVERNIGHT, BUT THERE IS NO TIME TO WASTE. TO WITHDRAW FROM THIS DRAMA -- OR TO FAN ITS FLAMES -- WILL SERVE NEITHER OUR INTERESTS NOR THOSE OF THE SOUTH AFRICAN PEOPLE.

IF ALL AMERICANS JOIN TOGETHER BEHIND A COMMON PROGRAM, WE CAN HAVE SO MUCH MORE INFLUENCE FOR GOOD. SO LET US GO FORWARD WITH A CLEAR VISION AND AN OPEN HEART, WORKING FOR JUSTICE AND BROTHERHOOD AND PEACE.

# # #

THE WHITE HOUSE

WASHINGTON

September 9, 1985

MEMORANDUM FOR THE FILES

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Remarks: South Africa

This version of the South Africa remarks was substantially revised over the weekend. I noted no legal objection to a later version of the remarks.

Attachment

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) _____

Name of Correspondent: D. Chew

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Remarks: South Africa

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Clinton	ORIGINATOR	85,09,07			/ /
	Referral Note:				
Chief of Staff	R	85,09,07		S	85,09,07
	Referral Note:				12N
		/ /			/ /
	Referral Note:				
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		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

CLOSE HOLD

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/6/85 ACTION/CONCURRENCE/COMMENT DUE BY: NOON TOMORROW, 9/7

SUBJECT: REMARKS: SOUTH AFRICA

(9/6 - 6:30 p.m. draft)

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	LACY	☐	☐
REGAN	☑	☐	McFARLANE	☑	☐
WRIGHT	☐	☐	OGLESBY	☑	☐
BUCHANAN	☐	☐	ROLLINS	☐	☐
CHAVEZ	☐	☐	RYAN	☐	☐
CHEW	☐P	☑BS	SPEAKES	☐	☐
DANIELS	☐	☐	SPRINKEL	☐	☐
FIELDING	☑	☐	SVAHN	☐	☐
FRIEDERSDORF	☑	☐	THOMAS	☐	☐
HENKEL	☐	☐	TUTTLE	☐	☐
HICKEY	☐	☐	ELLIOTT	☐	☑
HICKS	☐	☐	_____	☐	☐
KINGON	☐	☐	_____	☐	☐

REMARKS:

Please provide any edits directly to Ben Elliott by noon tomorrow, September 7th, with an information copy to my office. Thank you.

Please handle this on an extreme close hold basis.

RESPONSE:

1985 SEP -7 AM 9:33

David L. Chew
Staff Secretary
Ext. 2702

(Elliott)
September 6, 1985
6:30 p.m.

PRESIDENTIAL REMARKS: SOUTH AFRICA
MONDAY, SEPTEMBER 9, 1985

I want to address the issue of South Africa -- America's role in helping secure peace and democracy for that land so troubled and tormented by its system of apartheid.

Our position on apartheid, deliberate segregation denying blacks their God-given rights, is simple and straightforward. We believe apartheid is wrong. We condemn apartheid. And because we live by Lincoln's words -- no man is good enough to govern another without the other's consent -- we are united in hoping for the day when apartheid will be no more.

We also agree that we cannot simply march in and abolish this system. So the great issue before us, one that divides so many people of good will, is whether to continue working for peaceful evolution and reform, or to punish South Africa with economic sanctions that would injure the very people we are trying to help, and give aid and comfort to anti-democratic forces bent on revolution.

I believe we must help all those opposing apartheid peacefully; and we must recognize that the opponents of apartheid using terrorism and violence will bring not freedom and salvation, but greater suffering, and quite possibly, a totalitarian government.

We might remember that it took over 100 years for America to go from the Emancipation Proclamation to the passage of the Civil Rights Act. In South Africa, changes made in the last 10 years have gone far beyond the cosmetic.

In 1976, the South African government intended that: there be no citizenship rights for blacks outside tribal areas; future representation in Parliament reserved for whites; skilled jobs in industry reserved for whites; and education separated by race with blacks receiving second-class instruction. But today, coloreds and Indians are directly represented in Parliament; black and racially-mixed unions have gained legal recognition; the gap between black and white earnings has narrowed; barriers to black businesses are being removed; education is improving; desegregation of public accommodations has begun and social relations among races is increasing.

South African blacks are still far from being truly free. Yet we can say that their government, while flawed, is not totalitarian, and is slowly, steadily opening up. We can say that blacks in South Africa have a higher standard of living than neighbors living under socialism or communism, with many blacks from other African countries choosing to live and work in South Africa. We can say that a black man in South Africa is freer than a black man in Angola, Ethiopia, Mozambique, or Cuba. And, yes, we can say that a black man in South Africa is freer to speak, assemble, worship, and choose his path than a white man in the Soviet Union.

America has shown its limited potential to make things better in South Africa. But we also have immense potential to make things worse. Before taking a fateful step, let us ponder just one question: What will be the consequence of imposing sanctions and shunning this people in distress?

We should weigh carefully the advice of Gatsha Buthelezi, Chief of the Zulus, South Africa's largest black group, who pleads, don't disinvest. We should weigh carefully black labor leader Lucy Mvubelo's warning that the greatest hardships will fall on my people, black people. They will be the first to lose their jobs, to die of starvation, to be killed in a revolution.

And we should weigh carefully the argument of Alan Paton, author of Cry the Beloved Country, who wrote, "I take seriously the teachings of the Gospels, in particular the parables about giving drink to the thirsty and food to the hungry...If the nations of the West condemn us, they will only hinder the process of our emancipation from the bondage of our history."

Like Paton, I believe that imposing sanctions would be deeply wrong and immoral. It would be America turning away from a fallen friend crying out for help; it would be America turning away from our own Judeo-Christian heritage, for unlike the parable of the Good Samaritan, we would not be a good neighbor helping bind up the wounds of the fallen traveller, we would be the cold, uncaring stranger who passed him by.

Being true to our heritage is not treating South Africa with contempt, but reaching out in friendship; it's not investing less, but more; it's not reducing our contacts between churches and schools, but multiplying them as fast as we can. For who has worked harder, longer, or better than we Americans to integrate communities, create equal opportunity in the workplace, and join all people together at the table of brotherhood? This is the way of honor and courage.

But if we turn away from this flawed but friendly government, as we did in Vietnam, Cambodia, Iran, and Nicaragua, then the West will not only suffer a great strategic loss, we will once again consign a people to a fate far worse than they confront today.

Therefore, after much soul-searching, I have concluded that I must veto the sanctions legislation awaiting final congressional action. Instead, I am signing today executive orders that will disassociate the United States from apartheid, without punishing the people who live under that system, and that will associate the United States Government with peaceful change:

These actions include:

-- A ban on computer sales to agencies involved in the enforcement of apartheid and to the security forces.

-- A prohibition of sales of nuclear goods or technology, except as is required to implement nuclear proliferation safeguards of the International Atomic Energy Agency.

-- A ban on loans to the South African government, except loans which improve economic opportunities, or educational, housing, and health facilities that are open and accessible to South Africans of all races.

-- I am directing the United States Special Trade Representative to consult with our major trading partners to consider the feasibility and legality, under international trading agreements, of a ban on the importation of kruggerands. I am also instructing the Secretary of the Treasury to report to me within 60 days on the advisability of minting an American gold

coin which could provide an alternative to the kruggerand for our coin collectors.

I want to encourage ongoing actions by our government and by private Americans to improve the living standards of South Africa's black majority. The Sullivan Code -- devised by a distinguished black minister from Philadelphia, the Reverend Leon Sullivan, has set the highest standards of labor practices for progressive employers throughout South Africa. I urge all American companies to participate in it, and I am instructing the American Ambassador to South Africa to make every effort to get companies which have not signed to do so.

In addition, my Executive Order will ban from any kind of official worldwide export assistance any American firm in South Africa, employing more than 25 persons, which does not adhere by the end of this year to comprehensive fair employment principles.

I am also directing the Secretary of State to increase substantially the amount for scholarships provided by us to black South Africans and the amount our embassy uses to promote human rights programs in South Africa.

Finally, I am establishing, under the Secretary of State, an Advisory Committee of distinguished Americans to provide recommendations on measures to encourage peaceful change in South Africa. The Advisory Committee shall provide its first report no later than January 1, 1987.

Three months ago, I recalled our Ambassador in South Africa for consultations so that he could participate in the intensive review of the southern African situation that we have been

engaged in. I am now sending him back, with a message to State President Botha underlining our grave view of the current crisis, and our assessment of what is needed to restore confidence abroad and move from confrontation to negotiation at home. The problems of South Africa were not created overnight and will not be solved overnight, but there is no time to waste. To withdraw from this drama -- or to fan its flames -- will serve neither our interests or those of the South African people. Let us join together and go forward with a clear vision and an open heart.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 9, 1985

PRESS BRIEFING
BY SECRETARY OF STATE GEORGE SHULTZ
ON EXECUTIVE ORDER
REGARDING SOUTH AFRICA

The Oval Office

10:53 A.M. EDT

Q If the policy is no longer constructive engagement, what are you calling it? And how can you say that these are not economic sanctions, thereby, a reversal of the policy of the President?

SECRETARY SHULTZ: The President in his comments after his statement used the word "active" as well as "constructive." And, of course, we remain engaged and involved. And I think that has been our approach all along -- the President's approach. And we all feel that it is essential in South Africa where we have a stake, both a moral stake and stake in our interests, that we are there and that we exercise our influence; that we are engaged and we do it in a constructive way and an active way.

And I think, beyond that, the more we are there diplomatically, the more our labor people are there, the more our business people are there the more interplay there is. And that is the way in which we can exercise our influence.

Q And as to whether these -- the President said these are not economic sanctions. But how can you say that these are not economic sanctions and that this is not policy reversal for the him?

SECRETARY SHULTZ: Well, these are a codification and a setting out some things that are presently being done, some that are strengthened and made more clear, basically drawing on the conference report of the Congress of those things that they had planned to put into effect right away, although with some changes. And these are actions that are designed to register our view against apartheid, as distinct from actions designed to have an effect by depriving people in South Africa of economic livelihood, particularly blacks, of course.

So, the President has tried consistently to make that distinction and in selecting the things in the conference report that were slated, if the bill would pass, to go into effect immediately and not including the overhang of disinvestment and other types of economic sanctions. The President has been true to this purpose.

Q Mr. Secretary, why not simply ban Krugerrands -- Krugerrand imports as Congress would have done? Why give it to GATT? GATT doesn't usually --

SECRETARY SHULTZ: We don't give it to GATT. We are a party to what amounts to a treaty. GATT is a treaty. And when you sign it, you undertake certain obligations. And, so, if we want to do something in the field of trade, such as stopping the import of something, then, our treaty obligations under GATT come to bear.

So, we want the prohibition on the import of Krugerrands to be done in a proper way so that it will be effective, and we won't have a major suit on the subject.

And so that is the approach we're taking. I might say this was debated as the bill was being considered and I think the point is a recognized point.

Q Mr. Secretary, will you discuss the details of the letter to Botha or any of its provisions that the Ambassador --

SECRETARY SHULTZ: Will I?

Q Yes.

SECRETARY SHULTZ: I don't think it's appropriate -- I know it's not appropriate to discuss or to release the contents of a message from the President to Mr. Botha. However, as the President said, it expressed the concern of the United States, it expresses our desire to be constructively engaged, you might say to coin a phrase, and also the seriousness with which we take this.

Now, I believe that in taking this action, the President has -- and this is part of his intent -- tried to send a single message to the government of South Africa and the people of South Africa on behalf of all Americans, on behalf of all the government, on behalf of the Congress and the Presidency, that apartheid must come to an end. And we look to the government of South Africa to work with blacks, black leaders and others in their country to bring it to an end. That's the message.

Q Are you calling for one man, one vote?

SECRETARY SHULTZ: We are calling for the parties concerned to engage with each other and discuss the problem and how to resolve it.

My experience on these things is that there is a key break-over point that must be reached. And that is the point at which people conclude that the system, or whatever it is you're seeking to change, but in this case, the system of apartheid is going to end. And that is not the subject of argument. The question is how. And once that psychology is created, then the problems of how you end it and what you do can be worked with in a more operational way and a more satisfactory way. And that is the point that I hope they are reaching in South Africa.

Q Yes. You all have constantly said that if you put economic sanctions against, it's going to hurt the blacks. Less than one percent of the blacks work in those factories. When Allen Boesak was over here, he said he wanted the privilege to decide what misery he would accept. And my question is, this is not over -- the fight is not over economics with the blacks, this is a side issue. It's over freedom. And aren't you missing the point if you don't attack this from freedom, just as the Americans did during the Revolutionary War? They weren't all economics of freedom. Aren't you missing the point?

SECRETARY SHULTZ: The statements you made are precisely why the President picked out measures that are aimed at apartheid, like the ban on computer sales to agencies whose activities have a bearing on the administration of apartheid, and not things that would have some major disruptive economic effect.

Now, I think I am fairly stating the point that the economic progress in South Africa and the participation of blacks in it, and I might say with American firms leading the way, has enabled blacks to acquire skills, to have access to on-the-job training, to move up in the skill and managerial ladder, and to have a basis for forming labor unions -- labor unions now being one potential source of expression of black concerns. All of this is part of the economic base.

And beyond that, of course, is the livelihood of people

there, and not only the livelihood in South Africa, but the whole region is interdependent and what happens in South Africa has a great bearing on what happens in Botswana and so on and so on.

Q Mr. Secretary, have you received assurances from --

SECRETARY SHULTZ: Pardon?

Q Have you received assurances from Dole and other legislative leaders that they will put over a vote until March and would you welcome such a move on their part? Do you think that that would help keep the pressure on South Africa to change?

SECRETARY SHULTZ: I am -- I feel privileged that both Chairman Lugar and Majority Leader Dole have spent considerable time with me and colleagues in discussing this issue. What they -- how they react and what they will decide to do, of course, is for them to say, and no doubt they will give their views.

I believe and the President believes and I feel that they believe too that if we can, it is most important that we as a country express our view in a unified way on this subject. And that is why the President has done what he has done. And I might say that it's -- if you look at the structure of the Executive Order and much of the content of the bill, you see that there is a great parallelism there.

Q What are the features of the measure before the Senate today that you find objectionable -- specific features that you object to?

SECRETARY SHULTZ: The most objectionable feature is the overhang of economic sanctions that stand there as things that might be triggered in at some moment of time. So as I keep saying, the President has wanted to distinguish between measures directed against apartheid and measures that would wind up with substantial loss of jobs. That's the big distinction.

There are a lot of other distinctions between the Executive Order and the bill, some of them technical such as the slight difference on how to approach the banning of Krugerrands, and there are a number of other things of that kind that distinguish the Executive Order and, we think, improve it over the bill. But the item that I mentioned I think is the principal one.

I might just say, as a matter of something that I would personally be involved in very much, on the subject of an advisory committee --

in the bill, the advisory committee provided for is essentially to advise on the labor relations and economic matters basically having to do with the Sullivan Code. In the Executive Order, the advisory committee is to look at the whole range of developments having to do with the end of apartheid and advise on it. So the mandate is broader. And I hope that it will be possible to have an advisory committee that can not only make a report at some moment of time, but also be useful in counseling on events as they occur. And we all know there'll be a pattern of events. We don't know what they are. But I hope the advisory committee will be useful in that regard.

Q Mr. Secretary, why shouldn't we construe this as the administration being stampeded to cut Congress off at the pass? You weren't for these measures before. You are for them today because you knew that legislation would probably pass. And that appears to be the only reason, and not your burning desire to wipe out apartheid.

SECRETARY SHULTZ: Some of these measures are in effect now and are being codified. For example, there are prohibitions on sales of computers. There are prohibitions on sales of nuclear materials, since South Africa has not signed the Nuclear Proliferation Treaty, and so on. So there are things that are now being dealt with that are brought together. I think they're improved, they're strengthened on things like scholarships. The amount of money is somewhat larger, and so on.

I think the President's purpose here is, of course, in part to avoid a fight over something where there is a large measure of agreement, but more important, to reach out to the Congress and reach out to the American people and say, together, let us send a message about apartheid and work together as effectively as we possibly can to do whatever we can to bring it to an end. That's the reason for it.

Q Can you tell us, sir, if this Executive Order would have been issued around now in the absence of imminent passage of the bill this week?

SECRETARY SHULTZ: Well, there are a whole set of events, of course, that have taken place. There's a real dynamic here. And no one can say -- abstracting something or other if Mr. Botha hadn't given a speech in the middle of August that was a great disappointment, if this, if that, if something else. So, I think about the right thing to say is that there is a flow of events here and, under all the circumstances, the President felt that the United States would be well served by this action, and he's taken it.

Q Mr. Secretary, you --

MR. DJEREJIAN: Two more questions, Mr. Secretary.

Q -- you said that this package is designed -- I think you said something -- to register United States disapproval of apartheid. Doesn't returning our Ambassador on the very same day weaken that message?

SECRETARY SHULTZ: On the contrary. The Ambassador will go with a letter from the President -- and I've indicated the general content of it. It will supplement and support the ideas that the President expressed in his statement and are expressed, so to speak, in the Executive Order as such.

Furthermore, the object of an Ambassador is to represent us, to represent us with the government, to represent us with groups in the population of South Africa. So, we called him back for consultations. We've benefited a lot from having his first-hand views here. And we felt that at this point it's important for him to be at his post and on his job there doing the representational duty that ambassadors do all around the world.

Q Mr. Secretary --

Q Mr. Secretary --

SECRETARY SHULTZ: You pick the last question.

MR. DJEREJIAN: All right --

Q Mr. Secretary, what are the prospects that the South African government might retaliate for the sanctions by withholding strategic minerals that we are very dependent upon?

SECRETARY SHULTZ: I don't think there is much prospect of that or a desire to do that.

I might say that they're looking for all of the export -- foreign exchange they can get. So I think that's a very unlikely matter. And I hope that the net impact of the President's action will be to focus the attention of South Africa on the importance of really coming to grips with the problem of apartheid and acting on the basis that it is going to end and the question is how. And, of course, we think the "how" should be answered through a process of discussion and negotiation.

Q -- Ambassador intend to leave?

SECRETARY SHULTZ: Well, I think the President said he said goodbye to him this morning. And I don't know when his -- he actually takes off. But he's on his way.

Q Mr. Secretary, have you spoken to President Botha?

THE PRESS: Thank you.

END 11:06 A.M. EDT