

REAGAN vs. CITIES:
THE 20TH CENTURY
BATTLE OVER SOUTH
AFRICAN APARTHEID
& LESSONS FOR THE
TRUMP ERA

J U N E 2 0 1 7



REAGAN vs. CITIES:

THE 20TH CENTURY BATTLE OVER
SOUTH AFRICAN APARTHEID &
LESSONS FOR THE TRUMP ERA

BY ABHILASHA BHOLA
KATHERINE HOFF, ESQ.
MADELINE JANIS, ESQ.
JOBS TO MOVE AMERICA

LISA GRAVES, ESQ.
CENTER FOR MEDIA AND DEMOCRACY

JUNE 2017



ACKNOWLEDGMENTS

Many people and organizations contributed to this report. We thank the Ford Foundation for the support that helped make the research for this report possible. Also, many thanks to the longstanding support for Jobs to Move America from Helen Chin and Shawn Escoffery of the Surdna Foundation and Scot Spencer from the Annie E. Casey Foundation.

We give a special thanks to long time civil rights leader Dr. Mary Frances Berry, who gave us significant constructive input. Dr. Berry reminded us that the success of the anti-apartheid movement was made possible by the dedication, sacrifice, and detailed planning and strategy of the Free South Africa Movement as well as the hundreds of thousands of people across the United States who stood up for freedom and justice in South Africa.

Also, we give thanks to Jeff Monaghan, D. T. Cochrane, and Karen Emily Suurtamm who gave us access to the Temple University archive of documents from Reverend Leon H. Sullivan and the Industry Support Unit.

Lastly, we have huge appreciation for all of the JMA staff and consultants who made this report possible, especially Alaa Milbes and Jue Wang. And we are grateful to our talented designer par excellence, Armando Aparicio.

TABLE OF CONTENTS

ABOUT THE AUTHOR, ORGANIZATIONS, AND THE REPORT	01
EXECUTIVE SUMMARY	02
INTRODUCTION	05
METHODOLOGY AND RESEARCH	07
WHAT LIFE WAS LIKE IN SOUTH AFRICA DURING APARTHEID	08
THE U.S. ANTI-APARTHEID MOVEMENT	09
THE REAGAN ADMINISTRATION'S SOUTH AFRICA POLICY	12
ORGANIZED BUSINESS EFFORTS TO INFLUENCE U.S. SOUTH AFRICA POLICY	14
THE REAGAN ADMINISTRATION AND STATE & LOCAL SANCTION LAWS	20
CONCLUSION	31
APPENDIX I	32
APPENDIX II	280
ENDNOTES	284

ABOUT JOBS TO MOVE AMERICA

Jobs to Move America (JMA) is a national organization uniting community, labor, faith, civil rights, philanthropic, academic, and environmental groups and is dedicated to ensuring that the billions of taxpayer dollars spent on public infrastructure create better results for our communities: sustainable jobs, cleaner equipment, and greater opportunity for low-income and other disadvantaged people. For more information about JMA's work and this report, see www.jobstomoveamerica.org or contact Alaa Milbes, amilbes@jobstomoveamerica.org or Katherine Hoff, Esq., khoff@jobstomoveamerica.org.

ABOUT THE CENTER FOR MEDIA AND DEMOCRACY

The Center for Media and Democracy (CMD) is a nationally-recognized watchdog group that leads in-depth, award-winning investigations into corporations and lobbying groups acting behind the scenes to advance narrow special interests that hurt working Americans and their families. CMD's investigations have ignited national conversations on money in politics and the distortion of public policies about our democracy, environment, economy, and schools – at every level of government and in every region of the country. For more information about CMD's research, see www.ExposedbyCMD.org or contact Nikolina Lazic, Nikolina@prwatch.org.

ABOUT THE REPORT

Between December 2016 and June 2017, Jobs to Move America (JMA) researchers combed through thousands of pages of documents—legal memos, policy guides, court briefings, and correspondence between corporations and the Reagan administration. JMA wanted to piece together the story of how cities and states joined the fight against apartheid in South Africa and explore how the Reagan administration sought to suppress those efforts. JMA also investigated parallels between the Reagan era battles and current tensions between the federal government and cities and states. Finally, JMA examined the long-term effects of the Reagan era apartheid policies.

EXECUTIVE SUMMARY

Overview

By the 1980s, the apartheid political system in South Africa and its brutal oppression of people of color had become increasingly shocking to the world. Sustained global opposition resulted in the system's collapse by the beginning of the next decade.

In the United States, anti-apartheid efforts pitted community leaders, states, and cities against the federal government and the Reagan administration, along with numerous corporations and their business groups. By withholding public contracts and other financial benefits, cities and states sought to sanction U.S. businesses that were profiting from the South African apartheid system.

They were met with fierce opposition from the Reagan administration, whose stated position was to fully support the racist government of South Africa through "constructive engagement," claiming that policies to address apartheid should be developed by the federal government, not states or cities, and that economic sanctions would "exacerbate" the situation of black South Africans.

The clash between the Reagan administration and cities and states over apartheid teaches important lessons that provide guidance today. The tools wielded by the federal government to thwart cities and states during the anti-apartheid struggle continue to inhibit local innovation in public contracting today. How cities and states fought back also provides lessons for policymakers contending with threats from the Trump administration to punish "sanctuary" cities and other state or local communities that are resisting aggressive measures by the federal government.



REAGAN vs. CITIES:
A CENTURY BATTLE OVER SOUTH AFRICAN APARTHEID

& LESSONS FOR THE TRUMP ERA

The Battleground

Four Tactics Used by the Reagan Administration to Suppress State & Local Sanctions Laws

The Reagan administration's stated policy was one of "encouraging U.S. firms to remain in South Africa and to work to promote social and economic change in that country."^{1 2} Accordingly, the Reagan administration was staunchly opposed to state and local sanctions laws and launched efforts to curtail the sanctions and divestment movement. These efforts took many forms, but four federal government tactics are especially noteworthy:

- 1) Adopting national policy to deter independent actions by Congress, cities and states.
- 2) Collaborating with the business lobby to oppose sanctions.
- 3) Interpreting federal law to justify withholding federal funding from cities and states adopting sanctions and divestment policies.
- 4) Actively organizing support for litigation to challenge city divestment and sanctions laws.

The Local Response: A Tale of Two Cities and Beyond

In 1984, after sustained grassroots organizing, the New York City Council passed Local Law 19, which imposed sanctions on businesses with financial interests in South Africa. It allowed a city board to withhold contracts from companies doing business in or using material from South Africa, and to instead offer the contract to a company that was not invested in South Africa, so long as that company's proposal was within 5 percent of the original lowest bid.

The U.S. Department of Transportation (DOT) threatened to withdraw funding from federally funded transportation projects in New York City until Local Law 19 was rescinded. The DOT, supported by an opinion from the U.S. Department of Justice (DOJ), claimed that the law did not conform to the federal competitive bidding statutory provisions requiring "full and open competition." According to the DOT and the DOJ, the New York law could theoretically increase the cost of New York City contracts, thereby putting an "undue burden" on companies bidding on those contracts. The DOT also argued that the local law conflicted with federal laws on apartheid. Although then-Mayor Edward Koch protested both to President Reagan and DOT Secretary Elizabeth Dole, and threatened litigation, the city eventually relented. It revised Local Law 19 to meet the terms set by the federal government and "exempted federal transportation projects from [Local Law 19's] purview." Succumbing to pressure, New York never filed suit against the DOT.

In 1986, the City of Baltimore adopted an anti-apartheid divestment ordinance, Ordinance Number 765, which required Baltimore city pension funds to divest from any companies doing business with South Africa within two years. At the time, the ordinance covered \$1.1 billion in pension funds. Trustees of Baltimore's pension funds, along with pension fund beneficiaries, filed a suit to challenge the constitutionality of the ordinance in 1987. This was the first legal challenge to a divestment law in the country. While the Department of Justice chose not to file an amicus brief, the U.S. State Department and National Security Council submitted supplemental documentation in direct support of the divestment law challengers. After a lengthy trial, the City of Baltimore prevailed at the lower court level and subsequently prevailed in multiple appeals to the Maryland Court of Appeals. The business-backed litigants then sought review by the U.S. Supreme Court, which denied certiorari, allowing the final state court decision to stand. Baltimore's divestment ordinance survived as a victory for the anti-apartheid movement and as a testament to the power of a city to stand up to the federal government.

The Victory Against Apartheid

By 1991, 28 states, 1 territory, and 92 cities had imposed sanctions, divestment, or other measures on companies doing business in South Africa, costing U.S. corporations substantial sums of money.

Notwithstanding the Reagan administration's efforts, sustained opposition to the apartheid system caused its downfall in 1991. The sanctions and divestment movement is credited for playing a critical role in apartheid's demise.

The Lasting Impact of Reagan's Policies

While the Reagan administration ultimately lost its battle to curtail anti-apartheid sanctions and divestment, the tools it wielded in that battle endure. Specifically, the Justice Department's legal opinion from that era resulted in significant, long-term changes to the interpretation and application of laws defining federal authority to withhold funding from cities and states for their contracting policies.

Today, states and cities face obstacles to introducing innovative procurement policies that would benefit the public, such as mandating local hire, and ensuring good jobs, especially when federal funds are involved. The current interpretation of procurement policy must be re-examined and reinterpreted in light of the historic political context in which it was issued, and with the public good and equity in mind.

INTRODUCTION

By the 1980s, the apartheid political system in South Africa was in its final decade, but the brutal suppression of people of color continued to shock the world. In the U.S., cities and states attempted to withhold public contracts and financial benefits from major U.S. businesses profiting from slave-like conditions in apartheid South Africa. They were met with fierce opposition from the Reagan administration, which argued that, while racism and exploitation in South Africa were regrettable, policies to address these issues should be developed by the federal government, not states or cities, and that economic sanctions would further hurt the major businesses invested in South Africa and the black people who worked for them.

Jobs to Move America researchers reviewed hundreds of documents, which revealed that the Reagan administration and its major corporate allies were deeply committed to protecting access to and profits from precious mineral production in South Africa. A newsletter published by the American Legislative Exchange Council (ALEC) in 1983, for example, highlighted the fact that at that time, South Africa produced 81 percent of the world's chromium supply and 77 percent of its platinum supply, minerals said to "play a vital role in the manufacturing of virtually every product on the American market."³ The Reagan administration was also intent on defeating the so-called "communist threat" in South Africa, pointing to support from the Soviet Union

for the African National Congress and the South African Communist party.

Despite this pressure, a well-organized grassroots anti-apartheid movement grew throughout the U.S., demanding that the federal government, as well as state and local governments, adopt policies to divest all support from both the South African government and U.S. businesses profiting from their investments in the country. Pressured by massive civil disobedience and public actions taken by major political, entertainment, labor, and grassroots leaders, states and cities took direct, independent action to withhold contracts and other financial benefits from businesses profiting from investments in the apartheid system, arguing that businesses profiting from apartheid should not benefit from taxpayer-funded contracts, subsidies, or other government business.

The Reagan administration implemented sweeping measures to undercut cities and states as they pursued these actions by threatening to withdraw federal funding from many of these localities. They executed these threats through several means, most importantly, a Department of Justice legal opinion that claimed that federal grantees were prohibited from adopting laws or procurement requirements that placed a "burden on competition" by either limiting the pool of bidders vying for a federally funded contract or by raising the price of the federally funded contract.⁴

“The Reagan administration implemented sweeping measures to undercut cities and states as they pursued these actions by threatening to withdraw federal funding from many of these localities.”



As a result of these actions, some cities and states – such as New York City – repealed, limited, or failed to adopt laws barring companies with lucrative ties to South Africa from receiving public contracts or other public financial support. However, other cities, like Baltimore, resisted the administration’s threats and were ultimately successful in pressuring U.S. corporations to withdraw their investments from South Africa.

Their efforts helped hasten the end of the apartheid regime. However, the

Justice Department’s legal opinion from that era resulted in significant, long-term changes to the interpretation and application of laws determining U.S. federal agencies’ authority to withhold funding from cities and states. As the Trump administration uses similar tactics to pressure cities and states to abandon protections to undocumented immigrants, as well as the environment, the anti-apartheid sanctions and divestment movement provides a historical example that can remind cities and states of the power they wield in the face of federal bullying.

METHODOLOGY AND RESEARCH

This analysis was developed after months of research between December 2016 and June 2017. It involved archival research at the Ronald Reagan Presidential Library, where hundreds of pages of internal administration documents on the topic of South Africa sanctions were copied and analyzed. Researchers also obtained access to a database from Temple University that included archives from General Motors board member Reverend Leon H. Sullivan, the author of the so-called “Sullivan Principles” described in this paper, and numerous other primary documents from the 1980s. JMA research also included an extensive review of the legislative history of federal grant rules; numerous academic articles, books, and investigative journalism on corporate interests in apartheid; and the Reagan administration’s actions and policy around South Africa’s apartheid regime.

Most of the sources cited in this report are primary documents, including letters, memoranda, congressional testimony, court briefings, excerpts from the Congressional Record, and executive

orders. Researchers obtained physical or online copies of these primary documents from institutions, including but not limited to the Reagan Library, ALEC, the U.S. Department of Justice, Michigan State University, South African History Online, the United Nations, the University of Michigan, and LexisNexis and the powerful autobiography of Randall Robinson, one of the founders of the Free South Africa Movement.⁵ These sources issued or collected documents that illustrated the key historical events and players involved in the South Africa anti-apartheid movement. The authors also used credible secondary sources including news articles from reputable media outlets that covered the historical events, such as the New York Times, the Los Angeles Times, the Foreign Affairs magazine, and the Baltimore Sun. Secondary sources cited in this report also include journals, books, and dissertations written by credible historians and legal scholars in the field. The authors also used sources from respected non-governmental organizations, such as the American Committee on Africa and the Center for Media and Democracy.



WHAT LIFE WAS LIKE IN SOUTH AFRICA DURING APARTHEID

Although racial segregation existed in South Africa for hundreds of years, in 1948 the South African National Party, which was exclusively white, institutionalized these divisions by legally requiring racial separation through the apartheid system. The South African government claimed that this system, literally translating to “apartness” in Afrikaans, would support the separate but equal development of the races.⁶

From the beginning, apartheid policies proved to be a means of guaranteeing racial oppression against citizens who were not white. Black South Africans were forced to live in distinct “homelands,” called “Bantustans,” which the government designated for them based on their indigenous heritage. They worked low-wage and manual labor jobs, attended overcrowded, barely-resourced schools, and lived in substandard housing.^{7 8 9} Anyone who was not white was forced to carry race-identifying documents when traveling outside of his or her “homeland.” Black South Africans could not vote, and if they tried to organize or resist apartheid they were severely punished and often tortured and killed. The entire system of apartheid consisted of measures preventing black South Africans from achieving any kind of upward economic mobility. Meanwhile, white South Africans and major South

African-based businesses thrived off of a system that was essentially a form of modern slavery.^{10 11}

Two years after apartheid collapsed and the country held its first multiracial elections in 1994, the country formed a Truth and Reconciliation Commission^{12 13}, with the intent of letting victims of apartheid policies voice their experiences of abuse and bring their abusers to light. During those hearings, the commission found that:

- “Business was central to the economy that sustained the South African state during the apartheid years. Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefited from co-operating with the security structures of the former state. Most businesses benefited from operating in a racially structured context.”¹⁴
- “The denial of trade union rights to black workers constituted a violation of human rights. Actions taken against trade unions by the state, at times with the cooperation of certain businesses, frequently led to gross human rights violations.”¹⁵

- “The mining industry not only benefited from migratory labor and the payment of low wages to black employees; it also failed to give sufficient attention to the health and safety concerns of its employees.”¹⁶
- “Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule. This included involvement in the National Security Management System. Several

businesses, in turn, benefited directly from their involvement in the complex web that constituted the military industry.”¹⁷

“From the beginning, apartheid policies proved to be a means of guaranteeing racial oppression against citizens who were not white.”

THE U.S. ANTI-APARTHEID MOVEMENT

The apartheid government’s innumerable violations of the human rights of black South Africans led to scrutiny and outrage in the U.S.^{18 19} and around the world.²⁰ In the early 1970s, people across the U.S. began to publicly announce their support for the anti-apartheid movement and take meaningful steps against the South African government.²¹ For example, in the late 1970s, President Jimmy Carter spoke out publicly against apartheid and imposed sanctions barring the sale of arms to South Africa.²² In November 1984, the Free South Africa Movement (FSAM) was formed, after U.S. Civil Rights Commission appointee Dr. Mary Frances Berry, D.C. Congressman Walter Fauntroy, and advocacy group TransAfrica’s Executive Director Randall Robinson were arrested at the South African Embassy as they sat in the South African Ambassador’s office demanding the dismantling of apartheid.²³ “Over the

course of 1985 Arthur Ashe, Gloria Steinem, Congressman Ben Cardin, United Mine Workers president Richard Trumka, and Harry Belafonte would count themselves among the more than three thousand people arrested in Washington at the South African embassy.”²⁴ In fact, actions, sit-ins and pickets were held every single day of 1985, rain, snow or sunshine.²⁵ Grassroots efforts sprang up in more than 40 different U.S. cities, and Americans began to lobby higher education institutions, local governments, and elected officials to divest from South Africa.^{26 27}

From 1980 to the early 1990s, many cities and states adopted laws that barred companies with investments in South Africa from receiving public investments, benefits, or contracts.^{28 29 30 31 32} These sanction and divestment laws varied in severity and generally targeted three

different areas where the government did business: banking, pension investments, and public purchasing or procurement.

One example is California, which, with one of the largest economies in the world, had some of the strongest state and local sanctions laws.³³ These efforts gained strength when, during a tight 1986 re-election campaign,³⁴ Republican Governor George Deukmejian moved to back the divestment movement, stating: "Today, California is signaling to the government of South Africa, and indeed to the world itself, that a great and free people are not going to fall silent to racism and brutal oppression."³⁵

By 1991, 28 states, one territory, and 92 cities had imposed sanctions, divestment, or other measures on companies doing business in South Africa,³⁶ ³⁷ ³⁸ costing U.S. corporations substantial sums of money.³⁹ From 1985 on, there was a rapid increase in the number of sanctions against these companies at the city and state level, spurred that year by the refusal of the Reagan administration to institute comprehensive sanctions against the regime at the federal level. Reagan did institute a set of limited sanctions by executive order,⁴⁰ but these left U.S. corporations with interests in South Africa untouched. Reagan later attempted to veto a more serious push for sanctions through the Comprehensive Anti-Apartheid Act of 1986. In a landslide vote, Congress ultimately overrode the president's veto.⁴¹ ⁴²

"By 1991, 28 states, one territory, and 92 cities had imposed sanctions, divestment, or other measures on companies doing business in South Africa[.]"

CITY, COUNTY AND STATE SANCTIONS LAWS PASSED AGAINST SOUTH AFRICA



REAGAN vs. CITIES:
THE 20TH CENTURY BATTLE OVER SOUTH AFRICAN APARTHEID

& LESSONS FOR THE TRUMP ERA

THE REAGAN ADMINISTRATION'S SOUTH AFRICA POLICY

Six weeks after his inauguration, on March 3, 1981, President Ronald Reagan made a nationally televised speech in which he described South Africa as a friendly nation, a country of strategic consequence to the free world, and a wartime ally.⁴³ Reagan later developed an approach that he called “constructive engagement,” which was a substantial departure from former President Jimmy Carter’s human rights-centered policies. Constructive engagement focused on “slow change” instead of sanctions. Reagan opposed sanctions, arguing that enacting economic sanctions was contrary to U.S. interests in South African minerals and would also put black South Africans out of work.⁴⁴ Carter had publicly disavowed apartheid, protested the death of the Black Consciousness activist Steve Biko while he was in police custody, and stopped the sale of arms to the apartheid regime.⁴⁵ Under Reagan, the U.S. restored diplomatic communications with the South African government, enabled the sale of arms and permitted the sale of computers and other technology to the South African police which, at least initially, were used to track anti-apartheid activity.⁴⁶

The Reagan administration put forward various arguments for the policy of “constructive engagement.” The administration argued that engaging with South Africa would help contain the spread of communism.⁴⁷ The administration also argued publically that through constructive engagement, the U.S. could influence “moderate elements”

in the apartheid government and lead the country away from apartheid to a more equitable system.^{48 49} The main “moderate element” in question was P.W. Botha, the Prime Minister of South Africa, with whom Reagan corresponded and met in the U.S. and in Europe on multiple occasions.⁵⁰ Many historians have pointed out that the Reagan Administration did not actually take any actions to alleviate racial oppression and human rights violations in South Africa and that the policy of “constructive engagement” was a ruse to divert public attention from the sanctions and divestment movement in the U.S. In fact, the so-called “moderate” leader Botha oversaw some of the worst violence of the apartheid era and many of the “reforms” he promised were cosmetic at best.⁵²

Reagan did not operate alone. Top members of the Reagan administration worked together to enact the “constructive engagement” policy. For example, Chester Crocker, the Assistant Secretary of State for African Affairs, and architect of constructive engagement,⁵³ was criticized for consistently “forgetting” to invite black anti-apartheid activists to his events in South Africa, and he appeared to primarily meet with apartheid government officials.^{54 55} During Crocker’s tenure:

Minister Botha implemented a new South African constitution that provided for a tricameral parliament

including a controlling body for whites and separate decorative bodies for South Africa's Indians and Coloreds (mixed race). Blacks were excluded altogether from representation. Riots broke out in black townships across the country. Twenty-nine blacks were killed near Johannesburg alone... Within weeks Botha arrested the virtual entirety of South Africa's complement of black trade union leaders. The UN General Assembly deliberated on a nonbinding resolution that condemned the arrests. The

resolution passed overwhelmingly. The United States abstained.⁵⁶

Corporate interests also heavily influenced the Reagan administration's constructive engagement policy. American corporations lobbied the administration both directly,^{57 58 59 60 61 62} and through corporate lobbying groups like ALEC.⁶³ In turn, Reagan's policies prolonged the apartheid status quo⁶⁴ and furthered the profits of U.S. corporations by, among other things, keeping federal sanctions off the table as a policy option.⁶⁵

**Reagan vs. Cities:
Timeline of 20th Century Battle
Over Apartheid South Africa**

1980 Reagan takes office.

1983 Free South Africa Movement begins with arrests inside of S. African Embassy.

1985 Reagan's S. Africa policy "combine[s] resources of WH & Dept of State, Treasury & Commerce to oppose ... imposition of ... legislative sanctions against S. Africa"

1986 Federal Anti-Apartheid Act Passes

1987 Major businesses pull out of S. Africa because of sanctions laws. OMB considers threat to cut off federal funds because of alleged federal preemption. Baltimore successfully defends anti-apartheid law in Maryland Appeals Court.

1988 Nelson Mandela released from prison. Over 130 local & state sanctions laws still in effect.

1989 ALEC launches anti-sanctions program to stop laws at every level of government.

1990 U.S. Justice Dept finds that NY law is "burden on competition" & violates federal grant agreements.

1990 U.S. Justice Dept "burden" analysis incorporated into Common Grant Rule.

1990 New York City passes sanctions law.

**REAGAN vs. CITIES:
THE 20TH CENTURY BATTLE OVER SOUTH AFRICAN APARTHEID**

& LESSONS FOR THE TRUMP ERA

ORGANIZED BUSINESS EFFORTS TO INFLUENCE U.S. SOUTH AFRICA POLICY

The Reagan administration's fierce opposition to local, state, and all but the weakest federal sanctions was directly shaped by pressure from U.S. corporations and corporate advocacy groups, which produced legislative reports. These groups and corporations convened conferences, and performed extensive advocacy work designed to convince political leaders that divestment would have detrimental impacts on both the United States and black South Africans.⁶⁶ American corporations and the South African government had an interest in maintaining the status quo of apartheid, which meant blocking any attempts by local and state governments to institute sanctions against companies invested in South Africa.^{67 68} As Randall Robinson described in his seminal work *Defending the Spirit: A Black Life in America*, U.S. corporations were key partners and enablers of the white supremacist governance of South Africa:

Well before the layered corpus of racially discriminatory legislation was codified by Parliament in 1948 into full-blown apartheid, American corporations had become vital and enthusiastic partners in South Africa's growing machinery of racial tyranny... By 1897 Mobil Oil had arrived to play a critical role in keeping the army supplied with oil, gas, and chemicals. General Electric came in 1899 and, with Honeywell and Allis-Chalmers, would later assist South Africa in building its nuclear industry. By 1940 American general

corporate investments in South Africa had mushroomed to \$50 million. By 1981 it exceeded \$2.6 billion.⁶⁹

a. The Creation of the "Sullivan Principles"

The "Sullivan Principles", a set of voluntary guidelines developed by Baptist minister and General Motors (GM)⁷⁰ board member Leon H. Sullivan, stopped short of divestment, but provided "ethical labor standards" for American companies to continue doing business in apartheid South Africa.⁷¹ The principles included a commitment to abolish separate eating and working spaces for different racial groups and "equal work for equal pay."⁷² Despite Rev. Sullivan's stated intentions however, numerous American businesses used the Sullivan Principles as part of PR efforts to justify continuing business in South Africa by acknowledging the injustices of the apartheid system and articulating support for a means to achieve "gradual change" in South Africa without divesting.⁷³

General Motors, for example, denounced apartheid in a May 25, 1978 letter:⁷⁴

Despite the significant economic downturn in South Africa, our GM South African operation has continued its many progressive programs designed to increase the economic, educational and social well-being of its employes [sic] and many other South African people. We have expanded educational and

personnel development training programs which we are confident will result in the upgrading of increased numbers of blacks and other non-whites. In addition, we are continuing our dialogue with a number of our black South African employes [sic] who are attempting to organize a trade union. Apartheid is a policy which General Motors strongly opposes.

Their actions, however, belied their denunciations. At the same time that GM was publicly condemning apartheid and advocating for businesses to adopt the Sullivan Principles, the company had also secretly reached an agreement with the South African government to deploy South African military personnel and volunteer commandos who would protect GM plants during periods of civil disobedience.⁷⁵ Similarly, while the Ford Motor Company publicly supported the Sullivan Principles, at least one of its employees admitted that the company's espousal of the Sullivan Principles was a public relations move to appease apartheid opponents while allowing companies to continue making profits.⁷⁶

While embracing the Sullivan Principles, U.S. corporations joined calls to crack down on local sanctions measures, for example using the 1986



REAGAN vs. CITIES:
THE 20TH CENTURY BATTLE OVER SOUTH AFRICAN APARTHEID

& LESSONS FOR THE TRUMP ERA

federal anti-apartheid legislation⁷⁷ as a justification for nullifying stronger measures sought through local democratic efforts. To take one of many examples, Johnson & Johnson lobbied President Reagan directly to “remove the unnecessary pressure on the business community from the state and local governments,” urging that “if not removed, the future of the remaining United States businesses in South Africa may be in doubt.”⁷⁸

South African workers also reported that companies' actions diverged from their public ethical criticism of apartheid. Workers at a Colgate-Palmolive Company factory in South Africa, for example, reported intense company opposition to their requests for equal hours, equal pay, and equal benefits.⁷⁹ In the face of other worker protests, some companies, like Anglo American, used violence to break up the protests.⁸⁰ Many companies' actions fell short of the aspirational Sullivan Principles.⁸¹ This led to Reverend Sullivan eventually abandoning the principles and advocating for complete divestment from South Africa.^{82 83}

b. The Key Business Associations Fighting to Prevent or Eliminate Anti-Apartheid Sanctions Laws

Three major business organizations led the effort to undermine, block, and rescind local, state, and federal sanctions against businesses profiting from investments in apartheid South Africa. These were the South Africa Foundation, the Industry Support Unit (ISU), and the American Legislative Exchange Council (ALEC).

The **South Africa Foundation** was created in 1959 by a group of businessmen led by Henry Oppenheimer, the founder and CEO of South African mining industry giant Anglo American,⁸⁴ and is now the second largest mining company in the world.⁸⁵ The group claimed that it sought to alleviate some of the harsher aspects of apartheid and to stave off international actions that might negatively affect South African businesses.⁸⁶

Reagan administration officials described the foundation as a “vehicle to improve communication between Americans and South Africans and also as a moderating influence in the South African milieu.”⁸⁷

On April 10, 1981, John Chettle, Director of North and South America for the South Africa Foundation, wrote to Reagan’s National Security Advisor, Richard V. Allen. He requested a meeting between Allen and visiting officials of the South Africa Foundation, who sought to find “ways in which the influence of the private sector can be used not only to defuse tension in southern Africa as a whole, but also to promote change in South Africa and to lessen the misunderstandings which have clogged U.S-South Africa relations in the past.”^{88 89 90}

However, Anglo American coordinated with the apartheid police state when its business was threatened. For example, in 1987, black Anglo American miners held a strike demanding equal pay for black workers. The strike shut down more than 33 percent of South Africa’s gold and coal mines. Rather than using their own security staff, Anglo American called in the South African police, who broke up the strike by firing rubber bullets at the black Anglo American workers.⁹¹

The **Industry Support Unit (ISU)** was another major business association working to lobby against local and state sanction laws. The ISU was a subsidiary of the International Council for Equality of Opportunity Principles, an organization founded by Sullivan in 1977 to monitor companies that had adopted the Sullivan Principles. It promoted the Principles to local governments as an alternative to local sanctions legislation, which was taking a toll on businesses.^{92 93 94}



In one instance, Sal G. Marzulo, Chairman of the ISU, testified before Congress. He spoke on behalf of the Sullivan signatories, extolling the benefits of maintaining business ties with South Africa:

The growth of black trade unionism, for example, aided by US companies, has provided one of the most fundamental changes to have taken place in South Africa so far. We should be seeking, distinguished legislators, not to stop or impede the flow of this force for change, but to encourage it, and provide incentives for it. Harry Oppenheimer, one of South Africa's leading industrialists and liberal spokesman, has written that punitive acts, however well intentioned, may compromise the successes of the past and be counterproductive.⁹⁵

Marzulo also spoke against sanctions, testifying that he thought sanctions would create a slippery slope: "Enactment of economic sanctions... would set a senseless precedent for subsequent legislation restricting U.S. business operations in any countries whose social policies might be objectionable."⁹⁶

Another major business association that advocated against local and state sanctions laws, as well as federal sanctions was the **American Legislative Exchange Council (ALEC)**, which lobbied elected officials to abandon plans for sanctions at the federal and state levels in 1983 and beyond.^{97 98} ALEC describes itself as a group of state legislators, but it was and is funded by corporations and special interests to advance the corporate lobbying agenda.⁹⁹ As the Center for Media and Democracy has documented,

corporate lobbyists vote on model bills and resolutions through ALEC as equals with state legislators without the press or public present.¹⁰⁰

ALEC's special role in the corporate infrastructure has been to provide "model" bills and resolutions to state legislators and provide them with talking points and arguments to advance the corporate legislative agenda.¹⁰¹ ALEC has also deployed state legislators to preempt or thwart local measures that are contrary to the agenda of the corporations that fund ALEC.¹⁰² Another ALEC tactic has been to speak for state legislators in communications with federal lawmakers to help advance a corporate agenda.^{103 104} ALEC deployed many tactics like these¹⁰⁵ to support the Reagan administration and fight state bills to force public employee pensions to divest from South Africa, telling the press "What's at stake here is a company's right to invest anywhere it wants to invest."¹⁰⁶ ALEC's funders included numerous corporations invested in or benefiting from apartheid in South Africa, such as Eli Lilly and Chevron.^{107 108}

ALEC was an early opponent of divestment efforts, distributing a report against divestment in 1983 to elected officials in Congress, members of the administration, and state and local officials.¹⁰⁹ That report outlined arguments opposing the U.S. sanctions against South Africa, most notably because of U.S. manufacturers' dependence on the country's wealth of minerals.^{110 111 112} In response, U.S. Secretary of Commerce Malcolm Baldrige wrote a letter thanking ALEC: "Your Legislation Update does an excellent job of highlighting the accomplishments of U.S. firms in

promoting real social change in South Africa.”^{113 114} ALEC also took credit for “prominent leaders and groups like the U.S. Department of State, U.S. Department of Agriculture, the U.S. Trade Representative, and the Secretary of Commerce” going “on record against divestiture” since it published its report.¹¹⁵

In addition to its influence on the Reagan administration, ALEC also had substantial influence at the state level, pushing state legislators to oppose the sanctions movement by providing “most of the intellectual firepower” for these efforts.¹¹⁶ For example, in 1983, ALEC hosted a luncheon for state lawmakers, Mobil Oil Corporation and the South Africa Foundation on what it described as the potential harms of sanctions, in a presentation titled “The Economic Impact of Divestment on Your State.”^{117 118} Three years later, ALEC hosted an “issue workshop” in Denver with International Public Affairs Consultants Inc., a PR and lobbying firm that was receiving \$390,000 a year from the South African government, titled “The South African Divestment Movement: 1986 and Beyond.”¹¹⁹ That was also the year that White House staff urged the president to hold an event celebrating state elected officials who had successfully thwarted attempts to divest from South Africa.¹²⁰

ALEC urged lawmakers to oppose an array of state bills including pension fund divestment, bank deposit denial, procurement denial, and regulation of the South African currency, the Krugerrand. These are the kinds of arguments that ALEC made to its predominately

Republican state legislative members:

[S]tate and local government employee pension funds would lose millions of dollars through disinvestment at the expense of the 14 million Americans who have contributed to them and rely upon them. The responsibility for this loss will have to be borne by State Legislators and their constituents. The good that American corporations could do for South Africans would be negated by their having to succumb to the pressures of disinvestment legislation. The loss of South Africa as America’s economic and political ally would have a crucial effect on America’s technological industries and the balance of power in the free world.¹²¹

Even as apartheid teetered on the verge of collapse, ALEC touted state legislative successes in repealing divestment measures, such as Oregon’s 1991 repeal of legislation barring state investment in South Africa.¹²²

As legislative updates from ALEC indicate, the divestment movement threatened the bottom line of U.S. corporations active in South Africa, and risked normalizing sanctions against national companies that were profiting from abusive regimes.¹²³ According to one legislative update, ALEC wrote: “If successful on the South African issue, these activists can be expected to broaden their divestment strategy. And, it will be increasingly difficult to contain because a precedent will have been established for it in state law.”¹²⁴ According to ALEC,

sanctions passed at any level of government, no matter their severity, were a potential threat to business.

Outside of ALEC, ISU, and the South Africa Foundation, other corporate leaders also sought to influence the sanctions debate by sending letters directly to the Reagan administration. While the press touted business' opposition to apartheid, corporations

were lobbying the Reagan administration and state and local governments to put a stop to sanctions and divestment laws.¹²⁵ For example, United Continental Land Corporation,¹²⁶ the Hannaford Company,¹²⁷ the Fluor Corporation^{128 129} and Johnson & Johnson¹³⁰ all wrote to Reagan officials between 1983 and 1988 decrying local sanctions as harmful to business interests.



A demonstration commemorating the June 16, 1976 Soweto uprising.
 Photo by George Cohen
 New York, New York, United States, June 18, 1977

REAGAN vs. CITIES:
 THE 20TH CENTURY BATTLE OVER SOUTH AFRICAN APARTHEID

& LESSONS FOR THE TRUMP ERA

FOUR TACTICS USED BY THE REAGAN ADMINISTRATION TO CRACK DOWN ON STATE & LOCAL SANCTIONS LAWS

The Reagan administration's stated policy was one of "encouraging U.S. firms to remain in South Africa and to work to promote social and economic change in that country."^{131 132} For these reasons, the Reagan administration was staunchly opposed to state and local sanctions laws. The administration's policy is exemplified in this memo excerpt, from Herman Cohen:

The bottom line is that we want American companies to remain South Africa [sic], and the Congress, in its wisdom, has said the same thing, despite sanctions. If the Federal Government takes no action against local authorities, the companies will have to leave South Africa.¹³³

Beneath all of these Reagan administration tactics was a fear that other activist movements might follow the lead of the anti-apartheid activists¹³⁴ and push for sanctions on other human rights issues: "I gather that South Africa is not the only issue with which local authorities are running their own foreign policy. Northern Ireland and Arab-Israeli relations also stimulate similar activities."¹³⁵

Finding themselves in a climate of increasing activism and corporate pressure,¹³⁶ Reagan administration

officials launched efforts to curtail the U.S. sanctions and divestment movement. These efforts took many forms, but four federal government strategies stand out. These were: 1) adopting national policy to deter independent action by cities and states; 2) collaborating with the business lobby and organizing pressure to oppose sanctions; 3) interpreting federal law to justify withholding federal funding from cities and states adopting sanctions and divestment policies; and 4) actively organizing support for litigation to challenge city divestment and sanctions laws.

1) Adopting National Policy to Deter Independent Actions by Congress, Cities and States

On September 7, 1985, Reagan signed National Security Directive Number 187 (Directive 187), entitled "United States Policy Toward South Africa," which stated that suppressing sanctions was a cornerstone of the U.S. policy in South Africa. The directive opened by stating the importance of U.S. commercial interests in South Africa:

The United States and its allies have important political, commercial and strategic interests in South Africa. These are being threatened by widespread

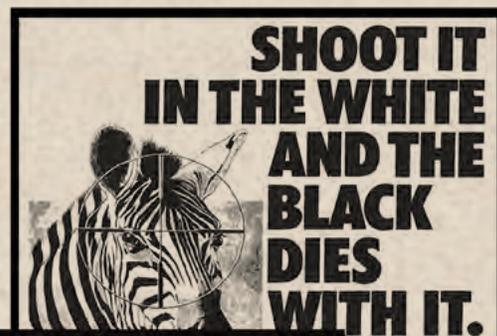
violence and increased tension in South Africa, and continued Soviet challenges to our important interests in that area. At the same time, there has been growing Congressional and public criticism of our policy despite our active engagement and strong record of accomplishment during the past four years.¹³⁷

To reach these goals, the directive laid out a coordinated national strategy, which included "Combin[ing] the resources of the White House and the Departments of State, Treasury and Commerce to oppose or satisfactorily limit the imposition of new legislative sanctions against South Africa..."¹³⁸ In addition, Directive 187 stipulated that the State Department would organize a public affairs strategy to persuade the public that sanctions were counterproductive.¹³⁹ And lastly, Directive 187 stated that part of the Reagan administration's strategy would be to convince the United Nations that economic sanctions were counterproductive.¹⁴⁰

Directive 187 was apparently drafted and adopted with some speed. A memo¹⁴¹ issued on the same date as Directive 187 from Reagan's National Security Advisor, Robert McFarlane,¹⁴² stated that portions of a prior draft had been deleted due to an "immediate and urgent need" to get the directive out.¹⁴³ (An earlier draft,¹⁴⁴ dated

August 7, 1985, offers some glimpse into what the August 5 draft might have contained.)

This haste may have been because Directive 187 was developed — at least partially — in response to Congress' introduction of the first iteration of a federal anti-apartheid bill,¹⁴⁵ ¹⁴⁶ which would have instituted sanctions against the apartheid regime, and which Reagan himself later vetoed.¹⁴⁷ Directive 187, however, was not enough to prevent Congress from enacting legislation. A few days after the directive was released, Reagan changed his stance and issued weak sanctions against South Africa.¹⁴⁸ ¹⁴⁹ A year later, when Reagan vetoed the Comprehensive Anti-Apartheid Act of 1986 (which was still enacted by Congress after years of organizing by the anti-apartheid movement), Reagan reiterated his opposition to state and local sanctions: "Sanctions ... do not add up to policy... Positive steps as well as negative signals are necessary."¹⁵⁰



**FREE ENTERPRISE FREES PEOPLE.
SANCTIONS DON'T.**

Sponsored by the South African Business Community in the interest of expanding and preserving free enterprise.

...talking about is the free
...Africa,
...only color-blind
...concern about the future of
...the most advanced technology
...to the world with the best in the West.
...our future with the rest
...bound by traditional traditions, seek
...non
...between 5% and 6%, the ravages
...will be even more
...sion. Because your right to
...set of free enterprise.
...only defence against
...For our government. Because a
...stand-up.
...Africa doesn't need armions.

**FREE ENTERPRISE FREES PEOPLE.
SANCTIONS DON'T.**

Sponsored by the South African Business Community in the interest of expanding and preserving free enterprise.

2) Collaborating With the Business Lobby to Oppose Sanctions

Internal documents indicate that the Reagan administration wanted to ensure corporations continued to operate in South Africa and believed that if the federal government took no action, the sanctions and divestment movement would undermine the ability and willingness of corporations to do so.¹⁵¹ Acting on this view, the Reagan administration collaborated, supported, and organized events with lobbyists and U.S. corporations that opposed sanctions.

In internal memos, Reagan administration officials coordinated efforts to recognize politicians who blocked local sanctions legislation. For example, Alex Dimitrief, a White House Fellow under the Assistant to the President for Political and Intergovernmental Affairs, Mitchell E. Daniels, Jr., proposed in a memo to Daniels that he help organize participants for an event to thank ALEC members:

The state ALEC office...alerts the office here of pending legislation and distributes whatever talking points ALEC may have...ALEC believes some sort of "reward" or recognition would be useful because these folks are towing the Administration's "line" even though many still feel sold out by the President's South Africa Executive Order.¹⁵² Although I agree that such a meeting could be productive, I believe the action on this one should remain entirely over at State...I would recommend having me bring Doug, Jayne Plank & Lee Hunt, and ALEC's

people together to give them a jump start on pulling the briefing off, help them pull the list together, and let them know that their efforts have your blessing.¹⁵³

In addition to organizing events to thank ALEC members, the Reagan administration helped organize a policy briefing on U.S. South Africa policy. The conference included several high-ranking Reagan administration officials and business leaders who met to discuss the business lobby's concerns. One of the lectures was titled "Role of Private Sector in Reform Process in South Africa." The conference guest list did not include any anti-apartheid activists or presenters.¹⁵⁴

The Reagan administration also spearheaded a domestic and international public relations campaign in cooperation with the United States Corporate Council on South Africa, a group of U.S. CEOs whose companies had major investments in South Africa.¹⁵⁵ The purpose of the collaboration was to advocate for "reform" and stop city and state divestment policies.¹⁵⁶ State Department memos detail the ways in which the corporate officials' advocacy was part of a larger campaign, including conservative groups and public figures who would write op-eds and letters, appear on TV, and speak publicly about the administration's South Africa policy.¹⁵⁷ In addition, as part of this campaign, U.S. corporate leaders pledged to spend millions of dollars on community efforts for South Africans and create more job opportunities for black South Africans.¹⁵⁸

This close strategic relationship between the federal government and American corporations is evident in a 1985 newsletter, in which the State Department celebrated the effectiveness of the Sullivan Principles and heaped praise upon the charitable contributions of American companies doing business in South Africa:

The US supports the Sullivan principles on fair employment, which have had a beneficial impact on black working and living conditions. Signatory US firms are a positive force for change, not only in the workplace but also in black communities where they have spent over \$100 million in the last 7 years on black education and housing. US firms have set the pace among all foreign and local firms in supporting black advancement.¹⁵⁹

The State Department's support for American corporations is also evident from department testimony drafted for a 1983 congressional hearing. This testimony principally argued that the voluntary compliance approach of the Sullivan Principles was more effective¹⁶⁰ than mandated legislative standards.¹⁶¹ In addition the testimony lauded the "impressive accomplishments of the Sullivan signatory companies,"¹⁶² highlighting the \$3.3 million Sullivan signatories had spent on training South African workers, and the \$10.5 million that Sullivan signatories had contributed to community projects for black South Africans, calling these American companies "leaders in community development"¹⁶³ and leaders in the "force

for peaceful, evolutionary change away from apartheid."¹⁶⁴

Active public promotion by the Reagan administration of the "good works" of U.S. corporations in South Africa was conducted in an environment where daily protests, arrests, and actions were occurring in Washington D.C and around the country, amidst well documented reports of massive arrests, torture, and ongoing racial persecution against black South Africans. This public relations campaign appears to have been developed to distort the reality of business complicity in black oppression and human rights violations in South Africa and to help U.S. corporations diffuse the growing sanctions movement in the U.S. Congress, cities and states.

3) Interpreting Federal Law to Justify Withholding Federal Funding from Cities and States Adopting Sanctions and Divestment Policies

The Reagan administration's third major tactic was to stretch the interpretation of federal law in ways that justified withholding federal funding from cities that passed local sanctions and divestment laws. One argument made by Reagan officials after congressional approval of the Comprehensive Anti-Apartheid Act (CAAA) in 1986 was that localities could not adopt sanctions laws because the federal government had essentially "occupied the field" and that city and state laws were therefore preempted by the CAAA. The administration also

argued that localities could not legally become involved in foreign affairs and interstate commerce because these areas were the sole dominion of the federal government. Finally, the administration successfully argued that federal statutes authorizing grant funding to states and cities prohibited the application of anti-apartheid sanctions and divestment laws to all contracts that included federal funds, because those laws could be a “burden” on competition and could impact contract prices.

Reagan officials attempted to apply this legal analysis through the Office of Management and Budget (OMB) across federal agencies to almost every state and city. The larger campaign to convince the OMB to issue this policy guidance failed. But the Reagan White House, with the support of the Department of Justice, Office of Legal Counsel (OLC), and the Department of Transportation, succeeded in curtailing New York City’s local sanctions law—Local Law 19. The OLC opinion that resulted had long-lasting effects on the federal government’s authority over grants to cities and states.

“Reagan officials attempted to apply this legal analysis through the Office of Management and Budget (OMB) across federal agencies to almost every state and city.”

a. Threatening to Withhold Funds from New York City Based on Alleged Violations of Federal Competitive Bidding Law

In 1984, after sustained grassroots organizing by many different organizations in New York City, the City Council passed Local Law 19, which imposed sanctions on businesses with financial interests in South Africa. It allowed a city board to withhold contracts from companies doing business in or using material from South Africa, and to instead offer the contract to a company that was not doing so, as long as that company’s proposal was within 5 percent of the original lowest bid.¹⁶⁵

The first city contract negotiation to fall within the purview of Local Law 19 was for \$8 million worth of copy machines. Kodak had the lowest bid. However, the company was initially rejected for the contract award by a New York City board because Kodak sold products to the South African military.¹⁶⁶ Subsequently, the U.S. Department of Transportation threatened to pull funding from federally funded transportation projects in New York City until Local Law 19 was reversed.^{167 168}

As one senior administration official noted:

The Justice Department has concluded that the Transportation Department must withhold federal highway construction funds from New York City to the extent that the City’s application of its local anti-apartheid

law is inconsistent with competitive bidding requirements of federal statute. This principle may have much broader application to other federally-funded programs.¹⁶⁹

The Justice Department and the DOT's reasoning was that the law did not conform to the federal competitive bidding rules, which require "full and open competition." The New York law could increase the cost of New York City contracts, thereby putting an "undue burden" on companies bidding on city contracts. In addition to arguing that Local Law 19 would increase the cost of work to be done, the DOT also argued that the local law conflicted with federal laws on apartheid.^{170 171 172}

New York City Mayor Edward Koch protested in a letter to President Reagan and through calls to DOT Secretary Elizabeth Dole.^{173 174} In addition, New York City's Corporation Counsel, Frederick A.O. Schwarz Jr., promised that the city would file suit against the federal government if the DOT pulled federal funding.¹⁷⁵ The DOT, however, persisted in threatening to take away New York's federal funding.¹⁷⁶

The DOT stance was backed by a 1986 legal opinion from the Office of Legal Counsel (OLC), asserting that Local Law 19 violated a provision of the Federal Highways Act (23 U.S.C. § 112).¹⁷⁷ On that basis, the OLC advised the Department of Transportation that New York was ineligible to receive transportation funding if Local Law 19 was applied to federally funded contracts.

The essential feature of the 1986 OLC opinion was an entirely new interpretation of the federal rules of competition and of 23 U.S.C. § 112, a subsection of the Federal Aid Highways Act¹⁷⁸ that was later codified as part of the highway statutes. Under this new definition, created by the OLC opinion but largely without legal basis,¹⁷⁹ protecting bidding pools to achieve the lowest price became the paramount factor in determining whether a state or local competitive bidding condition like Local Law 19, complied with the requirements of the federal "full and open competition" rule.^{180 181}

Over a five-year period, \$500 million in federal funding was on the line.¹⁸² Ultimately, Mayor Koch and the New York City Council revised Local Law 19 to meet the requirements set by the federal government and "exempted federal transportation projects from [Local Law 19's] purview."¹⁸³ The City of New York never filed suit against the DOT.

Although the Reagan administration's OLC opinion very likely discouraged some local sanctions laws, states and localities persisted in the face of this federal threat, adopting or failing to repeal more than 120 local sanctions and divestment measures in all.¹⁸⁴

"The City of New York never filed suit against the DOT."

The long-term consequences of the face-off between local and federal authorities had a lasting impact. The published 1986 OLC opinion was used to expand the “full and open competition” analysis from the Highways Statute to all federal grant programs.¹⁸⁵

b. The Comprehensive Anti-Apartheid Act of 1986 and Preemption

By 1986, the Free South Africa Movement and members of Congress had rallied support for sanctions legislation against South Africa, passing the Comprehensive Anti-Apartheid Act of 1986 (CAAA), and then overturning President Reagan’s veto. Nevertheless, sanctions passed at the state and local level were more stringent than those in the CAAA, and a debate took place in Congress during the passage of the bill regarding whether federal law could or should “preempt” local laws.¹⁸⁶ The legislative record clearly indicates that Congress had no intention of preempting state and local laws.^{187 188}

For example, Congress explicitly rejected an amendment proposed by Senator William Roth in 1985 that would have added preemption language.^{189 190} When the U.S. House of Representatives passed the Senate version of the anti-apartheid bill on September 12, 1986, the House simultaneously adopted House Resolution 549, expressing the intent of the House that there be no preemption in the Act.¹⁹¹

A prominent constitutional scholar at Harvard Law School, Professor Laurence

Tribe, also analyzed whether the CAAA would preempt local and state measures. He concluded that nothing in the federal legislation placed a ceiling on additional steps that either private or public entities might take on apartheid, and that the legal standard for establishing preemption requires “clear evidence that Congress in fact intended such unusual results.” There was no such proof in the record.¹⁹²

While the legislative history of the 1986 Anti-Apartheid Act clearly stated that the federal law did not preempt local and state sanctions laws, a revised version of a Senate amendment proposed by New York Senator Al D’Amato later became Section 606 of the Act:

- (1) No reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and (2) no other penalty may be imposed by the Federal Government, by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of enactment of this Act.

Upon introducing the amendment, which he co-sponsored with Senator D’Amato, Senator Daniel Patrick Moynihan stated that “This amendment will allow localities to enforce anti-apartheid bidding standards that differ from those set forth in the federal statutes and regulations, without the loss of federal funds, if they agree to pay for any additional costs that result.”¹⁹³

Thus, Section 606 was intended to reinforce, rather than preempt, state and local laws. However, the Reagan State Department and the National Security Council argued that Section 606 of the 1986 CAAA preempted local and state sanctions and divestment laws because only the federal government, and not state and local governments, could act in areas of foreign affairs and interstate commerce.¹⁹⁴

¹⁹⁵ Later, a ruling by the Maryland Court of Appeals on a case concerning a Baltimore divestment law¹⁹⁶ discredited these preemption arguments.¹⁹⁷ In 1987, however, the Reagan administration used this legal theory to try to crack down on local divestment and sanctions laws through federal agencies and federal grant processes.

c. Attempts to Withhold City and State Grant Funding Through the Office of Management and Budget

To successfully deploy this strategy, Reagan officials at the U.S. State Department and the National Security Council needed to transform their preemption analysis into policy. They pressured top officials at the Office of Management and Budget (OMB),¹⁹⁸ to curtail state and local sanctions laws by issuing guidelines making it clear that local sanctions provisions were incompatible with the receipt of federal highway construction funds and other grants.¹⁹⁹

In a 1987 memorandum for National Security Advisor Frank Carlucci, the Special Assistant to the President and Senior Director for Africa on the U.S.

National Security Council, Herman Cohen, asked Carlucci for his assistance in getting the OMB to issue a policy letter on behalf of the Reagan administration, threatening to pull federal funding from state and local governments. He cited the 1986 DOJ opinion authored by Charles Cooper as the rationale for the illegality of state and local procurement laws.²⁰⁰

To conform state/local practices to the supervening requirements of federal law, the next step is for the Office of Management and Budget to send a circular to recipients of federal funding and state/local procurement authorities to notify them that application of local anti-apartheid measures may disqualify them for continued federal funding.²⁰¹

Cohen further stated that he and his colleagues were having trouble convincing the OMB to act:

The State Department is now discussing this with OMB... At meetings I have attended on this subject, I note OMB agreement in principle, but a certain bureaucratic reluctance to demonstrate any zeal. I feel the matter is becoming urgent because a growing number of companies are beginning to doubt the wisdom of remaining in South Africa. This is just one more headache on top of all the others, including stockholder and consumer protests. I believe, therefore, that you should communicate with OMB Director Miller to let him know that the issue has a high foreign policy priority in addition to its legal aspects.²⁰²

Carlucci complied and subsequently wrote a letter to OMB director James C. Miller, asking for help in curtailing “[d]iscriminatory actions” by state and local procurement authorities because they “substantially undermine” the White House’s policy.²⁰³ At the same time, at least one corporation also wrote directly to the OMB requesting that it curtail sanctions and divestment laws.²⁰⁴

Reagan officials do not appear to have succeeded in convincing the OMB to issue new policy guidance with respect to state and local sanctions laws. With respect to New York City, however, the Reagan administration achieved its goal.

4) Actively Organizing Support for Litigation to Challenge City Divestment and Sanctions Laws

a. Introduction

The Reagan administration also directly supported litigation designed to stop state and local sanction measures in the courts. Members of the administration contemplated broad litigation strategies. For example, some top Reagan administration officials considered encouraging private plaintiffs to bring lawsuits, after which the federal government would file amicus briefs on the plaintiffs’ behalf.²⁰⁵ The White House also debated legally challenging local and state laws touching on other human rights issues, such as North Ireland, where pension fund-held corporations were being investigated for their treatment of workers.^{206 207}

The central litigation strategy, however, was the extensive effort by the U.S. State Department and National Security Council to support litigation surrounding a Baltimore City divestment ordinance in 1987.^{208 209}

b. The Baltimore Divestment Ordinance

In 1986, the City of Baltimore adopted a strong anti-apartheid divestment ordinance, which was later upheld by the Court of Appeals of Maryland. This marked the first time a state’s highest appellate court upheld the constitutionality of a municipal pension divestment ordinance related to South Africa.²¹⁰

In 1985, before the Baltimore divestment ordinance had been passed, the Baltimore City Council requested that the municipal pension boards sell their investments in companies doing business in South Africa.²¹¹ The municipal pension boards refused.²¹² Subsequently, Baltimore City Councilman Kweisi Mfume proposed a divestment measure, which ultimately became Ordinance Number 765.²¹³ It required the Baltimore city pension funds to divest from any companies doing business with South Africa within two years.²¹⁴ At the time, the ordinance covered \$1.1 billion in pension funds.²¹⁵

Supporters of the ordinance argued that divestment could be accomplished without loss to the pension funds.²¹⁶ This was an especially controversial issue, given that Baltimore city pension fund

investments had an extraordinarily high rate of return (20.7 percent annually between 1979 and March of 1986).²¹⁷ Opponents of the ordinance argued for slower divestment or less “radical” measures.

Despite opposition, the ordinance passed in July 1986, and went into effect on January 1, 1987. The ordinance gave the city two years to divest from companies doing business with South Africa.²¹⁸ Trustees of Baltimore’s pension funds and pension fund beneficiaries filed a suit to challenge the constitutionality of the Baltimore ordinance on December 30, 1987.²¹⁹ This was the first court challenge of a divestment law in the country.²²⁰

The Reagan administration tracked the Baltimore litigation closely.^{221 222} While the case was moving through the Maryland courts, Reagan administration officials who wanted to intervene in the lawsuit attempted to mobilize the Justice Department to file an amicus brief in the case.

Secretary of State George Shultz wrote to Attorney General Edwin Meese to advocate that the Justice Department become involved in litigation.²²³ Shultz told Meese that the National Security Council (NSC) had decided that such intervention would be legal: “I understand that all of the participants [in the meeting] agreed that such intervention is legally justifiable and would be supportive of administration

policy.”²²⁴ He also reassured Meese of the political optics of suing over sanctions laws and impressed upon Meese his view of the consequences of failing to take legal action. “If these [state and local sanctions] measures remain unchallenged, state and local authorities will be able to erode the federal government’s constitutional authority and ability to conduct a coherent foreign policy.”²²⁵

Other Reagan officials were also concerned about the Justice Department’s lack of involvement. Herman J. Cohen, a member of the National Security Council (NSC) under President Reagan, was perturbed that neither the NSC nor the U.S. State Department were invited to an internal Justice Department discussion on the issue of federalism and local sanctions laws.²²⁶ Both the NSC^{227 228} and the U.S. State Department^{229 230} were concerned that the conclusions reached by the Justice Department would be at odds with the Reagan administration’s foreign policy and would set an inopportune precedent. In a subsequent memo, Cohen wrote, “It looks to me like Cooper [at the Justice Department], who wants to do nothing, has been victorious. Last week, (IBM, Mobil, and 3M) came in to say that San Francisco’s action is now killing them.”^{231 232} Top-level strategy groups were subsequently organized for administration officials.^{233 234 235 236} Eventually, even officials within the DOJ itself attempted to convince the Attorney General to intervene.²³⁷

Business groups also directly lobbied the Reagan administration, urging Reagan officials to intervene in the Baltimore case against the City of Baltimore. In a U.S. State Department memo, Abe Sofaer, State Department legal advisor, remarked: "As you know, there are many in the business and legal community who are urging the Federal Government to file an amicus brief in this case."²³⁸ The memo then went on to cite a recent meeting, where members of the "Rule of Law Committee," which appears to have been part of the business lobby group the National Foreign Trade Council,²³⁹ lobbied the Reagan Justice Department directly, urging officials to intervene in the Baltimore case.

While the Justice Department did not ultimately authorize the submittal of a formal amicus brief in the Baltimore litigation due to certain political aspects of the case^{240 241} and because of the presiding judge,²⁴² the U.S. State Department²⁴³²⁴⁴ and National Security Council²⁴⁵ submitted supplemental documentation in direct support of the divestment law challengers.

After a lengthy trial, the City of Baltimore prevailed at the lower court level and then won again after the litigants appealed the case to the Maryland Court of Appeals. In its successful fight against the business-backed appeal in the Maryland Court of Appeals, the City of Baltimore organized dozens of local and national organizations to file powerful amicus briefs, including the National Lawyer's Committee,²⁴⁶ the American Civil Liberties Union, the National Conference of Black Lawyers, the Archdiocese of Baltimore, and the Johns Hopkins University Coalition for a Free South Africa.²⁴⁷ After losing at the Maryland Court of Appeal, the business-backed litigants appealed to the U.S. Supreme Court, which refused to grant certiorari. Baltimore's divestment ordinance stood as a victory for the anti-apartheid movement and the power of a city to stand up to the might of the federal government.



CONCLUSION

By 1991, 28 states, 1 territory, and 92 cities had imposed sanctions, divestment, or other measures on companies doing business in South Africa, costing U.S. corporations substantial sums — in order to stand up for the human rights of black South Africans repressed by a white supremacist regime.

The Reagan administration continued to oppose these local efforts, as it had in the case of the New York City law, by implementing measures to undercut cities and states including the threat to withdraw federal funding for many local initiatives.

Notwithstanding the Reagan administration's efforts, sustained opposition to the apartheid system caused its downfall in 1991. The sanctions and divestment movement is credited for playing a critical role in apartheid's demise.

Although the Reagan administration ultimately lost its battle to curtail anti-apartheid sanctions and divestment, the tools it wielded in that battle endure. Specifically, the Justice Department's legal opinion from that era resulted in significant, long-term changes to the interpretation and application of laws defining federal authority to withhold funding from cities and states for their procurement policies.

In 2017, President Donald Trump's advisors have revisited the Reagan playbook to advance his bid to engage in mass deportations of undocumented

immigrants working in the U.S. A few days after assuming office, Trump signed Executive Order 13768, "Enhancing Public Safety in the Interior of the United States." The Order requires state and local officials to share information about individuals' immigration status with federal immigration officials. Trump threatened to withhold federal funding from cities that provide "sanctuary" to undocumented immigrants and do not abide by the Order.²⁴⁸ Although San Francisco²⁴⁹ and several other U.S. cities brought legal challenges to the order, the Trump administration continues to look for ways to implement their policies. For example, after a federal judge blocked a key portion of Trump's Executive Order that restricts the rights of immigrants,²⁵⁰ Attorney General Jeff Sessions issued a statement claiming that withholding funds is "squarely within the powers of the president," and promising to continue litigation.²⁵¹

Trump is using similar tactics to those used by Reagan, including a public relations strategy aimed at vilifying opponents, cutting off funding to cities and states, and taking cities to court for challenging his Executive Orders. In the Trump era, as cities and states around the country prepare to challenge the White House, they can look to the example of the anti-apartheid movement, when grassroots groups and activists joined together with cities and states to fight the federal government's threats and together helped the movement of black South Africans triumph over a repressive regime.

APPENDIX I

Clear copies of documents have been provided where possible. In some cases, the originals themselves are illegible.

The following items are partial documents, either because the original was redacted, or because the authors selected a specific section of the larger document for relevance: items 24, 25, 26, 30, 59, 60, and 61.

CONTRACTS LOST DUE TO STATE & LOCAL ANTI-APARTHEID STATUTES

<u>Firm</u>	<u>Contract Lost</u>	<u>Approx. \$ Value</u>
<u>FREEPORT, NEW YORK</u>		
Major Bank	Underwriting	n/a
<u>LOS ANGELES</u>		
JH	Computer/Office Supplies	n/a
Allied Signal	Waste Management Project	\$250 million
Applied Electro Mech.	Electronic Equipment	n/a
Arthur Young & Co.	General Management	n/a
Atlantic Research Corp	Cable Television	n/a
Ashland Oil	Sewage Treatment	\$ 12 million
Bank of America	Bond Underwriting	n/a
Deloitte Haskins	General Management	n/a
Exide Corp.	Automotive Parts & Accessories	n/a
First Interstate Bank	Bond Underwriting	n/a
Fluor	Construction Management	\$300 million
General Electric	Construction Supplies	n/a
General Electric	Bond Underwriting	n/a
Goodyear Tire & Rubber	Tires, Tubes	n/a
W.R. Grace	Library Materials	n/a
IBM Corporation	Computer Equipment	\$5-25 million
Legi-Slate	Information Systems	n/a
Mine Safety Appliance	Safety Equipment	n/a
Motorola	Communication Equipment	n/a
National Chemsearch	Misc.	n/a
Nordam	Automotive Parts & Accessories	n/a
Paul-Munroe Hydraulics	Vehicle Repair	n/a
Peat Marwick Mitchell	Actuarial Services	n/a
Price Waterhouse	Telecommunication Audit	\$ 1 million
Rexnord	Building & Plant	n/a
Schindler Elevator	Facility Repair/Maintenance	n/a
Sears, Roebuck	Misc.	n/a
Soloman Brothers	Underwriting	n/a
Tillipman Elevator	Facility Repair, Maintenance	n/a
Westinghouse Elec Sup.	Electric Wire & Distrib.	n/a
Wm Mercer-Meidinger	Actuarial Services	n/a
Xerox	Typewriters/Copiers	\$ 8 million
Chemical Co.	Chemical Contract	\$ 3 million
Construction Co.	Did not bid on contract	\$ 50 million
Construction Co.	Canceled firm SA contract	over \$100 million

-2-

NEW YORK CITYXerox
Major Bank
Major BankTypewriters
Pension Fund Contract
Underwriting\$ 8 million
Millions over time
Millions over timeOAKLAND

Bank of America

Bank Services

\$100 million

PHILADELPHIA

IBM

Computer Equipment

\$5-25 million

PITTSBURGHMine Safety Appliance
Xerox
Major BankSafety Equipment
Copiers
Underwritingn/a
n/a
n/aRICHMOND, VIRGINIA

Major Bank

Underwriting

n/a

SAN FRANCISCOCombustion Engineering
W.R. Grace
Honeywell
IBM Corporation
Westinghouse
(Unnamed Chemical Firm)Construction
Library Materials
Air Conditioners
Computer Equipment
Electric Wire & Distrib.
Chemical Contract\$300 million
n/a
n/a
\$5-25 million
n/a
\$500,000STATE OF CALIFORNIAIBM
Major BankComputer Equipment
Underwriting\$5-25 million
n/aSTATE OF NEW JERSEY

IBM

Computer Equipment

\$5-25 million

UNITED STATES DEPARTMENT OF JUSTICE (2)

<u>STATE OF NEW YORK</u> IBM	Computer Equipment	\$5-25 million
---------------------------------	--------------------	----------------

<u>DISTRICT OF COLUMBIA</u> IBM Corporation	Computer Equipment	\$5-25 million
--	--------------------	----------------

<u>WESTCHESTER COUNTY, NEW YORK</u> Major Bank	Underwriting	n/a
---	--------------	-----

Other Examples:

- o An engineering firm lost \$5 Million in contracts in Los Angeles, San Francisco, Philadelphia, and Houston.
- o An electronic firm lost \$1 million in 1986 and expects more losses in 1987 due to local anti-apartheid statutes.
- o An automotive firm expects to lose \$125 million in revenues as a result of state/city anti-apartheid statutes.
- o A major chemical manufacturer lost \$1 million worth of contracts with New York City, San Francisco, Houston, and New York State.
- o An office materials and equipment manufacturer lost hundreds of thousands of dollars in state and local contracts in New York, Los Angeles, and San Francisco.
- o Major New York bank prohibited from selling commercial paper to major pension funds, thus raising the price of its borrowing.

Hanson, Pres.

Russell A. Hodge, Vice Pres.

M. J. Short, Sec. Treas.

UNITED CONTINENTAL LAND CORP.

802 Omar Drive

Escondido, Calif. 92025

(714) 745-7493

8113281

March 23, 1981

Edwin Meese 3rd.
 Counselor to the President
 The White House

021881

Dear Mr. Meese;

In view of the so-called backlash to the President's statements on South Africa perhaps it would be relevant to report a few impressions that I as a totally neutral observer and visitor to S. A. gained for myself.

Yes, they do have apartheid and how could it be otherwise in a nation with 4.5 million Whites and 20 million Blacks but I observed concrete evidence of the herculean effort the Government is making towards improving conditions for the Blacks.

We visited and spent a day in one of the "Homelands" which are areas set aside for individual tribes with the ultimate goal being independence and self government. Three of these areas have already achieved independence. Only one tribe can live there which is the way they prefer it. The Blacks do not intermarry and a member of another tribe cannot even get permission to take up residence in another tribe's Homeland and nor are Whites permitted there as residents. The So. African government builds houses, schools and hospitals for them within the Homelands and built factories there so as to create jobs. School construction is currently at the rate of one start per day. We visited homes of Blacks who had succeeded as businessmen within a Homeland and reached "millionaire status" along with 17 others.

A delicate surgical operation that would cost a White citizen say \$ 20,000. would be free for any Black. The Blacks do not pay taxes within the Homeland.

There is no violence between Whites and Black but the Black tribes are in constant skirmishes and kill thousands. Amin reputedly killed 300,000 Blacks belonging to tribes other than his own, a clear example of tribal rivalry. When several tribes performed tribal dances before us they were accompanied by armed guards to prevent violence.

I used to rate the Blacks right out of the Bush at 8 year old mentality. Since meeting with and dealing with Blacks in So. Africa I would change that to a Black fresh out of the Bush to have the mentality of

to five year olds. We met with educated Black Leaders born, raised and educated in So. Africa with a high level of intelligence. They spoke eloquently and expressed patience and declared that progress was being made but slowly which is easily understood considering the tremendous odds.

Government officials proved by export figures that although Mr. Carter had imposed sanctions against their country South Africa was still shipping minerals and ore on schedule, as always, to the United States.

It is sort of like the El Salvador issue; we can sit back and wait until Soviet armed forces are at the Mexican border or we can do something about it today. Unless the Western powers assist South Africa the Soviets will have South Africa. They would love to have the minerals and would like to be able to control the flow of oil past the Cape en route to Western Europe and America.

That flow is currently around 18 million barrels per day. So. Africa has a total of 3 submarines at the present time but have some of the finest harbor facilities in the world.

One Minister with whom I spoke at a party stated that if Carter had been re-elected the Russians would have been at the Cape within one year. I asked about Chromite a resource of which So. Africa has 80%.

Quoted to me was the statement of a Chairman of the Board of one of our largest corporations to the effect that without Chrome we cannot produce autos, jet engines and many other items nor can we can food products. Yes, we do need friends like South Africans and yes, they do need us although some of the Europeans are making great inroads there and in many instances acting as Brokers for needed U.S. supplies.

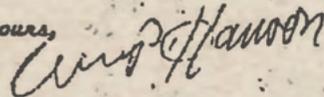
Although South Africa has not found oil as yet they will soon be within 25% of being energy self sufficient thanks to a process obtained from the United States and improved upon which produces natural gas from coal with a resultant "residue" (coke) which is used to produce electricity and other energy.

Finally, let me add that if trade is resumed with So. Africa they pay for the goods (or can pay) with gold bullion not "rubber checks" as so many other of our trading partners are using. At 71 years of age I am probably too old or I would put in my application for being the first Ambassador to So. Africa.

I sincerely hope that this information may help in a small way to paint a true picture and will add that every single person that we come in contact with in the community here is overwhelmingly in favor of all that the President is trying to do. It is indeed a new day for our Country.

Most sincerely yours,

William P. Hanson



wph:fc

13 APR 1981



SOUTH AFRICA FOUNDATION

SUITE 620 ■ 1225 19TH STREET, N.W. ■ WASHINGTON, D.C. 20036

TELEPHONE 223-5486

April 10, 1981

The Honorable Richard V. Allen
Assistant to the President for
National Security Affairs
The White House
Washington, D.C. 20006

Dear Dick:

In view of the current attention being given to U.S. - South Africa relations, I thought it important for you to know that Mr. Gavin Relly and Mr. Peter Sorour, respectively President and Director General of the South Africa Foundation, will be visiting Washington at the end of the month.

They will be here on Thursday and Friday, April 30 and May 1, 1981 and have expressed the wish to meet with you at your convenience on either day.

Alternatively should it not be possible to meet with them on either day, they have asked me to inquire whether you might wish to join them for a small and private dinner at my home on either evening.

Chester Crocker has told me that he has sought a meeting for them with the Secretary of State, but I am particularly anxious that they should meet with you during their visit.

Mr. Gavin Relly is the new President of the South Africa Foundation, and is also Deputy Chairman of Anglo-American, which is not only the largest mining corporation in the world, but also the largest single foreign corporate investor in the United States. He is heir apparent to Mr. Harry Oppenheimer, and will probably become Chairman of Anglo-American within the next few years. As such, he commands more influence than probably any other member of the private sector in South Africa, which is particularly significant at a time when the Prime Minister has recognized the vital role of the private sector in developing his own strategy.

President: W. F. de la Harpe Beck

The Council: L. G. Abraham H. T. Andrews F. H. Y. Bamford D. G. A. Baumeyer C. S. Barlow E. G. Blohm C. L. F. Borckenhegen
Nicholas Cayzer, Bt Dr. W. B. Coetzer Dr. F. J. C. Cronje Adv. D. P. de Villiers Dr. A. J. du Toit L. Egeland Dr. P. G. Eggstein
ello H. Goldberg P. Grubbelaar F. M. Harris F. M. Hirsch S. A. Hofmeyr C. J. F. Human H. W. Johnston (Ait) H. E. Joosub
Itshoff Mrs. M. Lessing A. Louw I. G. MacPherson Gideon Rose C. J. Saunders I. Solomon Dr. A. D. Wassenaar

Deputy Presidents: A. A. Lloyd G. W. H. Relly J. A. Stegmann

Vice-Presidents

Director General: J. de L. Sorour

President: Major-General Sir Francis de Guingand,
K.B.E., C.B., D.S.O.

Hon. Presidents: Dr. P. Etienne Rousseau
Basil E. Herov

The Honorable Richard V. Allen
April 10, 1981
Page two

Peter Sorour has been Director General of the Foundation for eight years, and is widely recognized for his influence in South Africa. During a recent visit to Australia and New Zealand, he was received by the Prime Ministers of both of those countries. He travels regularly to black Africa, and during a recent visit to Zambia conferred with the President of Zambia, Kenneth Kaunda. Both he and Relly confer regularly with the Prime Minister, and both have an influence which may not be equalled within the private sector in South Africa.

The South Africa Foundation, as you may know, is probably the most influential single private sector organization in South Africa, and its list of 350 Trustees contains not only the most prominent business leaders of the country, but also the most distinguished people, of all races, from the academic, religious, professional and other non-government sectors of the population. It has consistently used its influence in the direction of greater freedom and liberalization within the South African structure, and has stood unequivocally for the view that merit and not race should be the most important consideration.

The specific purpose of their visit is to seek ways in which the influence of the private sector can be used not only to defuse tension in southern Africa as a whole, but also to promote change in South Africa, and to lessen the misunderstandings which have clogged U.S.-South Africa relations in the past. We think that the new Administration provides us with a unique opportunity. Not only is the South African government increasingly dependent on the conviction with which the private sector carries out its wishes, but the private sector itself has lost the reserve which it used to have making its own views known and supporting more liberal legislation publicly.

There is a further matter of some delicacy where we may play a constructive role. As you no doubt know, there have been pressures inside South Africa, which the government has hitherto resisted, to make use of South Africa's mineral strength to forward its political aims. The private sector, including specifically the South Africa Foundation and Anglo-American, has used its influence against such a course. It would be helpful if we could be strengthened in that policy by some assurance that the vital

MEMORANDUM

NATIONAL SECURITY COUNCIL

2066 *WJH*

ACTION

April 17, 1981

MEMORANDUM FOR RICHARD V. ALLEN

FROM: FRED WETTERING *FW*

SUBJECT: Proposed Meeting with South African Business Leaders

John Chettle of the South Africa Foundation has in a letter to you (Tab B) proposed that you meet with the two top officials of the South Africa Foundation who will be in town on April 30 and May 1. The two officials are Gavin Relly, President of the SAF, and Peter Sorour, Director General of the SAF. Chettle notes that Relly is also Deputy Chairman of Anglo-American and heir-apparent to Harry Oppenheimer.

I recommend that if you can fit them in your schedule you meet with them. I believe these two gentlemen well represent the moderate forces for political change away from apartheid. Their thoughts on the April 29 South Africa elections and how the National Party and P.W. Botha can be encouraged and pushed to move faster in efforts to eliminate both petty and grand apartheid would be very interesting. I have drafted a response for you (Tab A) in which you agree to a brief meeting with them.

If you concur I would welcome the opportunity to meet these visitors and/or sit in on the meeting.

RECOMMENDATION: That you sign the attached letter to John Chettle agreeing to meet with Messrs. Relly and Sorour.

Approve Disapprove

*RVA
4/20/81*

Attachments

NSC/S PROFILZ

UNCLASSIFIED

ID 8102066

RECEIVED 16 APR 81 13

TO ALLEN

FROM CHETTLE, JOHN H

DOCDATE 10 APR 81

023523

KEYWORDS: SOUTH AFRICA

AA

RELLY, GAVIN

SOROUR, PETER

SUBJECT: PRES & DIRECTOR GEN OF SOUTH AFRICAN FOUNDATION REQUEST MTG W/ ALLEN
APR 30 - MAY 1

ACTION: PREPARE REPLY FOR ALLEN SIG DUE: 23 APR 81 STATUS S FILES

FOR ACTION

FOR COMMENT

FOR INFO

WETTERING

DERUS

COMMENTS

REF#

LOG

NSCIFID

(C /)

ACTION OFFICER (S)	ASSIGNED	ACTION REQUIRED	DUE	COPIES TO
<i>Allen</i>	<i>X 4/17</i>	<i>for signature</i>		
	<i>C 4/22</i>	<i>RVA repl letter to Chettle</i>		<i>Wet</i>

DISPATCH *done done 4/22 10:00pm* WATCH FILE *Wet* (c/dom)

2066.



U.S. National Archives & Records Administration

Current Status Details for CTRH RECID: 023523 MAIN SUBCODE: CO143

Current Status	None
User Name	dbarrie
Status Date	2010-09-01
Case Number	
Notes	Transferred to CO141

Review Status History

No.	Status	Date	User	Case Number	Notes
1	None	2010-09-01	dbarrie		Transferred to CO141

5b

2066
023523
4900
4800
CO 143

MG

THE WHITE HOUSE
WASHINGTON
April 20, 1981

FG 006-12
Relly, Gavin
Sorour, Peter

Dear John:

Thank you for your letter of April 10th, proposing that I meet with your two senior visitors. Assuming that a mutually agreeable time can be found, I would be delighted to receive Messrs. Relly and Sorour and hear their views on matters of mutual interest.

I fully appreciate the value of the South Africa Foundation and its members, both as a vehicle to improve communication between Americans and South Africans and also as a moderating influence in the South African milieu.

You should contact Ms. Irene Derus to establish a mutually convenient time for our meeting with Messrs. Relly and Sorour. It will be necessary to have a "compact meeting," meaning that not much time will be available.

Sincerely,



Richard V. Allen
Assistant to the President
for National Security Affairs

X

Mr. John H. Chettle
Director, North and South America
X South Africa Foundation
1225 19th Street, N.W.
Washington, D.C. 20036

DECLASSIFIED / KE R M M

NLS 195-029/5 #5430

2744 6a

CRJ NARA, DATE 4/18/06



Form. I. 13/2
Ref.

Republiek van Suid-Afrika • Republic of South Africa

Kantoor van die Eerste Minister
Prime Minister's Office

Privaatsek X83
Private Secy

Pretoria

0001

12 May 1981

Dear Mr. President

I have noted with much interest your remarks on recent occasions concerning South Africa and Southern Africa in general. What you have said leads me to believe that the moment is now opportune for our two governments to identify, and to assess how best we could promote our mutual interests, especially in the Southern African region, and move towards improved relations in those areas where avoidable constraints have been introduced in recent years.

The foundations on which better cooperation between our two countries could be built are long-standing. We have similar origins and a parallel history of development. We share the same value systems and we subscribe to the democratic tradition. We have in this century several times been allies in war to defend the values which we cherish.

Today we are confronted by new dangers of immense dimensions. I fully share your perception of the global Soviet threat to the survival of the free world, and the Soviet drive for world domination. The firm stand you have taken as leader of the Western alliance can only have been welcomed by all countries threatened by Russian encroachment. We in South Africa certainly regard it as timeous, since we are convinced that the expansionist moves of the Soviet Union have until now to a considerable degree been predicated upon the conviction that the West lacked the resolve, if not the means, to resist those acts.

While the commitments of the United States are world-wide, South Africa's concerns are strongly centred on the threat to Africa in general and the Southern African region in particular. Accordingly, of especial importance to South Africa are your views on vital Western interests in this continent. The Cuban presence in Angola and Soviet influence in other parts of the Southern African region are well known.

/2 There

There is no doubt that Southern Africa is a major target in Soviet strategy. Soviet domination of the region would have serious implications for the West. It would gravely endanger the sea route around the Cape and place in jeopardy the supply of essential and critical minerals not only from South Africa but also from Zimbabwe, Zaire and Zambia. South Africa and the Soviet Union together produce a preponderant percentage of many essential minerals required by the West and possess reserves of the same order.

It is clear that if the Soviet Union were through surrogate forces or subordinate regimes to exercise control over Southern Africa and over the sea-lanes round the South African coast, it could at will apply a stranglehold on the West. A recent Congressional report following an on-the-spot investigation of the mineral resources of Southern Africa has underlined this fact.

Within the limits of its resources South Africa is doing its utmost to assure its own security, thereby affording protection also to Western interests in the region. By imposing an arms embargo the West is in effect harming its own interests. In addition, we are faced with threats of economic sanctions, including calls in the United States and elsewhere for disinvestment from South Africa. Our determination to resist and overcome the effects of these measures should never be doubted but if our adversaries should succeed in their objectives, instability in the entire Southern African region will ensue and open the door to further Soviet encroachment, to the detriment of the Western world.

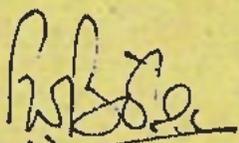
We are already fighting a Soviet-backed threat to South West Africa/Namibia. I should like to emphasize in this context that my Government and the internal democratic parties strongly desire a solution to the South West Africa/Namibia issue. These parties are ready to continue to explore with the United States and other members of the Western contact group, appropriate and fair means of achieving a peaceful solution to the problem. This is one of the issues which will receive close attention in the discussions between Minister Botha and Secretary Haig.

My Government is intent on working for the achievement of conditions in Southern Africa which will promote stability and development. The electorate of South Africa has just given me a strong mandate to continue with my policies of political and constitutional development, designed to build a secure and just future for all and to promote an acceptable accommodation between the different population groups of our country. I am determined to press ahead with my plans with realistic speed.

/3 South

South Africa's policies are not rigid. They are constantly evolving to accommodate current realities and new developments, both domestically and regionally. South Africa has the commitment and capacity not only to overcome her domestic problems and play an important and constructive role in Southern Africa, but also, if afforded the opportunity, to make a not inconsiderable contribution internationally to securing the future for democracy. It is my hope that our two governments may be able to work to this end.

Please accept, Mr. President, the assurance of my highest consideration.



P.W. BOTHA
PRIME MINISTER OF THE REPUBLIC OF SOUTH AFRICA

Mr. Ronald W. Reagan
President of the United States of America
The White House
WASHINGTON, D.C.
United States of America

#2744
Wettering
Pres ms95
SAF

THE WHITE HOUSE
WASHINGTON

June 11, 1981

Dear Mr. Prime Minister:

Thank you for your personal message of May 12 delivered to me on the occasion of the visit of Minister of Foreign Affairs and Information Botha to Washington. I feel that the Minister's visit was most productive. Our meetings were an important first step toward improving communication and dispelling some of the misunderstandings that have at times distorted relations between our two countries.

We are ready to work with you to develop a new, constructive relationship between the United States and South Africa solidly based on shared concerns, interests, and objectives.

As we said to Foreign Minister Botha, the problem of Namibia, which complicates our relations with European allies and with our friends in black Africa, is an obstacle to the development of a new relationship with South Africa. But given our shared concerns for the security of southern Africa, a settlement of the Namibia problem can also be an opportunity to help stem the growth of Soviet influence in the region. I am encouraged that our two governments have already begun to work to seek a settlement that will be responsive to our shared interests.

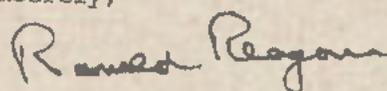
Please accept my congratulations on your April 29 election victory. With this clear mandate you will now be able to proceed with implementation of your vision of a South Africa changed, modern, and strong, with bright prospects for stability and development rooted in justice, and responsive to the needs of all South Africans. We recognize

DECLASSIFIED (RE 10952)
NLS F95-029/S-#5428
CIS NARA, DATE 4/18/06

2

fully that developments in your country hold the key to long-term stability, development, and peace in the region. We are prepared to work with you in pursuing these shared objectives.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Reagan". The signature is written in a cursive style with a prominent "R" and "R" at the beginning and end.

His Excellency
Pieter Willem Botha
Prime Minister of the Republic of South Africa
Pretoria

OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON D C 20503

June 2, 1983

SPECIAL
3799

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer-

Department of the Treasury
Department of Commerce
National Security Council
Export-Import Bank
Department of Labor

SUBJECT: State's proposed testimony on H.R. 1693.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than C.O.B., FRIDAY, JUNE 3 -- Hearings are scheduled for June 7 and 8.

Questions should be referred to me (395-4700)

Ronald K Peterson
RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: Pat Schleuter

SPECIAL

[Handwritten mark]

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

June 3, 1983

3799

150847

CO 141

LE

LA002

FG006-12

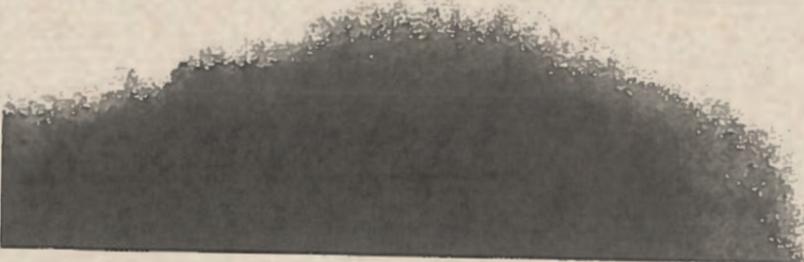
BE003

MEMORANDUM FOR RONALD K. PETERSON
Office of Management and Budget

SUBJECT: Proposed Testimony on HR-1693

The NSC concurs in State's proposed testimony on HR-1693
regarding fair employment practices for U.S. firms operating in
South Africa.

[Signature]
ROBERT M. KIMMITT *DEPUTY*
Executive Secretary



Statement by
Hon. Frank G. Wisner
Before the
House Banking Subcommittee
on
Financial Institutions
June 7, 1983

on
U.S. Government Support
for
The Voluntary Sullivan Code
of
Fair Employment Practices
for
U.S. Firms Operating in South Africa

The Commission, in the period 1950-1951, conducted a study of the operations of the 100 largest U.S. companies in South Africa. The study was designed to determine the extent of U.S. investment in South Africa and the role of U.S. companies in the development of the country. The study was conducted in cooperation with the South African government and the results are contained in the report "U.S. Investment in South Africa, 1950-1951". The report is available to the public through the Freedom of Information Act.

The Administration strongly supports the Sullivan Commission's findings regarding U.S. investment in South Africa. The Commission's report is a valuable contribution to the knowledge of U.S. investment in South Africa and is a welcome addition to the literature on the subject. The Commission's findings are being used by the Administration to guide U.S. policy in South Africa. The Commission's report is a valuable contribution to the knowledge of U.S. investment in South Africa and is a welcome addition to the literature on the subject.

There are currently 100 signatories of the Sullivan Commission's report representing approximately 170 operating units. There are also 150 other business units operating in South Africa affiliated to U.S. companies which are not signatories of the Commission.

U.S. firms and affiliates employ 127,000 individuals in South Africa. Seventy-one percent (90,000) of these employees work for the 170 business units of the 100 Sullivan signatory companies.

- 2 -

Of the 37,000 employees working for the 152 business units which are not signatories, fifty-four percent (20,000) work for nineteen business units where the U.S. interest does not amount to control and could not enforce implementation or reporting.

Thus, of the 37,000 employees working for the 152 business units which are not signatories, less than 17,000 workers in South Africa are employed in the 133 subsidiaries managed and controlled by U.S. companies who have not signed the Sullivan Principles. Twenty-five firms controlling 27 business units account for eighty-three percent (14,000) of this total. The remaining 3,000 employees (two percent of total employment of 127,000) are employed by 106 business units (69.7 percent of non-signatory firms and 32.1 percent of U.S. business units operating in South Africa).

The 146 firms representing 178 business units which are Sullivan signatories thus account for 54 percent of the 330 business units which potentially could be signatories but at the same time they represent seventy-one percent of all employees potentially covered by the Sullivan Code. These statistics are of importance as it is our impression that the proposed legislation is motivated in part by a concern that the voluntary Sullivan Code effort has not fully succeeded. This concern is based on a statistical analysis which looks at the number of firms which have adhered but not at the number of employees covered. We do not believe that the success of the Sullivan Code can be judged on this basis

- 3 -

We would also note that when measured against the standards of the proposed legislation the record of voluntary compliance is even more noteworthy. The proposed legislation would exempt from compliance firms with less than 20 employees. Of the 330 business units operating in South Africa, 81 business units or 24.5 percent of all U.S. business units in South Africa have less than 20 employees. The legislation would, therefore, only apply to 249 business units or 75 percent of U.S. business units operating in South Africa. The legislation is thus motivated by concern that 152 business units have not adhered to the voluntary code but the legislation goes on to exempt 81 firms from compliance in recognition that the code may not be completely relevant to a very small business operation. By its own terms, therefore, the proposed legislation recognizes that simply taking the number of U.S. business units operating in South Africa (330) and comparing the number of firms which have adhered to the Sullivan Code (146) is not a valid means of determining the applicability, and therefore the success, of the Sullivan Code.

We would also point out that of the 81 business units with less than 20 employees, 25 are already Sullivan signatories. These 25 small firms have 150 employees. The remaining 56 business units with less than 20 employees which are not Sullivan signatories have 450 employees. An unintended result of the legislation is that firms which have adhered voluntarily would be exempt from doing so under the proposed legislation. This is a prime example of why a voluntary approach is preferable to mandatory legislation.

- 4 -

These statistics demonstrate that even by the standards of the proposed legislation the Sullivan Code, as a voluntary institution, has been a success whether measured in terms of the number of firms which have adhered (178 business units out of the legislation's proposed base of 249) or the number of employees covered by the Principles (over 90,000 out of legislation's proposed base of some 126,400). In many respects voluntary adherence has been more of a success than mandatory compliance would be.

I would also note that with regard to reporting under the voluntary Sullivan Code fifty-four percent or 69,000 employees work for firms which submitted reports in the Sixth reporting period. A clear majority of employment is in U.S. companies which show sufficient dedication to the principles to report fully, even if they receive low scores or do not meet all of the basic requirements to be rated.

Sullivan signatories spent \$3,310,772 on training of employees last year, a 48 percent increase (in Rand terms) over their previous years' expenditures. Sixty percent of the employees benefitting from the training were black, colored, or Asian. Signatories contributed over \$10,500,000 on projects to assist the disadvantaged black, colored or Asian communities in South Africa. This represented slightly more than 2 percent of the total profit derived from U.S. direct investment in South Africa during 1981. Expenditures for community

- 5 -

development and education and training assistance for non-employees by the 120 signatory reporting units represent approximately 3.5 percent of their 1981 profits. This does not include an evaluation of the contributions of time of U.S. subsidiary employees which was also substantial (13,000 employee days). Neither does it take into account contributions in these areas made by non-reporting or non-signatory U.S. subsidiaries. These additional contributions indicate that the actual percentage of U.S. corporate income from South Africa made available for these purposes was really higher than 3.5 percent. It is interesting to note that an across the board contribution of even 3.5 percent of all corporate profits in South Africa would yield an impressive annual nest egg of \$215 million for development of the disadvantaged communities which would contribute to a much more rapid evolution in the situation. But this is a far greater sum than was actually spent by the private sector in these areas during 1981, again demonstrating the leadership position of U.S. companies in community development.

There are some areas where the Sullivan signatories report less progress. Under the equal employment principle, the Sixth report discusses the varying medical facilities and services available to different groups in the society and the problems this poses in providing equal health benefits as well as the limited progress in increasing the numbers of blacks, coloreds, and Asians in supervisory and management

- 6 -

positions. Nonetheless, the report identified a degree of movement in these areas among U.S. affiliates which is not generally present in independent companies of comparable size in South Africa. That progress has been slower in these areas is due in part to the fact that they are less susceptible to solutions emanating solely from within the private sector. They require environmental change which can best be effected by the body politic. The signatories realizing the problems they face in implementing these principles are working at alleviating them, with some success.

The efforts in the social responsibility field by U.S. companies are by no means limited to Sullivan signatories. Many of the non-signatories have corporate codes along the same lines. At least one has adopted the principles in a board resolution. It is unwilling to become a signatory because it rejects the idea that any body outside of the board can set standards for the corporation. We believe that this is a prevailing attitude among the non-signatories. They object to the Sullivan system even though they understand that socially responsible policies and constructive engagement in the South African system to coax the Government to put forward additional social and political reforms are in their long term interest.

In terms of South African employees, the twenty-five largest of the non-signatory companies include: Getz Bros., Oak Industries, Echlin Manufacturing Co., International Playtex, Chesebrough-Pond's, Inc., A.M. International Inc., Maremont Corp.,

- 7 -

Chicago Bridge and Iron Co., Alexander and Alexander International Corp., BBDO International Inc., Dun and Bradstreet International, Associated Metals and Minerals Corp., Newmont Mining Corp., Chicago Pneumatic Tool Co., Pepsico International, Columbus-McKinnon Corp., Ingersoll Rand Co., Blue Bell, Inc., Eaton Corp., Timken Company, Wyeth International, V.F. Corp., Dresser Industries, Precision Valve Corp., and City Investing International.

As one example of the commitment of these companies, eight of them made contributions to Project Pace (the Soweto technical school) totaling \$140,700 for capital projects. Additional amounts will be made available for scholarships. Non-signatories have also made contributions to other institutions popular among the signatory companies and have participated in the Adopt-a-School movement. A final indication of their interest in corporate responsibility is their attendance at the annual Sullivan reporting discussion sessions conducted by the American Chamber of Commerce and Arthur D. Little.

While these efforts by non-signatories may present a good case for limiting pressure on them to "shape up," increased support for and more adherence to the Sullivan Code and more universal reporting under it would be beneficial to the U.S. business community generally in advancing its role as a catalyst for change in South Africa. We, therefore, believe that non-signatory firms should formally adhere to the voluntary Sullivan Code even if the firms are implementing their own fair employment practices. We do not believe that formally legislating

- 8 -

such adherence is an appropriate response to the failure of the remaining firms to adhere, but clearly they must be persuaded that voluntary adherence is in their interest, the interest of their employees and the interests of the United States and South Africa.

The failure of these twenty-five firms to adhere to the Code should not be allowed to obscure the impressive accomplishments of the Sullivan signatory companies. Among the general public in the U.S. and even among groups knowledgeable about South Africa there still seems to be limited awareness of what U.S. companies are doing. A good deal of media attention has been given to the disinvestment initiatives in the U.S. However, less attention has been given to the Sullivan Code and the results of the Code for the black South Africans who benefit from this voluntary initiative.

U.S. direct investment represents only approximately 3.5 percent of total fixed investment by the private sector in South Africa and provides only 1.5 percent of all employment. However, the activities of U.S. companies have great impact as a model or a catalyst. The codification and coordination of U.S. companies' efforts helps significantly in providing this impetus, both through increased publicity and through the systemization of information exchanged in the Sullivan task force groups. Examples of important areas where U.S. companies' efforts have acted as an example for others as a catalyst include: The Pace Project which not only brought in contributions from non-U.S. companies but also set an example which is being copied by

- 9 -

the German Chamber of Commerce along with the Urban Foundation in the establishment of a \$3.2 million in-service teacher training center in Soweto, encouraged the establishment of an Alliance-Francaise teacher training center in Soweto, and encouraged the Department of Education and Training to upgrade facilities provided in the Pace neighborhood; the Adopt-a-School Program which has become a popular program with the Sullivan signatories, has also become an institution through the merger of two South African organizations (Read and Teach), which has attracted significant participation from the South African private sector; the IBM program of providing video taped teaching aids to black schools, aimed at subjects such as science and mathematics, where the available teachers are somewhat deficient, has also been a catalyst in drawing support for black schools from the South African business community. Although IBM developed the teaching guides and video tapes at its own cost, duplication and hardware costs are paid by sponsoring businesses. Actions by the U.S. companies have also had an impact on non-U.S. companies in areas besides education and community development. In Springs, a town about 30 miles from Johannesburg, there is a concentration of U.S. companies. Salaries for black workers there are above the Pretoria-Witwatersrand Vereeniging, (the industrial heartland of South Africa) norm because the U.S. companies pay scales have set a standard that other local companies must meet. South African companies in the Johannesburg area point out that they too have integrated facilities, another indication of the impact of the Sullivan Code.

- 10 -

Organized labor--particularly the emerging black unions--view the Sullivan Principles skeptically. The Code calls on firms to recognize unions, it does not call on them to agree automatically to union wage demands. This point has engendered some confusion about the point of the Code. The Principles actually only require that U.S. companies accept freedom of association to allow employees to join or form either registered or unregistered unions--and to deal with these unions as they deem appropriate in keeping with normal corporate policies, while recognizing the special circumstances of South Africa. The Code has focussed union efforts on signatory companies because they are expected to be more sympathetic or subject to greater pressures to yield to union demands due to observation of their actions by entities outside of South Africa and their general openness concerning their activities as part of the Sullivan reporting program. Generally, the unions have been less than happy with the results of the Sullivan Principles. They would like to see any set of social responsibility principles include a more direct stance on the issues they espouse in working for better conditions for their members. But in the final analysis, many are coming around to the view that if a union is functioning properly, the Principles are irrelevant. Although few will say so publicly, even among those that are critical of the Code or consider it irrelevant, many would admit that it has played a useful role in the evolving world of South African industrial relations.

- 11 -

The performance of U.S. companies in social responsibility efforts is not flawless. Application of the Principles is inconsistent. Some companies make serious and strenuous efforts, others make little more than a token effort. To a great extent the accomplishments depend on the attitude of local chief executives. In companies where they believe that social responsibility is in the company's direct interest, the entire management exerts itself in that direction. Others who view the principles as a sop to critics, harassment or a distraction from basic business, produce results which border on window dressing, and the program is not taken to heart by the rest of the management team. Some South African businessmen view the Sullivan Principles (but not necessarily social responsibility) negatively. They object to the seeming dictation of solutions by groups external (both to South Africa and to the U.S. corporations) to South Africa, and feel that they and their counterparts in the U.S. or other foreign companies are better informed about the realities of South Africa, and therefore better able to develop appropriate responses for their companies. We note with interest, however, that Firestone SA has continued to report despite the takeover of 75 percent of its equity by the South African firm Federal Volkskasbeleggings. We are not always this fortunate. To date, those who advocate disinvestment have failed to address the fact that disinvestment only transfers ownership, it does not result in capital withdrawal from South Africa. In some instances the new owners will not act to maintain Sullivan Code practices. Thus, it

- 12 -

is the black workers who suffer, not the apartheid system which is strengthened through the elimination of outside influence.

Representatives of the Sullivan signatory companies in South Africa indicate that they believe the Code still has a role to play, and that the thrust of social responsibility efforts by U.S. companies will continue to set an example for others to follow. There are no statistical goals which the various task forces have set in any area. The focus in future efforts will continue to be such areas as training, advancement, and community development; those areas where there is most to do, and where internal corporate control is limited, having moved away from the easily controllable elements such as integration of facilities and equal pay for equal work. This is somewhat complementary to the general attitude of the most progressive South African firms and organizations, who want to see "liberal" businessmen effect changes that reach beyond the workplace. While the innovations of U.S. companies in training and housing schemes, community development projects, and education promotion programs may be yielding pride of place to the duplication of tried and true projects gleaned from the exchanges taking place in the task forces, the extension of these most useful programs and increases in the resources committed to social responsibility will have at least as important an impact in the future as innovation had in the past. The efforts of U.S. companies preceded the establishment of the Code, but have been channeled by it and fanned by economic necessity. In the Sixth Report nearly all of the reporting companies indicated that they are now paying equal

- 13 -

wages for equal work, with most applying a standard job categorization system to establish equality between differing responsibilities.

The functioning of the Principles served and will continue to serve primarily as an opportunity for managers to assess the progress of their organizations against both a general yardstick and the efforts of other corporations, as an area for the exchange of ideas, and as a means for bolstering arguments in favor of change in South Africa and to demonstrate the benefits of continued constructive engagement in the system.

For all of these reasons we believe it would be a travesty to destroy the Sullivan Code by turning it into a Congressionally mandated legal requirement for doing business in South Africa. Ninety-thousand employees of U.S. firms in South Africa are already covered by the Sullivan Code through voluntary adherence. The question is how to extend this coverage to the remaining 17,000 employees.

U.S. corporations with subsidiaries and affiliates in South Africa led by the Sullivan Code have developed into a leading force for peaceful, evolutionary change away from apartheid. The activities of these firms, in the face of enormous institutional opposition in South Africa, have had impacts far beyond the book value of U.S. investment in South Africa. We feel strongly that this is where the U.S. business community belongs. We are prepared to support strongly and defend openly the U.S. business community in its efforts to promote economic growth and social

justice in South Africa. We are not prepared to condone a business-as-usual posture by firms which have not adhered to the Sullivan Code.

By definition constructive engagement means supporting that which we believe in, not simply reiterating our well-known view that apartheid is unacceptable and carries within it the threat of future political instability to the entire southern African region. Supporting that which we believe in means taking the initiative and keeping it. Capitalism is on trial in much of the Third World including Africa. South Africa is a special case, perhaps more important than many others. At stake is whether our system's enormous potential for good can be translated into reality.

Adherence to the Sullivan Code of Fair Employment Practices is one of the key methods of manifesting the bona fides of American capitalists. We strongly urge all non-signatories to adhere to the code and to participate in the activities of the Sullivan task forces. Adherence to the Sullivan Code is good business practice. It is also good for the U.S. and for South Africa.

5/24/83
AP/S-26, A-1-15

SULLIVAN SUBSIDIARIES

DECLASSIFIED/RELEASED
NLS 605029/5#5438
87 - CU NARA, DATE 4/18/06

THE WHITE HOUSE
WASHINGTON
November 23, 1983

8405^E
Walters
WB
file
SAP pres
MSK

Dear Mr. Prime Minister:

We in the United States watched the November 2nd voting on the proposed new constitution for South Africa with particular interest. As you know, we welcomed its result as a clear willingness by white South Africans to move ahead under your leadership, in a spirit of cooperation with other elements of South African society, toward a more equitable and just political framework.

I applaud the courage of your decision to lead South Africa along this path, as well as the strength and persistence you have shown in persevering to a successful conclusion. I am told that the mandate you received from the voters was significantly greater than even you, yourself, had expected.

Mr. Prime Minister, you are also aware that we did not comment publicly on the content of the proposals themselves. I am highly sensitive to the dilemmas of leadership that you face. I am also confident that you appreciate the requirements facing me as leader of our multi-racial democracy; and of the nation that leads the West and represents the founding principles of our Judeo-Christian tradition of government. It is for that reason that I want to say that we hope to see your great nation sustain movement away from governance based on racial separation toward broadened participation in the national political life by all your citizens.

-2-

We are heartened by your commitment to constructive change and by the mandate for it you have now received. I want to assure you that the United States is ready to work to help South Africans shape their own future free of foreign military intervention, and to realize the goals of a stable and just society for all. For Americans, this is a controversial course, and I will work to maintain it as long as there is continued evidence of a commitment to goals which we can both support.

A key dimension of the stronger relationship we seek with South Africa is the question of building a climate of security in your region. You know of my determination in this regard. There is no legitimate reason for southern Africa to be an arena for Soviet-Cuban military activity. Our two governments have worked together during these past few years to achieve an acceptable basis for a Namibia settlement, in conjunction with a withdrawal of Cuban troops from Angola. Together, I am convinced we can succeed, while denying to Moscow a foothold in other parts of your region.

It is my deep hope that our relations will continue to improve on the basis of our success in addressing these questions in a spirit of confidence and cooperation.

Sincerely,

Ronald Reagan

His Excellency
Pieter Willem Botha
Prime Minister of the Republic
of South Africa
Pretoria

1984

DISINVESTMENT

The Department of State's position with regard to sanction-type initiatives which have been launched at the federal, state and local levels, such as those aimed at discouraging U.S. firms from investing in or doing business with South Africa, is that such measures do not appear to be consistent with broad U.S. foreign policy objectives or strategy regarding South Africa. U.S. policy toward South Africa seeks to use American influence to identify those constructive things we can do to support peaceful change away from apartheid and toward government based on the consent of all South Africans. Our approach is to engage ourselves positively; to add the weight of the U.S. public and private sectors in support of American values; to back ideas, institutions, and groups that can add to a dynamic for change; to open doors and build bridges--not the reverse. The concept of supporting efforts for positive change also has Congressional support, which has been manifested in passage of several programs aimed at improving the situation of those disadvantaged by apartheid. Specifically, Congress has approved programs which provide for scholarships, labor and entrepreneurial training, a Human Rights Fund and drought relief, totalling nearly \$10 million in fiscal year 1984. These programs, which help form the building blocks for change, provide tangible evidence of our commitment to remain involved on behalf of peaceful change away from apartheid inside South Africa.

Measures which call for penalizing U.S. firms which are involved in South Africa undercut a very important aspect of the constructive engagement philosophy on which our policy is based. Rather than engaging in actions which have the effect of pushing U.S. firms to consider withdrawing from South Africa--the aim of many of the divestment measures proposed--we believe it is more appropriate for those who wish to see change in South Africa to focus on encouraging and supporting the positive things which U.S. firms can do and have been doing to improve the situation for blacks in that country..

I refer in particular to those firms which have signed the Sullivan Principles of corporate conduct which provide for equal treatment for all employees on the job and active involvement on the part of the employer in efforts to benefit black employees in such nonworkplace areas as education, housing, health and recreation. Approximately 134 of the 350 U.S. firms with investments in South Africa adhere to the Sullivan Principles, covering about 70 percent of the black employees employed by U.S. firms in South Africa. These firms have spent well over \$100 million on behalf of improvements in community conditions for their nonwhite employees in South

-2-

Africa in the past six years, as well as establishing a nonsegregated and more equitable working environment. Such precedent setting actions have become an example for other firms in South Africa, and have undisputably served as a catalyst for significant change in a society that is seeking ways to transform itself.

Efforts to encourage U.S. firms to leave South Africa or to punish them for being there would work at counter purpose to overall U.S. policy by having the effect of curtailing or bringing to an end these sorts of important contributions to peaceful change. In addition, to the extent that such efforts are successful, they would result in direct harm to the very people we are trying most to help, namely the black employees who would be the first to lose their jobs or come under less enlightened management when U.S. firms are bought out--at bargain basement prices.

Black workers have expressed their concerns at these sorts of proposals, most recently in a U.S. State Department-commissioned survey conducted by South Africa's most respected private opinion pollster, which concluded that while black factory workers are unhappy with their lot in life and generally support groups opposed to the government, at the same time 75 percent of these workers are opposed to the pullout of U.S. firms from South Africa. This is not at all surprising since what the divestment advocates propose ultimately threatens the loss of jobs for black South Africans already struggling to survive in that society. We should also point out that it is unlikely that divestment or other sanctions efforts would have the desired political effect of prompting the SAG to move away from apartheid. Indeed, the historical precedents indicate that the reverse is likely. Rather, we believe it is more appropriate for critics of apartheid--and we count ourselves among them--to find ways to urge U.S. firms operating in South Africa to become more involved on behalf of their nonwhite employees, particularly by becoming full adherents to the Sullivan Principles or similar codes of conduct, or by recognizing the contributions of those U.S. firms already fully committed to change.

U.S. Department of State
December 1984



PRESIDENTIAL CABINET MEETING
 SECRETARY DOLE, TRANSPORTATION 1/17/85

After a gracious review of the important work ALEC does, and a mention of how two of ALEC's publications (State Factors; Trucking Deregulation, and the sale of Conrail) were helpful as informational tools, Sec. Dole outlined the Transportation Department's priorities for 1986.

The Secretary emphasized the importance of deregulation in transportation as a continuing concern and a forefront policy goal for the Department. She then gave background information of when she began the fight to deregulate during her tenure at the Federal Trade Commission. Promotion of competition and a deemphasis of the Federal Government's role, were the two main selling points of her argument for deregulation. The Secretary also mentioned the advantages of better quality and the more efficient work done under private sector control.

Sec. Dole desires deregulation law instead of the present system of defacto deregulation. "An open market place, and a system that provides jobs and protects small communities and shippers, can be achieved through deregulation," said Sec. Dole.

Airline deregulation was mentioned by the Secretary as an example of how deregulation can bring down costs. Although there were problems at first and some transition, it is clear that deregulation has saved the American public \$10 billion dollars over four years since its start. A discrepancy in statistics and the relationship of accidents and near-misses before and after deregulation, prompted criticism of the program. Secretary Dole explained that the actual figures of near-miss and accidents compared with the total number of flights is minimal, and she defended the safety of air travel.

In the area of Railroad deregulation, the Secretary said that the Department of Transportation will "hold the line" on the Staggers Act, giving railroad companies the ability to adjust rates and routes do to competition.

AMTRAC's incredible dollar losses of \$9 billion to date and another \$11 billion dollars over the next decade to keep it running, were a major concern of Sec. Dole, and she emphasized that privatization of the railroad would save it from bankruptcy.

On the issue of selling Conrail to the private sector, the Secretary explained that Norfolk Southern offered the best bid in terms of money and also pay benefits to employees. The bid, which is exempt from I.C.C. review, has been sent to the Justice Department. Secretary Dole believes that the federal government has no business in owning a four year profitable freight railroad. She also mentioned the importance of the privatization of Conrail as the flagship of future privatizing efforts, and urged the Legislators present to lobby their Representatives. Due to the efforts made in the battle to privatize, the defeat of the Conrail proposal would delay other attempts for a long period of time.

Secretary Dole gave examples of other efforts in the area of privatization, citing the sale of Alaska Railroad, and the proposed transfer of Dulles International and Washington National Airports from the federal to a regional authority. She also mentioned how happy she was with the Maritime Regulatory Reforms the Department had accomplished, and reemphasized the importance of the federal government changing their role in transportation.

The Secretary sees the Transportation Department giving an increased amount of control to the states, when possible, and redefining what the federal government should be concerned with in state transportation issues. Due to the budget crisis, Sec. Dole sees the federal government being involved in only the essentials in transportation needs. The Secretary, in closing, wanted to stress that safety was of the utmost importance and that deregulation would be used for economic reasons only.

Unfortunately, due to time constraints, the next two speakers had two minutes only in which to express their priorities. Mr. Ray Barnhart, Administrator of the Federal Highway Administration, stressed his commitment to the federal highway programs. He said that it is of extreme importance to the nation as a whole that there must be sufficient highway systems throughout the country to ensure transportation of goods and services. He stated that it is the responsibility of the federal government to ensure safety on the nation's highways.

Mr. Alfred Dellibovi, Deputy Administrator of the Urban Mass Transportation Administration (UMTA), discussed the crisis throughout the country regarding mass transit. He cited examples of cities which have begun mass transit projects that will cost untold millions of dollars, while serving a very few even if the funds are secured to complete these projects. He discussed the move towards privatization of these urban transit systems as a priority for UMTA. He stated that the private sector, unlike the public sector, has a need to make mass transit systems functional, cost effective and profitable.

gist

A quick reference aid on U.S. foreign relations
Not a comprehensive policy statement
Bureau of Public Affairs • Department of State

Southern Africa: Constructive Engagement February 1985

Background: On taking office in January 1981, the Reagan Administration determined to focus on the threat to stability in southern Africa posed by the unresolved issues of Namibian independence, the presence of large numbers of Cuban troops in Angola, the abhorrent policy of apartheid in South Africa which denies basic rights to that country's black majority, and the seemingly endless cycle of cross-border violence in the region.

US policy: To address these problems and protect US and Western interests, the Administration developed a regional policy toward southern Africa that has come to be known as "constructive engagement." This policy has four objectives:

- Namibian independence: The Contact Group on Namibia (US, UK, France, West Germany, Canada), in consultation with the Front-Line States (Angola, Botswana, Zambia, Zimbabwe, Mozambique, and Tanzania), obtained agreement of all the parties, including South Africa, to the UN plan for Namibian independence as set forth in Resolution 435. At US initiative, that plan was strengthened and now offers the best available prospects for a fair and impartial result. At the same time, the US and its allies have successfully turned aside attempts to substitute other settlement formulas. However, South Africa has made clear its readiness to proceed only in the context of a parallel commitment to resolve the longstanding problem of Cuban troop withdrawal from Angola.
- Regional peace: To overcome this last obstacle to Namibian independence, the US has engaged in an active dialogue with the Angolan Government. All parties, including Angola, now accept that Cuban troop withdrawal must be part of an overall settlement. We helped broker the February 1984 Lusaka agreement between South Africa and Angola, under which South Africa undertook to disengage its military forces from southern Angola and the two nations established a Joint Monitoring Commission to oversee the withdrawal. That withdrawal is nearly complete; the two nations continue to discuss future security arrangements. Fighting between South African and Angolan forces has ended.

We also helped Mozambique and South Africa negotiate the March 1984 Nkomati accord, under which both governments agreed to prevent the use of their territories as bases for armed attacks against each other. South Africa continues to work closely with the Mozambican Government to effect a ceasefire between the government and antigovernment guerrillas. Other agreements between the two nations will bring Mozambique substantial economic benefits in the fields of energy, transportation, tourism, and investment. These and other instances involving Lesotho, Zimbabwe, and Botswana indicate that the nations of this potentially explosive region are increasingly looking to the US, not to the Soviets and their allies, for solutions to the problems of development and regional coexistence.

- Movement away from apartheid: Constructive engagement seeks to encourage peaceful change away from apartheid in South Africa. We have used our limited influence to encourage the government to accommodate the legitimate demands of South Africa's black majority. The US has called for an end to apartheid and has rejected the "homeland" concept, under which black South Africans are deprived of South African citizenship and offered no political role except as tribal groupings in impoverished rural "homelands." The new constitution, approved overwhelmingly in 1983 by white voters, is flawed because it does not grant political rights to South Africa's black majority; it does, however, provide for sharing limited national political power with Asians and Coloreds. It is part of a process of change that has begun but clearly has a long way to go. President Botha's statement of intent to engage in a dialogue with black South Africans to discuss changes in apartheid implies movement away from apartheid. Similarly, the legalization of black trade unions in recent years is a positive step; unions are an agent of democratic change that should be supported. American leaders, including the President, Vice President, and Secretary of State have spoken out forcefully and consistently against violations of basic human rights in South Africa, such as forced removals of settled black communities to the homelands. That policy is now being reviewed by the South African Government. The US is providing \$10 million annually to assist black education, help small, black-owned business, and train black labor unionists.

The US maintains an arms embargo and enforces other restrictions on the sale of equipment to South Africa's military, police, and other agencies enforcing apartheid.

- Reassertion of US influence: Although the gains are fragile and much remains to be done, we have made significant progress largely because the US is the only mediator enjoying credibility with all the regional governments and guerrilla movements. The US has seized the strategic initiative from the Soviets and their allies, shifting the focus from military to diplomatic and economic solutions.

US investment in South Africa: The Administration opposes punitive economic sanctions or trade restrictions against South Africa because they will harm the intended beneficiaries and are not likely to provide us influence over the pace and direction of change. The US supports the Sullivan principles on fair employment, which have had a beneficial impact on black working and living conditions. Signatory US firms are a positive force for change, not only in the workplace but also in black communities where they have spent over \$100 million in the last 7 years on black education and housing. US firms have set the pace among all foreign and local firms in supporting black advancement.

Important US role: Serious problems remain. We do not regard the situation in South Africa as satisfactory. But we can play a genuine role in encouraging peaceful evolution only if we are involved and are seen to be supporting positive change in South Africa and working to bring about regional coexistence.

South front

For...

H. SAUL

Am...

STATEMENT OF
SAL C. MARZULLO, CHAIRMAN, INDUSTRY SUPPORT UNIT
ON BEHALF OF THE SULLIVAN SIGNATORY COMPANIES

BEFORE THE
SENATE COMMITTEE ON BANKING,
SUBCOMMITTEE ON INTERNATIONAL FINANCE AND MONETARY POLICY

SENATE DIRKSEN OFFICE BUILDING
ROOM 338
CONSTITUTION AVENUE AND FIRST STREET, N.E.
WASHINGTON, D.C.

MAY 24, 1985

Sanctions
bad

- 1 -

1b

Mr. Chairman, Members of the Subcommittee, my name is Sal Marzullo. I am Chairman of the Industry Support Unit, the industry group representing the now 152 American companies who are signators to the Sullivan Principles.

I appreciate the opportunity on their behalf to appear before you today, however, briefly, to explain why we remain in South Africa and why we believe we are making a genuine contribution toward the change process developing in South Africa.

It is doubtful whether there are many more emotional, contentious, and complex issues facing us today in the area of foreign affairs than those posed by the existence of apartheid in South Africa. Yet that very fact requires us to look at all the realities, pleasant and unpleasant, that one must deal with in looking for rational solutions to peaceful, effective and genuine change in that society.

We are aware, of course, that there are many strategies for dealing with this issue and we do not question either the motivation or the goodwill of those who disagree with us. Yet we would like to suggest that our position is one that is not only equally moral and tenable, but a practical one as well. We seek to help change a society through our active involvement and presence, not to distance ourselves from the injustices that exist.

The utilization of our human, technical and financial resources in South Africa is all aimed at bringing about peaceful change and racial equality in that country. We seek to work with all those in South Africa who strive for that equality: government, business, academe, church, and other institutions. Our way to change is not easy and it is often frustrating, but it has produced measureable results. What we are doing is not the total answer to that country's problems and never will be. But it is an important part of the ultimate solution and those efforts have stimulated initiatives from other companies, European and South African, and have galvanized thinking on the need for change among other institutions in the country. I do not wish to over-exaggerate what has been accomplished, but equally it would be wrong to underestimate or ignore both the practical results and the symbolic importance of the change process that has been set forth by the implementation of the Sullivan Principles.

Apartheid has been eroded by economic growth. The process of urbanization and industrialization has done more to doom traditional apartheid and separate development than any other single influence. If South Africa is to survive and prosper we must build on that momentum and help to bring white and black South Africa together as one people, one nation. American companies have helped to accelerate reform and the Sullivan Principles, far from being cosmetic, have been a useful vehicle

1
Sullivan Principles
Parsons

for helping to build a climate for change--first in the work place and later in the larger outside community. It has not been easy--it will not be easy in the future; but the changes are real and if apartheid has not yet been dismantled, its pillars have been hammered away and chipped away--it will ultimately fall. The growth of black trade unionism, for example, aided by U.S. companies, has provided one of the most fundamental changes to have taken place in South Africa so far. We should be seeking, distinguished legislators, not to stop or impede the flow of this force for change, but to encourage it and provide incentives for it. Harry Oppenheimer, one of South Africa's leading industrialists and liberal spokesman, has written that punitive acts, however well intentioned, may compromise the successes of the past and be counterproductive.

The Sullivan Principles are not perfect. We keep revising them, and Dr. Sullivan, a deeply committed man who has given so much of his total energies to this task, prods and pushes us and proposes still more challenges. South Africa is not the same country it was just five years ago--and never will be again. Whatever its problems, the Sullivan Principles have helped to shape major changes in South African legislation and labor policy. Changes have come both from internal forces now operative in the South African ambience (primarily the economic forces of South Africa's economic development) and from moral pressure from American shareholders, churches, and others here in our own country. The responsible, concerned, caring, pressure is welcome. The simplistic, sloganizing helps no one.

We know, however, even as you do, that the Sullivan Principles alone are not a guaranteed method of providing quick and simple resolution of the injustices that exist in South African society. Only South Africans, all of them, will evolve the final solutions to their problems. But we must help them. In short, we strongly believe, that our collective commitment to the Sullivan Principles, properly coordinated and properly implemented, offer the possibility of making a greater contribution to change than does withdrawal. Again, I emphasize the vital importance not only of the changes but of their symbolic value. Our efforts are multiplied by those of leading South African businessmen and by South Africa's major employer groups who in January publicly committed themselves to a full and equal role for blacks in both the economic and political life of South Africa. These groups represent more than 80% of the employment strength of the country.

I might add here that since 1977, when 12 American signatory companies signed the original Principles, we now total 152 companies. We have spent well over one hundred million dollars in health, education, community development, training, housing since 1978. More importantly, programs initially developed on a local level have now been developed for longer-term results at both the regional and national levels in the

1974-1975
NICE
Dorinda

- 3 -

fields of health, education, housing and black entrepreneurship. We are making progress.

U.S. firms in South Africa are an anti-apartheid force, a force for change, for bridge building and racial reconciliation. Our severest critic in the United States, Rev. Sullivan himself, has said while calling for a complete end to apartheid, the following: "The Principles are not an academic response designed to advance the views of those who are proponents of either investment or divestment. To the contrary, the Principles are a pragmatic policy based upon the most judicious engagement of available resources, and are intended to improve the quality of life, to help bring justice to unliberated people, and to help build a peaceful, free South Africa for everyone."

We are at a critical juncture in South African history. Many white South Africans now understand that meaningful advance for the non-white population and their own long-term survival is not possible without fundamental structural reform. We must work with these people to hasten the pace and to make those changes South Africans of all races desire. It would be ironic if at this critical point in South Africa's political history, when a Government is beginning the process of fundamental change that we have all been calling for, that we who detest apartheid and all that it represents, should make it impossible for those changes to take place peacefully.

The apartheid policies of South Africa are repugnant to all Americans. The debate however is not about defending apartheid, for it is indefensible. It is about how best effectively to change South Africa's racial policies and on that strategy good and honest men may and do disagree.

In conclusion, Mr. Chairman, gentlemen, I would like to make the following points:

1. Our only leverage to exercise change in South Africa is in our presence--withdrawal from South Africa would neither bring down the South African Government nor affect the policies of that Government.
2. American firms, through adherence to voluntary standards of social responsibility, have been a leading force for evolutionary change away from apartheid. Mandatory, confrontational, legislation would jeopardize that effort.
3. Divestment or curbing American investment would be against the wishes of a large number of South African blacks who see the role of U.S. business in their country as constructive and progressive.

r - African Investment, NCC, Records

- 4 -

4. Economic power is vital to the non-white community in South Africa. Investment, through jobs and training, provides that power. A well-educated and well-trained work force is the ultimate force causing the system to change.
5. U.S. businesses should be encouraged to increase their role in the economy and their voluntary efforts to influence social change.
6. To the extent that sanctions seek to govern the actions of South African affiliates of U.S. companies, they place these companies in an impossible situation between two authorities.
7. Enactment of economic sanctions also would set a senseless precedent for subsequent legislation restricting U.S. business operations in any countries whose social policies might be objectionable.

Once again, thank you for your invitation to appear before this Subcommittee.

SGM:mp1

~~SECRET~~

D R A F T/8/7/85

SYSTEM II
90831

~~SECRET~~

UNITED STATES POLICY TOWARD SOUTHERN AFRICA *let*

The United States and its allies have important political, commercial, and strategic interests in South Africa and southern Africa. These are being threatened by widespread violence in South Africa, increased tension in the region and continued Soviet challenges to our important interests. At the same time, there has been growing Congressional and public criticism of our policy despite our active engagement and strong record of accomplishment during the past four years. It is, therefore, now necessary to reemphasize the objectives of U.S. political strategy for the area which are:

- Use U.S. influence in South Africa to promote peaceful change away from apartheid, to a system which provides justice and opportunity for all with a government based on the consent of all its people; reduces the prospect of revolutionary violence and the opportunities for expansion of Soviet influence;
- Contain and reduce Soviet and Soviet-proxy influence in the region;
- Seek an internationally acceptable solution to the Namibia problem based on UNSCR 435 and Cuban troop withdrawal;
- Encourage peace and coexistence between South Africa and its neighbors, promoting policies which can enhance regional stability and extend the benefits of democracy to all peoples of the region. *15)*

NOV 13 1985

K/C Box 15

African Affairs
Records

DECLASSIFIED

NLS E95-029/30/64

~~SECRET~~

BY inf NAOS DATE 6/2/99

~~SECRET~~~~SECRET~~

2

In order to achieve these objectives, the U.S. will remain actively involved and pursue a comprehensive and coordinated strategy toward the countries and issues of this region. This strategy will consist of the following specific elements:

With respect to South Africa:

- Maintain close diplomatic communications including Presidential messages, when appropriate, and quiet diplomacy, to influence the actions of that government;
- Make it clear to South Africa that our present relationship can be sustained only in a framework of cooperation in the region, continued internal reform toward ending apartheid and with a system of rule based on the consent of all governed;
- Urge and apply pressure on South Africa to pursue the course of reform energetically and without delay, to begin genuine negotiations with the country's black leadership, and take steps to redress black grievances;
- Expand contacts with representative black organizations and encourage them to pursue change by nonviolent means;
- Increase funding for education, labor, business, self-help and human rights programs in South Africa aimed at improving conditions for black Africans, and black awareness of U.S. initiatives and policies;
- Urge U.S. business entities in South Africa to continue and to consolidate programs to improve the welfare of black South African employees, to assist black-owned companies and to use their influence to argue for change away from apartheid;

~~SECRET~~

MA 6 Box 15

African Affairs Directorate, USA
Records

~~SECRET~~

~~SECRET~~

3

-- Combine the resources of the White House and the Departments of State, Treasury and Commerce to oppose or satisfactorily limit the imposition of new legislative sanctions against South Africa;

-- Pursue negotiating possibilities offered by the South African Government, including high level meetings, as appropriate, to discuss internal or regional developments; seek to establish and maintain a cooperative framework for a relationship based upon realistic appraisals of both achievable goals and U.S. influence;

-- Review the possibilities of joint diplomatic efforts with key Western allies to foster progress toward internal reform and away from apartheid.

-- Continue U.S. efforts to work with South Africa and the IAEA to safeguard South African nuclear facilities and obtain South African adherence to the non-proliferation treaty. (S)

With respect to the southern Africa region:

-- Counter and reduce Soviet and Soviet-proxy presence and influence;

-- Maintain funding of U.S. development and security assistance and humanitarian food relief programs consistent with our strategic objectives;

-- Continue U.S. efforts to improve relations between South Africa and its neighbors, maintain an active dialogue in support of U.S. objectives with all relevant parties, and to help contain

~~SECRET~~

~~SECRET~~~~SECRET~~

4

regional violence-both cross-border and terrorism by any party- and promote peace initiatives;

-- Seek Namibia's independence in accordance with UNSCR 435 and pursue openings offered by the MPLA regime in Angola to achieve an agreement on Cuban troop withdrawal in that context; work actively with the African Front Line States to encourage them to press the MPLA regime for a peaceful settlement;

-- Continue contacts with UNITA, making it clear to all parties the U.S. believes there will not be peace in Angola until national reconciliation is achieved; encourage and develop initiatives with all pertinent parties to speed realization of that objective;

-- Encourage Mozambique's move away from the Soviet Bloc; work for stability and an end to violence in that country in concert with our allies and South Africa.

-- Work with our allies and other nations as appropriate to find means to accelerate achievement of our regional goals. ~~BT~~

Recent South African Government actions require more forthright public diplomacy to create better public and media understanding of our policies, especially our opposition to apartheid and our encouragement of reform, and to broaden both domestic and international support for them. Our Public Diplomacy and Public Affairs strategy shall consist of the following elements:

-- I, the Vice President, and other senior Administration

~~SECRET~~

KAL SOX 15

African Affairs Division, USA Records

~~SECRET~~

~~SECRET~~

officials will make public statements or speeches when appropriate reflecting high-level concern over developments in the region, explaining our principled opposition to apartheid, and underscoring our commitment to promote peaceful, non-violent change away from that system;

-- Mobilize a coordinated State Department-led public affairs strategy involving senior officials throughout government, including the White House Public Liaison Office, to explain and seek public understanding and support of our policies and of why sanctions are counterproductive;

-- Under the leadership of USIA, engage in renewed and vigorous public diplomacy abroad to defend our policy and our long-term goals and carefully explain the explosive and unacceptable alternatives to peaceful change and continued U.S. engagement in South Africa;

-- In the United Nations and other international fora, actively promote understanding of U.S. policy; oppose new, international mandatory sanctions against South Africa;

-- Mobilize and coordinate U.S. mission outreach and USIA Visitor Programs in South Africa to promote human rights and constitutional reforms broadly acceptable to the parties inside South Africa; seek to move these key issues from the discussion to the agenda stage;

CONFIDENTIAL

MAE Boy 15

African Affairs Directorate, USA Records

~~SECRET~~

~~SECRET~~~~SECRET~~

6

-- Work with non-governmental groups, including the National Endowment for Democracy and key private groups representing labor, business, and religious groups to help strengthen the democratic forces in South Africa. (S)

Council votes South African investment ban

By Sandy Banisky

The Baltimore City Council voted last night to direct the trustees of the city government's pension funds to end all investments with firms that do business in white-ruled South Africa.

"This is a historic day in the history of Baltimore city," said Councilman Nathaniel J. McFadden, D-2d, as the body approved the measure on a vote of 17 to 0, with two members absent.

Last night's resolution directs the trustees of the city's two pension funds — one for fire and police employees and one for all other city workers — to begin selling off stocks of any company or affiliate doing business in South Africa "and to carry out this divestiture with

responsible fiscal prudence."

The resolution is only a declaration of city policy and does not carry the force of law, but several council members said last night they expected the trustees to comply with the directive.

"They are willing to cooperate, clearly," Mr. McFadden said. "They've indicated they would do something of a substantial nature to comply."

The council chambers were filled last night with supporters of the divestment bill, who cheered and applauded the vote. Before the meeting, the group of about 50 had rallied outside City Hall to chant and sing in protest of apartheid, which allows only whites to be first-class citizens, and in support of the South Africans who are fighting to overturn the system.

"There's a spirit of death that hovers over much of South Africa at this hour," Councilman Kwesi Mfume, D-4th, said as he voted for the resolution. "It is a spirit that beckons us to move rather quickly."

"This is a small step," Councilwoman Agnes Welch, D-4th, told the spectators. "Don't forget you have more work to do."

The move toward divestment began in February.

At the time, its supporters said they preferred to begin their campaign with a resolution only. Should that fail to produce results, they said, they would introduce a bill, which, if passed, would require divestment by law.

Speaking of the attitude of the pension

See COUNCIL, 4B, Col. 5

Council votes to end holdings in firms tied to South Africa

COUNCIL, from 1B

fund's trustees, Councilman Timothy D. Murphy, D-6th, said: "We have discussed this with them. This was a cooperative effort. I'm satisfied that we're dealing in good faith. The events in South Africa are developing in such a fashion it's clear now that adherence to the spirit of the resolution is consistent with good fiscal policy."

In March, the pension officials reported to the council that the funds have about \$174 million, or about 21 percent of their total holdings of \$833 million, invested in firms that do business in South Africa.

At a hearing in May, many speakers said they detested apartheid but worried that selling off holdings in firms that do business in South Africa could endanger the fiscal health of the pension systems. Many of the largest American firms, which pay the greatest dividends, do business in South Africa.

By law, the trustees of the pension funds are to manage the system to earn the most money for the city's retirees. City taxpayers make larger contributions to the system should the returns fall below projected levels.

But sponsors of the bill argued

"There's a spirit of death that hovers over much of South Africa at this hour."

COUNCILMAN KWEISI MFUME

that other cities and states have passed legislation ending investment in firms with links to South Africa without losses to pension systems.

In other business, the council approved a resolution that directs it to hold hearings into the sale, possession and use of handguns in Baltimore.

Mr. McFadden, sponsor of the resolution, hopes the hearings will help the council draft legislation to be introduced into the legislature to control the use of handguns in the city.

By state law, only the state can legislate gun control. "We want to ban the sale and possession of handguns in the city," Mr. McFadden said. "We hope as a result of these hearings we can develop some legislation that can be pre-filed" in Annapolis for the next session of the legislature.

SYSTEM 11
10831

September 7, 1985

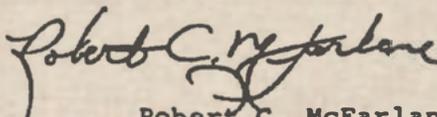
MEMORANDUM FOR THE VICE PRESIDENT
 THE SECRETARY OF STATE
 THE SECRETARY OF THE TREASURY
 THE SECRETARY OF DEFENSE
 THE ATTORNEY GENERAL
 THE DIRECTOR OF CENTRAL INTELLIGENCE
 CHAIRMAN, JOINT CHIEFS OF STAFF
 DIRECTOR, UNITED STATES INFORMATION AGENCY

SUBJECT: United States Policy Toward South Africa,
 NSDD-187 (C)

The President has approved and signed NSDD-187 establishing U.S. policy toward South Africa. (C)

Those portions of the previous August 5, 1985 draft NSDD dealing with southern Africa and requiring additional inter-agency discussions and consultations have been eliminated from the NSDD. This was done to fill the immediate and urgent need of an approved Decision Directive dealing with our policy toward South Africa. Review of the broader regional policy issues will be made via a separate inter-agency process which will be initiated soon. (S)

FOR THE PRESIDENT:



Robert C. McFarlane

Attachment
 NSDD-187

DECLASSIFIED
 Sec. 3A(b), E.O. 13526, as amended
 White House Group, Dec. 11, 2006
 BY NARA *smf* DATE *7/19/11*

~~SECRET~~
 DECLASSIFY ON: OADR

~~SECRET~~

COPY 0 OF 9 COPIES
NSC

~~SECRET~~
SECRET

SYSTEM II
 90831.

THE WHITE HOUSE
 WASHINGTON

~~SECRET~~

September 7, 1985

National Security Decision
 Directive Number 187

UNITED STATES POLICY TOWARD SOUTH AFRICA (C)

The United States and its allies have important political, commercial, and strategic interests in South Africa. These are being threatened by widespread violence and increased tension in South Africa, and continued Soviet challenges to our important interests in the area. At the same time, there has been growing Congressional and public criticism of our policy despite our active engagement and strong record of accomplishment during the past four years. It is, therefore, now necessary to re-emphasize the broad objectives of U.S. political strategy toward South Africa which are:

-- Use U.S. influence to promote peaceful change away from apartheid, to a system which provides justice and opportunity for all with a government based on the consent of all its people;

-- Use U.S. influence to reduce the prospect of revolutionary violence and the opportunities for expansion of Soviet influence;

-- Encourage peace and coexistence between South Africa and its neighbors, promoting policies which can enhance regional stability and foster the benefits of democracy to all peoples of South Africa and the region. (C)

In order to achieve these objectives, the U.S. will remain actively involved and pursue a comprehensive and coordinated strategy toward South Africa. This strategy will consist of the following specific elements:

-- Maintain close diplomatic communications including Presidential messages, when appropriate, and quiet diplomacy, to influence the actions of that government;

-- Make it clear to South Africa that our present relationship can be sustained only in a framework of cooperation, continued internal reform toward ending apartheid and with a system of rule based on the consent of all governed;

-- Urge and apply pressure on South Africa to pursue the course of reform energetically and without delay, to begin genuine negotiations with the country's black leadership, and take steps to redress black grievances;

~~SECRET~~
 DECLASSIFY ON: OADR

DECLASSIFIED
 Authority: EO 12356, USC, (FP7-1035)
 Date: 2/16/94

SECRET

COPY 0 DE 9 COPIES

NSC

~~SECRET~~

~~SECRET~~

2

-- Expand contacts with representative black organizations in South Africa and encourage them to pursue change by nonviolent means;

-- Increase funding for education, labor, business, self-help and human rights programs in South Africa aimed at improving conditions for black Africans, and black awareness of U.S. initiatives and policies;

-- Urge U.S. business entities in South Africa to continue and to consolidate programs to improve the welfare of black South African employees, to assist black-owned companies and to use their influence to argue for change away from apartheid;

-- Combine the resources of the White House and the Departments of State, Treasury and Commerce to oppose or satisfactorily limit the imposition of new legislative sanctions against South Africa;

-- Pursue negotiating possibilities offered by the South African Government, including high level meetings, as appropriate, to discuss internal developments; seek to establish and maintain a cooperative framework for a relationship based upon realistic appraisals of both achievable goals and U.S. influence;

-- Review the possibilities of joint diplomatic efforts with key Western allies to foster progress toward internal reform and away from apartheid;

-- Continue U.S. efforts to work with South Africa and the IAEA to safeguard South African nuclear facilities and obtain South African adherence to the non-proliferation treaty. (S)

Recent South African Government actions require more forthright public diplomacy to create better public and media understanding of our policies, especially our opposition to apartheid and our encouragement of reform, and to broaden both domestic and international support for them. Our Public Diplomacy and Public Affairs strategy shall consist of the following elements:

-- I, the Vice President, and other senior Administration officials will make public statements or speeches when appropriate reflecting high-level concern over developments in South Africa, explaining our principled opposition to apartheid, and underscoring our commitment to promote peaceful, non-violent change away from that system;

~~SECRET~~

~~SECRET~~

COPY 0 OF 9 COPIES

NSC

SECRETSECRET

3

-- Mobilize a coordinated State Department-led public affairs strategy involving senior officials throughout government, including the White House Public Liaison Office, to explain and seek public understanding and support of our policies and of why punitive sanctions are counterproductive;

-- Under the leadership of USIA, engage in renewed and vigorous public diplomacy abroad to defend our policy and our long-term goals and carefully explain the explosive and unacceptable alternatives to peaceful change and continued U.S. engagement in South Africa;

-- In the United Nations and other international fora, actively promote understanding of U.S. policy; oppose new, international mandatory economic sanctions against South Africa;

-- Mobilize and coordinate U.S. mission outreach and USIA Visitor Programs in South Africa to promote human rights and constitutional reforms broadly acceptable to the parties inside South Africa; seek to move these key issues from the discussion to the agenda stage;

-- Work with non-governmental groups, including the National Endowment for Democracy and key private groups representing labor, business, and religious groups to help strengthen the democratic forces in South Africa. (6)

(S. ...)

SECRET

0 of 9 COPIES
NSC

~~Secret~~

DECLASSIFIED IN PART

NLS F95-029/5 05408

By LTI NARA Date 1/2/06

FOIA(b) (1)

FOIA(b) (3)

South Africa: Unlikely To Use Strategic Minerals Leverage

We believe that South Africa is unlikely to react to Western sanctions by cutting off supplies of strategic minerals to the import-dependent West. A South Africa embargo would be counterproductive economically, lowering export earnings in the face of a debt and liquidity crisis. Moreover, an embargo would tarnish South Africa's reputation as a reliable supplier of strategic minerals and would spur substitution and recycling efforts by industrial users. Even if some limited action were taken for political reasons, we believe that such an embargo would be short lived and have limited impact on the West.

Key Supplier

Concerns that South Africa would use its vast mineral wealth as a political lever against the West have surfaced each time Western economic sanctions against Pretoria have been suggested or imposed. South African officials themselves have occasionally hinted that a strategic mineral cutoff might be used in retaliation. What makes the threat credible is the heavy dependence of many Western countries on a variety of South African minerals.

- South Africa is the West's leading producer of chromium, manganese, platinum-group-metals (PGM), and vanadium, accounting for 24 to 90 percent of Western output. Only the Soviet Union can compete in terms of volume of production and reserves.
- Western import dependence for these four strategic minerals varies from 50 to 99 percent for the United States, 92 to 100 percent for the EC, and [redacted]. South Africa is the key supplier to most of these markets [redacted].

Strategic Minerals Import Dependence Percent

	United States		EC*
	Share of US Consumption Supplied by Imports (1984)	Share of US Consumption Supplied by South Africa (1980-83)	(1983)
Chromium	82	55	92
Manganese	99	39	99
Platinum group	91	49	100
Vanadium	52	44	100

* Details on EC [redacted] imports of South African strategic minerals are incomplete.

This table is Unclassified.

Minerals and the South African Economy

While mining revenues account for approximately two-thirds of South African export earnings, the importance of strategic minerals is dwarfed by the economic contribution of gold and other minerals. Gold alone accounts for nearly half of all export earnings. Diamonds and coal, not normally considered strategic, contribute an additional 10 to 11 percent. Chromium, manganese, vanadium, platinum-group metals, and ferroalloys account for no more than 9 percent of earnings, according to our estimates.

The strategic mineral industry's contribution to South African employment also is relatively minor. The entire mining industry (including coal and

~~Secret~~
DI IE2W 85-039
27 September 1985

16b

~~Secret~~

Strategic Minerals: World Production and Reserves, 1984

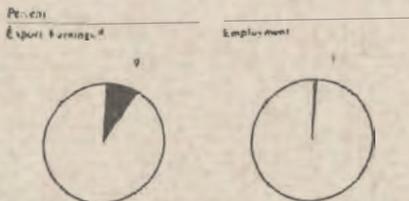
Percent

South Africa			Other Producers		
Mineral	Share of Western Production	Share of World Production	Share of World Reserves		Share of World Production
Chromium	46	27	84	USSR	29
				Albania	11
				Zimbabwe	5
				Turkey	5
				India	5
Manganese	24	11	71	USSR	47
				Gabon	9
				Brazil	9
				China	7
				India	6
Platinum group	90	42	81	USSR	54
				Canada	3
Vanadium	59	30	47	USSR	33
				China	17
				Finland	11

This table is

~~Secret~~

South Africa: The Importance of Strategic Minerals, 1984



uranium) employs only 14 percent of all South African workers with the gold industry again the major player. We estimate that only 10 percent of all mine workers—1 percent of the entire labor force—are employed by the strategic minerals sector.

Lack of Minerals Leverage

Although the South African economy is not dependent on the export of strategic minerals, an embargo at this time would deepen the current financial crisis. Over the longer term, an embargo would be more damaging.

- Gold earnings are expected to decline because of depletion of high-quality reserves, and South Africa will look to nongold exports—such as strategic minerals—to maintain economic growth.
- Any deliberate supply cutoff would tarnish South Africa's reputation as a reliable supplier, and a portion of its market share could be lost even if the embargo were later lifted.

- In addition, a supply cutoff would undoubtedly trigger accelerated substitution and recycling efforts, encourage competing producers to gear up production, and possibly lead to use of government stockpiles. The Soviet Union would probably exploit the situation, using substantial profits to offset declines in other hard currency exports.

Prospects for an Embargo

Moreover, there is no indication that South African mineral producers are concerned that their government will take action. According to Embassy reporting, producers are more concerned that Western trade sanctions—currently confined to coal—could spread to other mineral commodities. As a result, we believe that a total embargo of South African strategic minerals is unlikely. However, Pretoria might opt for a partial embargo as a political gesture. South Africa would lose little of its trade volume, at least in the short run, and would probably try to reorient its strategic mineral trade to other markets. In that case, we believe Western countries could survive by encouraging alternate producers to restart idled capacity, increasing imports from the USSR, using stockpiled materials, intensifying recycling efforts, and, if necessary, reducing civilian usage.

This article is

~~Secret~~

~~Secret~~

South African Strategic Minerals—
Prospects and Vulnerabilities

Uses and Strategic Applications	South African Prospects	South African Vulnerabilities	Uses and Strategic Applications	South African Prospects	South African Vulnerabilities
Chromium			Manganese		
Ferrochromium stainless steel specialty alloys	Will probably emerge as premier ferrochromium producer because of vast reserves and cheap power	Some competition from new ferrochromium plants in Greece, India, Philippines, Finland, Sweden, and Turkey	Ferromanganese for steel production	Will retain position as one of world's major producers—has large reserves	Technology will continue to lower amount of manganese used per unit of steel
Tanks, ships, military aircraft, naval nuclear propulsion systems	Low rand value will contribute to keep costs down and dollar earnings high for producers	Increased substitution likely in noncritical applications	Ships, tanks, other military vehicles	Recent merger of two major producers should curb production costs and improve competitiveness	Consumption tied to steel demand
	Earnings unlikely to rise dramatically—prices forecast to increase slowly				Increased competition from Gabon, Australia, and Brazil
					May be unable to capture part of new Soviet and Chinese markets
Platinum-Group Metals (PGM)			Vanadium		
Auto catalytic converters	No major new competition on horizon	Forces depressing gold prices—strong dollar, high interest rates, and low inflation—could continue to keep lid on PGM prices despite improved market	Steel alloys	Producers willing to compete by lowering prices	Boom-bust nature of industry likely to continue
Electrical contacts	Domestic industry in throes of major expansion to meet projected increased demand		Titanium alloys	Rand weakness has boosted revenues	
Petroleum and chemical catalysts			Oil pipelines		Large sales to the West by China if prices rise sufficiently
Jet aircraft engines			Jet engines		
Lasers	Industry controlled by three companies who adjust production to changes in demand, thus stifling substitution and recycling	Recycling could supply up to 10 percent of world consumption by 1990			
	Consumption expected to rise as Europeans impose strict auto emissions standards				

This Table is

~~Secret~~

Strategic Minerals: World Production and Reserves, 1984

	South African Share (percent)			Other Producers Share (percent)	
	Western Production	World Production	World Reserves	World Production	
Chromium	46	27	46	USSR	29
				Albania	11
				Zimbabwe	5
				Turkey	5
				India	5
				Other	16
Manganese	24	11	71	USSR	47
				Gabon	9
				Brazil	9
				China	7
				India	6
				Other	11
Platinum group	90	42	81	USSR	54
				Canada	3
				Other	1
Vanadium	59	30	47	USSR	33
				China	17
				Finland	11
				Other	9

Strategic Minerals: Critical Uses and Alternatives to South African Supplies

Share of US Consumption Supplied by South Africa (percent)	Strategic Applications	Best Short-Term Alternatives to South African Supplies
Chromium	55	Stainless steel and specialty alloys for tanks, ships, military aircraft, and naval nuclear propulsion systems
		Increase imports from India, Philippines, Turkey, USSR, and Albania. Substitute other materials in noncritical applications.
Manganese	39	Steel for ships, tanks, and other vehicles
		Increase imports from Gabon and Australia.
Platinum group	49	Catalysts for petroleum and fertilizer production
		Increase imports from USSR
		Electrical contacts for jet aircraft engines and lasers
		Increase recycling—particularly from spent catalytic converters
Vanadium	44	Steel and titanium alloys for oil pipelines and jet engines
		Increase US production and increase imports from China

Confidential



Memorandum

Washington, D. C. 20590

to Anti-Apartheid Provisions Date NOV 15 1985
 from Director, Office of Highway Operations Reply to
 Title of HHO-32
 to Regional Federal Highway Administrators
 Regions 1-10

This is to advise that the Region 1 Office of Engineering and Operations has recently withheld approval for inclusion in Federal-aid contracts a New York City contract provision which would require the lowest responsible bidder to certify that he/she had not received or provided services or supplies to and would neither receive nor provide future services or supplies to apartheid governments in South Africa. In the absence of the low bidder's certification, the contract would be awarded to the next lowest responsible bidder whose bid was within 5 percent of the low bid and who had made such a certification.

We concur with the Region's position. It is our determination that such provisions violate basic Federal-aid policy which holds that States may not impose requirements which are discriminatory against contractors, because of their residency (23 CFR 635.108) or because of whom they elect to do business with (23 CFR 635.409), whether the situation involves other States or foreign countries.

Further, regarding regulations impacting foreign relationships such as the subject matter, the Federal Constitution reserves the conduct of foreign relations and the regulation of foreign commerce to the Federal Government. Congress may delegate certain of this power, by law, to the government of a State, such as under "Buy America." However, Congress has not authorized any State thus far to discriminate against contractors in Federal-aid projects because of their relationships (either directly or indirectly) with the Republic of South Africa or for that matter any other foreign country nor has DOT enunciated such a policy.

11-14-85 David S. Gendell

David S. Gendell

THE WHITE HOUSE
WASHINGTON

January 13, 1986

→ Kae
assume
been?
703/114
Deb 1.14

MEMORANDUM FOR MITCH DANIELS
DEBORAH STEELMAN ✓

FROM ALEX DIMITRIEF *Alex*

SUBJECT POSSIBLE SOUTH AFRICA BRIEFING

Following up on our South Africa discussions, we can expect various sorts of divestment bills and debates over the next six months in fifteen states:

- California (governor vetoed bill last year);
- Connecticut;
- Florida;
- Illinois;
- Maine;
- Massachusetts;
- Michigan;
- Minnesota;
- New Hampshire;
- New Jersey;
- New York;
- Ohio;
- Pennsylvania;
- Washington;
- Wisconsin.

In addition, we can expect anywhere from 75 to 100 city councils to take up similar resolutions or ordinances.

At present, ALEC is providing most of the intellectual firepower to those state legislators fighting disinvestment petitions, helped occasionally by State's IGA Office. This is usually done through the State ALEC office, which alerts the office here of pending legislation and distributes whatever talking points ALEC may have. Vonni Borie, who heads up ALEC's efforts, and Jayne Plank would both be overjoyed by some sort of Washington "event" for the top players in each state -- they could easily provide us with a "top 5" from each of the fifteen states in question for an audience of 75, and we could invite city officials on top of that. ALEC believes some sort of "reward" or recognition would be useful because these folks are towing the Administration's "line" even though many still feel "sold out" by the President South Africa Executive Order.

Although I agree that such a meeting could be productive, I believe the action on this one should remain entirely over at State; we can certainly help Doug Holladay get a good list together, but I would be wary of involving the White House once again in a nettlesome issue which most would agree the President handled rather adroitly last summer. I sense that what these folks want more than anything is some sign that the Administration does in fact care about and support their efforts, and this can be done just as easily through a State Department briefing as anything else.

In short, I would recommend having me bring Doug, Jayne Plank & Lee Hunt, and ALEC's people together to give them a jump start on pulling the briefing off, help them pull the list together, and let them know that their efforts have your blessing.

South Africa issue tied to a mayoral appointment

By Sandy Baszky

Baltimore City Councilman Michael B. Mitchell, D-4th, says he will no longer do any official business with the municipal pension boards, which last year rejected a council request to sell off its investments with firms doing business in South Africa.

So last night, during a routine report on a mayoral appointment to the board of trustees of the Fire and Police Employees' Retirement System, Mr. Mitchell stood and tried to block the appointment of Kenneth P.

Taylor.

Immediately, Councilman Nathaniel J. McFadden, D-2nd, was on his feet to protest. "Mr. Taylor is a black and well understands the problem and could be of benefit to us," said Mr. McFadden, who is, like Mr. Mitchell, black and a proponent of disinvestment.

"Mr. McFadden, this transcends color," Mr. Mitchell answered.

The councilman said that, inspired by South African Bishop Desmond Tutu, "I philosophically and in good conscience can not in any public way . . . morally support the pro-

cess to keep in tact a trustee system that thumbs its nose at us.

"Any official sanction of the process would be to me a support to the system," Mr. Mitchell went on.

He added that he knew Mr. Taylor to be "a very capable and fine young man, fine young banker. . . . Race is a part of things, but there is a larger question, a moral question involved."

Mr. Mitchell moved to table Mr. Taylor's appointment to the pension board, but his effort failed and the nomination won tentative approval.

The chairwoman of the Executive

Appointments Committee, Councilwoman Rochelle "Rikki" Spector, D-8th, said that she was "very sensitive to the issue" of disinvestment and had asked Mr. Taylor about it when her committee interviewed him.

She said she was satisfied with his answers. And, she observed, Mr. Mitchell's father, the late Clarence Mitchell Jr., had been successful in pushing civil rights legislation through Congress because "he understood the process" and worked with the system.

Participants in the February 5, 1986
Briefing for Businesspersons

Walter J. Brown
E & C Associates
Greensboro, NC

John Kenneth Lee
Attorney/American Federal Savings & Loan Association
Greensboro, NC

Larry Shaw
Shaw Food Services Company
Payetteville, NC

Abraham S. Venable
Executive Director, Urban Affairs
GM
Detroit, Michigan

James Morris Griffin
President, Comprehensive Marketing Systems, Inc.
Washington, DC

Larnie Glenn Horton
President, International Domestic and Development Corporation
Raleigh, NC

Joe Kirven
AECO Maintenance Company
Dallas, TX

James E. Haynes
Past President, National Association of Real Estate Brokers
Cleveland, Ohio

William Frank Pickard
Chairman, African Development Foundation
Bloomfield Hills, MI

William B. Kanaga
Chairman, Arthur Young
New York, NY

James D. Johnston
Vice President for Industry-Government Relations
GM
Washington, DC

Edward P. Heenan
Corporate Division, Human Resource Programs
Burroughs Corporation
Detroit, Michigan

Carole P. Hoover
Senior Vice President, Greater Cleveland Growth Association
Cleveland, Ohio

George Schroll
 Director of Corporate Employee Relations
 Colgate-Palmolive
 New York, NY

Ralph L. Phillips
 Senior Planning Analyst
 Mobile Oil
 New York, NY

Wilfred Kopolwitz
 Vice President for International Public Affairs
 Citibank
 New York, NY

Reginald Dunn
 Booker T. Washington Foundation
 Washington, DC

Ronald R. Morris
 Company Group Chairman
 Johnson & Johnson
 New Brunswick, NJ

Aldrage B. Cooper, Jr.
 Director, Public Affairs
 Johnson & Johnson
 New Brunswick, NJ

James A.R. Johnson
 Manager, Government Affairs
 Xerox Corporation
 Washington, DC

AF Bureau and NSC representation

William B. Robertson
 Deputy Assistant Secretary for African Affairs
 The Department of State

F. Allen Harris
 Deputy Director, Office of Southern Affairs
 The Department of State

Phil Ringdahl
 National Security Council

Commerce Department Staff

W. Davis Coale, Jr.
 Desk Officer for South Africa, Commerce Department

White House Staff

Mel Bradley
 Special Assistant to the President

Smith

1
2
11

African Affairs Directorate
 Records

Speakers

Charles W. Muller
Secretary and Treasurer, Urban Foundation
New York, NY

Susan Blackman
Director, Office of Africa, Commerce Department

Jay P. Morris
Deputy Administrator, Agency for International Development

Walter Raymond
Senior Director International Communications and Information,
National Security Council and Special Assistant to the President

Frank Wisner
Deputy Assistant Secretary for African Affairs, The State
Department

SAWG staff

J. Douglas Holladay

Alan Van Egmond

Ronald Quincy

Richard Campanelli

Joseph F. Ryan

Maureen McEwen

IV. PROPOSED AGENDA

- 9:30am J. Douglas Holladay, Director, South African Working Group
- 10:00am TOPIC: Greeting and Introduction
Frank Wisner, Deputy Assistant Secretary for African Affairs, Department of State
- 10:30am TOPIC: Overview of situation in South Africa and Administration policy
Walter Raymond, Special Assistant to the President and Senior Director of International Communications and Information, National Security Council
- 11:00am TOPIC: Role of private sector in reform process in South Africa
- 11:00am Coffee Break
- 11:30am Jay F. Morris, Deputy Administrator, Agency for International Development
- 11:50am TOPIC: AID programs in South Africa
Susan Blackman, Director, Office of Africa, Department of Commerce
- 12:10pm TOPIC: Commerce initiatives in South Africa
Charles Muller, Secretary and Treasurer of the Urban Foundation, USA
- 12:30pm TOPIC: One example of the work of a private organization in South Africa
J. Douglas Holladay, Director, South Africa Working Group
- 1:30pm Close Meeting

Mobil - Black develop.

Bill Kopsowitz Citibank

Ron Hanger, Johnson & Johnson (no payroll → projects)

Colgate, Hd of Sullivan ed.

Trade + Devt Progr. clear value for feasibility studies

Comments published as Obstacles to all businesses in S Africa
[Dave Coles] A review for Am. bus. firms

1975 DIRECTOR'S RECORDS

City Council testimony divided on South African divestment

By Ann LoLordo

The supporters of a pension divestment bill now before the City Council were unequivocal in their views yesterday: Economic sanctions must be imposed against South Africa to protest its policy of apartheid.

The message of retired city firefighters and police officers was just as clear: Don't use our pension funds as a means to that end.

Those arguments reverberated through a crowded council chamber during a hearing over the legislation that would require the city retirement systems for police, fire and other municipal employees to divest itself of its \$1.1 billion pension fund from companies doing business in South Africa.

The bill proposed by Councilman Kwesi Mfume, D-4th, would affect 27 percent of the pension fund, or \$309 million. Retirement system officials oppose the bill because it would force them to divest themselves of 40 percent of the fund's stocks — investments that have returned 20.7 percent annually between 1979 and this past March.

The measure would require full divestment within two years. But it would allow the trustees of the pension system to seek an extension of that deadline should divestment "necessitate substantial losses."

Mr. Mfume and other supporters of the bill argued that democracies have a moral obligation to oppose apartheid.

Ernest Crofoot, director of the Maryland chapter of the American Federation of State, County and Municipal Employees, described South Africa as a nation of "kings and people treated like slaves."

"Every dollar we send there makes the kings a little richer," he said in supporting the measure.

With careful planning and responsible investment strategies, proponents maintained, divestment could be accomplished without losses to the pension system.

Marcy M. Murningham, an investment counselor from Cam-

bridge, Mass., whose firm has helped institutions successfully divest, contended that the investment return of South Africa-free portfolios "either matches or outperforms" the Standard and Poor 500 Index.

But Joseph E. Stegmund Jr., speaking on behalf of 450 retired city police officers, said pension funds should not be tampered with in pursuit of a social cause.

"Once the door is open, the system becomes fair game for anyone who has a cause or feels they have a cause," he said.

Others argued that divestment could cost retirees future benefits and possibly require an increase in the city's contribution to the pension system.

Investment income accounted for 68 percent of retirement revenues between fiscal years 1978 and 1986, said Ernest J. Glinka, acting administrator of the pension system.

Beginning in 1979, trustees for the retirement system decided to have several investment firms — rather than one — manage the pension portfolio. As a result of that diversification, the annual investment return has risen from about 5 percent to 14.7 percent, Mr. Glinka said.

Mr. Glinka maintained that if the city had to contribute to the pension system at the rate it did in 1978, the city's anticipated surplus of \$26 million for this year would in fact become a \$2 million deficit.

John Seiss, of Local 964 of the International Association of Firefighters, said pensioners fear divestment would adversely impact their futures.

"It's kind of like asking people to play Russian roulette with their futures and the future of their families," he said.

But Dr. Levi Watkins, a Johns Hopkins Hospital cardiac surgeon and proponent of divestment, told retirees: "Don't let your fears undermine your humanity."

The New York Times

22a

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers, please [click here](#) or use the "Reprints" tool that appears next to any article. Visit www.nytreprints.com for samples and additional information. [Order a reprint of this article now.](#) »

June 22, 1986

AMERICAN CITIES TAKE ON PRETORIA

By SCOTT BRONSTEIN

SEVERAL days ago, the New York City Board of Estimate awarded an \$8 million contract to the Eastman Kodak Company to provide high speed copiers for city agencies. It was a close call for Kodak. Although the company was the lowest bidder, it almost lost out because of business dealings half a world away. Kodak had sold film to the South African military, putting it at the mercy of a year-old New York law that allows city officials to bypass low bidders who do business in South Africa.

Kodak got the contract, but only after it pledged to cease dealing with any government agency in South Africa. "The purpose of the law was not to punish contractors, but to encourage them to stop supporting apartheid," said Mayor Edward I. Koch at a news conference after the contract was awarded. Peter F. Vallone, the City Council majority leader, adds: "This is a tremendous example of how New York City can shape corporate policy."

Congress seems to be thinking along the same lines. The Senate is weighing a measure that the House passed in a surprisingly swift move Wednesday that would force American companies and individuals to divest any assets they hold in South Africa and to halt all operations there within 180 days.

Of course, cities do not have the authority to enforce such a sweeping law. But some are trying to accomplish the same thing via economic pressures. A year ago, New York became one of the nation's first municipalities to pass legislation requiring companies that do city business to say that they do not conduct business with the South African Government or any of its agencies that enforce apartheid. Since then, 28 other cities or counties - and, as of last month, one state, Maryland - have passed laws that are variations on the same theme. (See box.) And, with the South African authorities' imposition of a state of emergency that further restricts civil rights more cities are expected to join in.

Detroit, for example, is having second thoughts about contracts with companies that have South African dealings. A few months ago the city awarded a contract to Combustion Engineering Inc., to build a trash-to-energy plant. Now, although no one is talking about rescinding the contract, city officials imply that they might not be too quick to award another one.

"South Africa is a very big issue in the City Council," said Barbara-Rose Collins, one of the nine Council

members. She says that the Council did not know that Combustion Engineering was building six power plants outside of Johannesburg, and that such knowledge "might have affected the vote."

Just this week, Boston officials started talking about adding a selective purchasing law to the books. The city's pension funds already have divested \$12.5 million in stocks of companies with South African ties. Still, "the events of the past week have prodded our city to do a lot more," said Charles C. Yancey, one of Boston's 13 councilmen.

The emergency restrictions on the freedoms of blacks, activists and the press that preceded the tenth anniversary of the Soweto uprising have convinced many over here that anti-apartheid tactics based on investment decisions - for example, divestiture of stock in companies that do business with South Africa, or refusal to deposit money in banks tied to that country - have not gone far enough in altering South Africa's racial policies. Now, by passing selective purchasing laws, cities are hoping their purchasing departments will be able to effectively supplement the efforts their portfolio managers are making.

"The selective purchasing development is the second wave of the divestiture debate that has been going on for years," said Marcy Murningham, president of the social investment services division at the Mitchell Investment Management Company, an investment advisory firm. THE new municipal purchasing rules do seem to be having an impact on American companies. In the last six months, numerous companies, including such giants as American Telephone and Telegraph, Bell & Howell and General Electric, have pulled out of South Africa. A number left, at least in part, because of local pressure.

For example, the Bell & Howell Company, based in Chicago, has stopped making and distributing industrial photographic equipment in South Africa. "Boycotts by government purchasing agencies are a real fear," said Donald N. Frey, the company's chairman and chief executive officer. South African operations had represented less than 1 percent of the company's total revenues; about 40 percent of Bell & Howell's revenues come from textbooks that its Merrill Publishing Company puts out under municipal contracts. Losing those contracts "could be devastating to us," Mr. Frey said.

Local selective purchasing laws undoubtedly also were a contributing factor in Bank of America's decision three weeks ago to cease all lending to South Africa. Most other major American lending institutions do not lend to the South African Government or its agencies, but still lend money to private companies and banks there.

Bank of America officials would not draw a direct link between pressure from local councils and their decision. But Elizabeth H. Nachbaur, the bank's vice president and manager of social policy, did say, "We're certainly aware of the concerns of our customers over our engagement in South Africa, and we have been actively working with these municipalities, whose business is very important to us."

Those companies that continue to do business with South Africa are being dealt some fairly hefty economic blows by city officials. Signal Environmental Systems, part of the Henley Group, unsuccessfully bid on a \$250 million contract to build a trash-to-energy facility in Los Angeles. Ogden Martin, not Signal, was the low bidder, and Alfred B. DelBello, Signal's president, insists that it was economics, not politics, that cost him the contract. "We were trying to get the city to pay more," he said simply.

But city council members say that the Henley Group's ties to South Africa - through Tilghman Wheelabrator, a small South African manufacturer of equipment cleaning material that Henley is in the process of selling - were a major factor in its decision. The council makes such considerations "an official part of the city's apparatus," said Councilman Zev Yaroslavsky, of Los Angeles.

Similarly, San Francisco refused to grant Combustion Engineering a \$300 million contract to build a trash-to-energy plant. The City Council was not at all swayed by the fact that the company's South African power plant contracts were signed in 1981, a stance that company executives see as unfairly rigid.

"We have elected to not pursue any additional business in South Africa, because of concerns expressed from local governments," said Charles Hugel, Combustion Engineering's president and chief executive officer. "But the nature of our business is long-term. It takes years to complete the contracts. I am trying to work this through in a responsible way, and it's very difficult." SOCIAL activists both within and outside local governments view corporate discomfort with selective purchasing laws as a small price to pay to rid the world of apartheid. These activists no longer hold out much hope that pressure from Washington will have any great impact on Pretoria.

"There is really an impatience at the level of ordinary people in this country, expressing itself as a demand to do something at the local level, rather than wait for further sanctions by the Federal Government," said Jennifer Davais, executive director of the American Committee on Africa, a New York-based lobbying group sponsoring anti-apartheid activities across the country.

The Federal Government and the cities have at times seemed at cross purposes. In at least one case over the last year, the Department of Transportation threatened to withhold Federal funding for New York City highway contracts, alleging that the city's law interferes with Federal regulations concerning competitive bidding.

So far, it has not made good on that threat, though. And several other cities have passed their own selective purchasing laws without waiting to see what happens in New York.

"We wanted to find a way to demonstrate the city's position relative to apartheid," said Chicago Alderman Danny K. Davis, who sponsored a selective purchasing bill that was passed unanimously by the city's 50 alderman on May 30. "We think by a city like Chicago doing this, it will spur the

enactment of other ordinances by other municipalities and other public institutions."

That prospect terrifies executives of corporations who claim they cannot easily pull out of South Africa—for example, corporations with large plants there, or in the middle of projects. These executives envision a nightmare world of conflicting regulations and obscure options.

"There's no consistency," complained Mr. Hugel of Combustion Engineering. Some cities, he notes, only forbid their contractors from doing business with the South African military; others proscribe the signing of any future contracts with South Africa; and yet others will not award city business to any company that is fulfilling past South African contracts, even if it pledges not to transact any future business there.

"There's such a hodge-podge of rules and regulations that are so different," Mr. Hugel said, "it's difficult to proceed, and it makes for a very difficult business proposition."

It also may undermine competition between American firms and foreign firms, warns James R. Lamb, Jr., a spokesman for the Xerox Corporation, which has a South African subsidiary, and which was one of the losing bidders on the New York contract that Kodak was awarded last week. He notes that Japanese companies, which sell copiers through various overseas dealers, might not appear to be linked to dealers in South Africa and thus might not show up on lists that the cities get from activist groups and investment houses.

"It becomes difficult to make sure everyone is treated fairly," Mr. Lamb said. "We want all competitors to have to meet the same obligations."

In fact, if changing municipal regulations does not persuade enough American companies to pull out of South Africa, some cities may have no choice but to go to foreign suppliers for automobiles, computers, and other equipment. For example, Mr. Hugel calls the San Francisco law "onerous" in this respect. "The city can't buy any Ford or G.M. cars, or any I.B.M. computers," he said. "San Francisco literally can't function if they apply this law all the way. The law wasn't thought through."

Even if there were some functional dislocation, it would be a small price to pay, counters Mr. Davis, the Chicago alderman. In his view, the issue is cut and dried: "Apartheid is evil. And it must not be supported." SIMILAR GOALS, BUT DIFFERING MEANS Though local laws designed to put economic pressure on South Africa differ widely in detail, their provisions fall roughly into four categories, based on the specific restrictions they place on American companies. The following table, based on data supplied by the Mitchell Investment Management Company, groups the cities, counties and one state with laws in effect today. Those cities with fairly comprehensive laws appear more than once. 1. No product made in South Africa can be purchased by the local government. Alameda County, Calif., Camden, N.J., Chicago, College Park, Md., New York City, Oakland, Calif., Omaha, Richmond, Rochester, N.Y. 2. Companies without any tie to South Africa get preference, even in competitive

bidding situations. Alameda County, Calif., East Lansing, Mich., Kansas City, Mo., Kansas City, Kan., Madison, Wis., Oakland, Calif., Stockton, Calif., Topeka, Kan., Washington, D.C. 3. No city contracts or merchandise orders will go to any company operating or investing in South Africa. Los Angeles, Maryland, Newark, New

Orleans, Prince Georges County, Md., Richmond, Calif., San Francisco, Sonoma County, Calif., Tucson, Ariz., West Hollywood, Calif. 4. No contracts or orders will go to companies that sell to the South African military, police, or other agencies that enforce apartheid.

Charleston, S.C., New York City, Pittsburgh, Raleigh, N.C. WHAT THE U.S. EXPORTS

Top 1985 merchandise exports to South Africa; millions of dollars:

Military goods...\$282.1; Computers...121.4; Chemicals (unfinished)...83.4; Aircraft parts...57.8; Industrial machinery...51.2. WHAT THE U.S. IMPORTS

Top 1985 merchandise imports from South Africa; millions of dollars:

Precious metals (not gold)...\$572.3; Diamonds...274.2; Ferro-alloys...147.3; Nuclear fuel materials...138.7; Numismatic coins...99.8.

Photo of trade unionists at a rally in South Africa (Gamma Liaison/Peter Magubane); Photo of anti apartheid protester (Woodfin Camp/Leif Skoogfors); Graph of U.S. current accord transactions with South Africa, 1980-85 (U.S. Commerce Department)

Original of Cooper Memo
with later deleted footnote



cc: C-2/10
U.S. Department of Justice
Office of Legal Counsel

File
So. African
Sanctions

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 30 1986

MEMORANDUM FOR JIM J. MARQUEZ
General Counsel
Department of Transportation

JUN 30 11 25 AM '86

Re: Applicability of New York City Local Law 19 to
Bidding under Federal-Aid Highway Act Programs

I. Introduction and Summary

This memorandum responds to your request of April 24, 1986, for the opinion of the Attorney General on the question whether the Secretary of Transportation must withhold approval for payments under the Federal-Aid Highway Act for any contract which has been awarded pursuant to a bidding process subject to New York City Local Law 19 (Local Law 19).¹ Section 112 of the Federal-Aid Highway Act of 1958, as amended, 23 U.S.C. 112, requires the Secretary to withhold approval for contracts for locally administered highway construction projects funded in whole or in part by the federal government unless the contracts are awarded through competitive bidding.

¹ The Attorney General has delegated his responsibility for rendering opinions to government agencies to the Assistant Attorney General, Office of Legal Counsel. See 28 C.F.R. 0.25.

You also requested that we opine on the issue of the legality of Local Law 19 as applied to federal programs in general. Because the statutory framework under which a particular federal program is administered may be highly relevant to the legality of applying Local Law 19 to that program, we are not able to provide a more general opinion. We would be pleased, however, to respond to requests from the Department of Transportation or other agencies concerning the applicability of Local Law 19 to specific programs.

The provisions of Local Law 19 impose certain disadvantages in the bidding process for city contracts on bidders who fail to sign an anti-apartheid certificate stating that they have not, within the previous twelve months and for the term of the impending contract, done business with, and have neither bought from nor sold goods to certain agencies of the government of the Republic of South Africa or Namibia. Moreover, in the case of a contract to supply goods, the city requires the contractor to certify that none of the goods to be supplied to the city originated in South Africa or Namibia. See 13 N.Y.C. Code 343.11.0(a).² These certification conditions are not required by

² Section 343.11.0(a)(1) provides:

With respect to contracts described in subdivisions b and c of this section, and in accordance with such provisions, no city agency shall contract for the supply of goods or services with any person who does not agree to stipulate to the following as material conditions of the contract if there is another person who will contract to supply goods or services of comparable quality at a comparable price:

(1) that the contractor and its substantially owned subsidiaries have not within the twelve months prior to the award of such contract sold or agreed to sell, and shall not during the term of such contract sell or agree to sell, goods or services other than food or medical supplies directly to the following agencies of the South African government or directly to a corporation owned or controlled by such government and established expressly for the purpose of procuring such goods and services for such specific agencies:

- (a) the police,
- (b) the military,
- (c) the prison system, or
- (d) the department of cooperation and development; and

(2) in the case of a contract to supply goods, that none of the goods to be supplied to the city originated in the Republic of South Africa or Namibia.

Although the term "comparable price" in this section is not defined, section 343.11.0(b) makes clear that an agency must refer any contract in which a complying bid is within five percent of a non-complying bid to the board of estimate, which will make the final decision as to its award.

any federal law or executive order.³

Section 343-11.0(b) provides that if a bidder complying with the anti-apartheid certification makes a bid no more than five percent higher than a low bid submitted by a non-complying contractor, both bids are to be passed on to the New York Board of Estimate which "may determine that it is in the public interest that the contract shall be awarded to other than the lowest

³ Executive order 12532 forbids government agencies from providing export aid to corporations doing business in South Africa unless they certify that they are adhering to certain principles of nondiscrimination with respect to their employees. The order also forbids the supply of computers to certain South African agencies but contains no general prohibition against contracting with these agencies. See 21 Weekly Comp. Pres. Doc. at 1031-54 (September 9, 1985).

responsible bidder."⁴ New York City has declared that it will apply Local Law 19 to federally funded projects.

⁴ Section 343.11.0(b) provides:

In the case of contracts subject to public letting under sealed bids pursuant to section three hundred forty-three of the charter, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in subdivision a of this section and another bidder who has agreed to stipulate to such conditions has submitted a bid within five percent of the lowest responsible bid for a contract to supply goods or services of comparable quality, the contracting agency shall refer such bids to the board of estimate which, pursuant to such rules as it may adopt, and in accordance with subdivision b of section three hundred forty-three of the charter, may determine that it is in the public interest that the contract shall be awarded to other than the lowest responsible bidder.

Section 343 of the NYC Charter requires a two-thirds vote and the approval of the corporation counsel and the comptroller before any such decision is made. New York City observes that section 343 of the charter applies to all contracts for goods and services exceeding \$5,000 and thus allows the board of estimate to award contracts to contractors other than the low bidder regardless of the applicability of Local Law 19. See Letter from Jeffrey Friedlander, Deputy First Assistant Corporation Counsel, New York City to John McGinnis, Attorney-Advisor, Office of Legal Counsel at 5-6, 11 (June 18, 1986) (hereinafter cited as NYC Mem.). Therefore, New York City argues that Local Law 19 cannot be deemed to violate section 112, because it does no more than refer certain contracts for consideration under a standing procedure to which the Secretary of Transportation has not heretofore objected. The short answer to this argument is that the Secretary is not disabled from challenging the application of a provision to federal contracts which has not been brought to her attention previously. While the issue of the legality of section 343, considered by itself, is not directly before us, we believe that its application to federally funded highway projects would raise many of the same issues as does application of Local Law 19. We note, however, that Local Law 19 is different from section 343 in that it singles out a specific group of contractors and declares that, in certain circumstances, their low bids must be referred to the board of estimate for potential disapproval. Therefore, the Secretary is wholly justified in being more concerned about Local Law 19 than section 343, because the latter does not single out a particular class of contracts for mandatory reference to the board of estimate.

We conclude that application of Local Law 19 to federally funded highway projects administered by New York City would violate 23 U.S.C. 112. Section 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency. By imposing disadvantages on a class of responsible bidders, Local Law 19 distorts the process of competitive bidding in order to advance a local objective unrelated to the cost-effective use of federal funds. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to Local Law 19.

II. Analysis

Under the Supremacy Clause,⁶ state or local action must give way to federal legislation passed pursuant to one of Congress' enumerated powers where the "act of Congress fairly interpreted is in actual conflict with the law of the State" or state subdivision. Florida Lime & Avocado, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). It is well settled that Congress, pursuant to its taxing and spending powers under Article I, section 8, of the Constitution, is authorized to disburse federal funds to the states for particular programs and to "fix the terms on which it shall disburse federal money." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). Accordingly, when Congress elects to distribute federal funds to states, it may attach conditions to their distribution. So long as the conditions are valid and clearly expressed, id., "[r]equiring States to honor their obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." Hell v. New Jersey, 461 U.S. 773, 790 (1983). "If the conditions [are] valid, the State [has] no sovereign right to retain [federal] funds without complying with those conditions." Id. at 791.

⁵ This Office has been informed that legislation is being considered in Congress that would direct the Secretary to approve payments under the Federal-Aid Highway Act for contracts entered by New York City before October 1, 1986, regardless of the application of Local Law 19. The stated purpose of this legislation is to provide time for the Department of Justice to render an opinion on the issue of the legality of the application of Local Law 19 to federal programs. Our opinion, of course, considers the legality of Local Law 19 under existing federal law and does not purport to evaluate the effect of pending legislation on the Secretary's obligation or authority to withhold approval for New York City highway construction projects using federal funds.

⁶ U.S. Const. Art. VI, Sec. 2.

STEVENS, FULL SENATE FILES

The Supreme Court has specifically upheld Congress' attachment of conditions to the distribution of federal highway funds. In Oklahoma v. United States Civil Service Commission, 310 U.S. 127 (1947), the Court upheld a federal denial of highway funds to Oklahoma because of the state's failure to observe the requirements of the Hatch Act. Congress had conditioned states' receipt of federal highway funds on compliance with that Act. The Court stated: "While the United States is not concerned with, and has no power to regulate, local political activities of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed." Id. at 143.

New York City does not dispute that the competitive bidding conditions imposed by section 112 of the Federal-Aid Highway Act are valid exercises of the congressional spending power -- conditions which DOT is therefore obligated to enforce. And careful examination reveals that Local Law 19 is in clear conflict with these conditions.

Section 112 applies to all highway projects using federal funds "where construction is to be performed by the State highway department or under its supervision." See 23 U.S.C. 112(b). The first two sentences of section 112(b) provide:

Construction of each project . . . shall be performed by contract awarded by competitive bidding, unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more

⁷ Because our opinion rests on the actual conflict between Local Law 19 and 23 U.S.C. 112, we need not reach the question whether application of Local Law 19 to federally funded projects impermissibly burdens foreign commerce or intrudes into a field -- foreign affairs -- which is uniquely the concern of the federal government.

⁸ Section 112(d) makes clear that the phrase "under [the] supervision [of the State highway department]" in section 112(a) is intended to make that section apply to local subdivisions, such as New York City, as well as to State highway departments. Section 112(d) provides (emphasis added):

No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

cost-effective. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.

A version of this provision has governed the process for awarding highway contracts since 1954 when the Senate insisted on amending the Federal-Aid Highway Act of 1954 to require competitive bidding "unless the Secretary finds some other method is in the public interest." See Pub. L. No. 83-350, sec. 17, 68 Stat. 71 (1954).

The Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2106 (1983), strengthened the competitive bidding requirement by eliminating the public interest exception and imposing the current requirement that departures from competitive bidding be justified by a demonstration by the local highway department that the alternative is more cost-effective. The

⁹ The last section of section 112(b) provides:

No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder for a project, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

This sentence was added to the Federal-Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 830 (1968), in order to assure that the federal requirements of equal employment opportunity mandated by Executive Order 11246 be advertised before the bidding so that contractors would know what was expected of them. See S. Rep. 1340, 90th Cong., 2d Sess. 16-18 (1968). The provision is manifestly not a certe blanche for the state to impose additional requirements of its own choosing unrelated to cost-effective use of federal funds. By the terms of this provision, any state requirement must be "otherwise lawful" and therefore cannot interfere with the competitive bidding requirement established by the first two sentences of the section.

¹⁰ The Senate proposed the amendment requiring competitive bidding, see S. Rep. 1093, 83d Cong., 2d Sess. 14 (1954) (stating that requirement is designed to prevent "collusion or any other action in restraint of free competitive bidding"). After the House acceded to the Senate amendments, one Senator hailed the bidding provision as one of the most important achievements of the entire bill. See 100 Cong. Rec. 5124 (1954) (remarks of Sen. Gore).

legislative report accompanying the amendment reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway projects funded by the federal government. See H. Rep. 555, 97th Cong., 2d Sess. 11 (1982). The 1982 amendments therefore make clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested.

Local Law 19 contravenes the clear requirement of section 112 that all contracts be awarded through a process of competitive bidding to the responsible bidder who submits the lowest bid; the local ordinance frustrates the manifest congressional mandate reflected in the statute and its legislative history.¹¹ By imposing disadvantages on a certain class of contractors, New York City discourages responsible contractors¹² from bidding and undermines the competitive bidding process.¹² New York City has failed to justify, as required by the statute, its departure

¹¹ New York City argues NYC Mem. at 8 that this congressional mandate is somehow undercut by 23 U.S.C. 145, which states:

The authorization of the appropriation of Federal funds or their availability under this chapter will in no way infringe on the sovereign rights of the States to determine which projects will be financed. The provisions of this chapter provide for a federally assisted State program.

A provision permitting states to choose their own projects obviously has no bearing on the issue of whether Congress has restricted the permissible procurement procedures for such projects in the interest of the cost-effective use of federal funds.

¹² There can be no doubt that an otherwise qualified contractor who fails to furnish an anti-apartheid certificate is still a "responsible" bidder. Local Law 19 itself acknowledges that the requirements of the anti-apartheid statute are not criteria of responsibility because section 343-11.0(b) refers to "the lowest responsible bidder who has not agreed to [the anti-apartheid certificate]." (Emphasis added.)

from competitive bidding procedures by considerations of cost-effectiveness.

New York City has attempted to defend the legality of its ordinance by observing that all contractors that have bid for its contracts have furnished the anti-apartheid certificate and that there is no evidence that any potential bidder would not be able to comply with the requirement. See NYC Mem. at 12-13. Thus, the City argues that its anti-apartheid certification requirement has not been shown to adversely affect the efficient use of federal funds. This argument is unavailing, however, because it attempts to reverse the burden of proof that the section 112 requires to justify departures from competitive bidding. In order to satisfy this burden, New York City must demonstrate that its

¹³ Indeed, because the primary purpose of the anti-apartheid certification requirement is "to send a message to the government of the Republic of South Africa and to encourage those who do business there to support change," see section 2 of New York City Local Law 19, Local Law 19 is not designed to promote cost-efficiency, but to express a well-justified abhorrence of apartheid. To be sure, the ordinance states that it "also seek[s] to protect the financial interest of the city by limiting the number of city contracts which may depend for their satisfaction on the internal security of South Africa, where relentless oppression has led to increasing civil disturbances, making sabotage of business interests and even revolution possible." Under certain circumstances, such considerations may very well affect the cost-effectiveness of a given contractual arrangement. New York City has not, however, provided the Secretary with any evidence for the proposition that a particular company's contractual agreement with an agency in South Africa will endanger an unrelated contractual agreement to be performed in New York City on a highway construction project.

procedures lead to a more cost-effective use of federal funds; it cannot shift the burden to the Secretary of Transportation to demonstrate that the City's procedures detract from cost-effectiveness.

Second, New York City argues that its ordinance does not violate section 112 because it is not an absolute bar to the award of contracts to contractors who submit the lowest bid for a project but fail to provide an anti-apartheid certificate. According to the provisions of Local Law 19, a non-complying bidder is awarded the contract unless a complying bidder is within five percent of the low bid. Moreover, New York City emphasizes that even when there is less than a five percent differential between a complying and non-complying bidder, the Board of Estimate must still vote by a two-thirds majority to award the contract to the complying bidder rather than the non-complying bidder. The short answer to this argument is that section 112 requires that the contracts be awarded through a process of competitive bidding, not simply that contracts be awarded by a process that may lead to the award of the contract to the lowest bidder. This distinction is important, because the knowledge that a contract will be awarded through a strict process of competitive bidding in itself contributes to the cost-effective use of federal funds by encouraging the submission of bids by contractors who might not otherwise participate. Conversely, a contractor's knowledge that he may submit the low bid and yet not win the contract would deter him from entering the

14 We do not read 28 C.F.R. 635.108 as a decision by the Secretary through regulation to shoulder the burden of proof on the issue of cost-effectiveness. Section 635.108 provides (emphasis added):

No procedure or requirement for prequalification or licensing of contractors will be approved which, in the judgment of the [Federal Highway] Administration, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor whether resident or nonresident of the state wherein the work is to be performed.

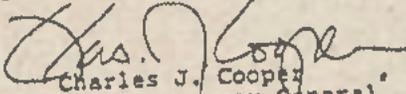
Because the administrator must still disapprove the procedure if the procedure may restrict competition (i.e., has the potential to restrict competition), the burden of showing that the procedure does not restrict competition still rests with the locality.

bidding process and incurring bid preparation costs.¹⁵ Only a process which strictly adheres to the competitive bidding requirement comports with Congress' overriding objective of cost effectiveness by maximizing the number of contractors who will bid for the contract and increasing the likelihood that the contract will be let for the lowest possible price.¹⁶

Since the provisions of Local Law 19 conflict with the requirement of competitive bidding contained in section 112(b), it is clear that 23 U.S.C. 112(d) requires the Secretary to withhold approval for contracts let subject to the provisions of Local Law 19.¹⁷

CONCLUSION

For the foregoing reasons, we believe that the Secretary of Transportation is obligated to withhold federal funds under the Federal-Aid Highway Act for the payment of contracts whose award is subject to the procurement provisions of Local Law 19.


Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

¹⁵ The contractor who does not sign the anti-apartheid certificate knows that in the event of a complying bid that is within five percent of his bid, he will have to persuade the Board of Estimate to award the contract to him, notwithstanding his refusal to comply. The rational bidder would therefore revise his price to reflect the costs associated with lobbying the Board of Estimate on this issue. Thus, even if the contract is awarded to the non-complying bidder, it is reasonable to expect that his bid would be higher than it would be without the application of Local Law 19.

¹⁶ New York City's argument that the Secretary of Transportation may not disapprove contracts awarded under Local Law 19 until New York City actually withholds a contract from a low bidder under that ordinance merits a similar response. The Secretary is obligated to act when New York City's procurement procedures depart from the process of competitive bidding required by federal law, rather than when New York City declines to accept a low bid.

¹⁷ For the text of section 112(d), see supra, n.6.

21862

CONGRESSIONAL RECORD—SENATE

August 15, 1966

SEC. — ANTI-APARTHEID AMENDMENTS

(a)(1) notwithstanding any other provision of law and subject to paragraph (1), (a) the eligibility of a State or a political subdivision of a State to receive funds under any Federal law; and

(b) the amount of funds which a State or a political subdivision of a State is eligible to receive under any Federal law, shall not be affected by the application of any anti-apartheid law for the State or political subdivision to a contract entered into by the State or political subdivision which is funded in whole, or in part, with funds provided by the Federal Government.

(2) The Federal Government shall not be responsible for the payment of the amount of any increase in the cost of any contract entered into by a State or political subdivision of a State if such increase is a result of the application of an anti-apartheid law of that State or political subdivision.

(b) for purposes of this section:

(1) the term "anti-apartheid law" means a law which requires a State or a political subdivision of a State to include in contracts entered into by such State or political subdivision provisions and conditions relating to the contractor's business relationships in South Africa or to limit or condition the award of contracts on the basis of such relationships or to take such relationships into consideration in the award of contracts; or a law which prohibits or restricts the purchase of goods originating in South Africa; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

THE PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, today I am offering an amendment that expresses my personal abhorrence of the doctrine of apartheid practiced by the Government of South Africa. Passage of this amendment would assure that State and local governments will not suffer the loss of Federal aid due to their enforcement of local laws limiting or prohibiting contracts with parties having business interests in South Africa. My distinguished colleagues, Senators MOYNIHAN, KENNEDY, STONE, MURKIN, and Mr. BRADLEY are co-sponsoring this amendment.

My amendment would permit States and political subdivisions of States to enforce State or local anti-apartheid laws with respect to contracts funded in whole or in part by Federal moneys. Such laws would not affect the eligibility of States or local governments to receive Federal funds, or the amount of Federal funds which may be allocated to them. However, should the application of such local laws increase the cost of any federally aided contract, the Federal Government will not be responsible for paying the increase.

The term "anti-apartheid law" would cover local laws that require contracts to contain provisions relating to a contractor's business relationships in South Africa or to limit or condition the award of contracts on

the basis of such relationships. It also includes laws which prohibit or restrict the purchase of goods originating in South Africa.

This amendment is needed immediately to assist those local governments which have chosen to restrict their dealings with those who do business with South Africa. According to the American Committee on Africa, there are at least 25 local governments that have passed such legislation. While some of these laws specify that they do not apply to federally funded contracts, some do permit local discretion with respect to their application to contracts involving Federal funds. New York City has enacted a local anti-apartheid law, Local Law 19, which applies to all contracts entered into by the city.

New York City enacted Local Law 19 in 1965. Compliance with this law is now a condition of doing business with the city. Local Law 19 requires contractors to agree not to do business with the agencies that enforce apartheid in South Africa. If the lowest bidder does not agree to these conditions, but another bidder within 5 percent of the low bidder does agree, the bid would be referred to the board of estimate to determine whether it is in the public interest to award the contract to other than the low bidder. The board of estimate can go with the low bidder even if it is in violation of Local Law 19. To date, the low bidder has always been chosen.

The U.S. Department of Transportation and the Justice Department believe that New York City's anti-apartheid law interferes with the competitive bidding process; as a result, DOT had withheld about \$138 million in Federal aid for city highway projects. In order to assure that these funds were not lost to New York City, I introduced an amendment to the fiscal year 1966 supplemental appropriations bill (Public Law 96-349) signed by the President on July 3. My amendment permits New York City to continue to enforce its local law without the loss of Federal funds. However, it only applies until the end of fiscal year 1968 and it does not cover jurisdictions other than New York City. That is why the amendment I am proposing today is so necessary; we must not allow this protection of a local anti-apartheid law to expire in less than 7 weeks.

This amendment would change Federal contract law to allow local governments to meaningfully participate in the anti-apartheid movement if they are willing to bear any additional costs that ensue. It provides a long-term solution to the problems faced by all State and local governments that wish to follow this course of conscience without depriving local taxpayers of desperately needed Federal aid.

THE PRESIDING OFFICER. The distinguished Senator from New York, Mr. MOYNIHAN, I thank the Chair and the chairman.

Mr. President, I rise to join my distinguished colleague in this matter.

As the Senator from New York has stated with such clarity, the purpose of this legislation is simple, direct and in our view wholly congruent with the larger legislation we are considering today and which this Chamber will adopt by the end of this day.

The United States Government is setting forth now to impose a series of sanctions on the Government of South Africa and economic activities therein. And these sanctions will, in one way or another, probably raise the costs of certain activities here in the United States. But we accept this willingly; if there were no costs, there would be no consequence, at least of the kinds we intend.

Now a number of States and municipalities have already adopted similar measures as the city of New York most assuredly has done. We would like simply to include in the larger anti-apartheid legislation, a provision which says that States or localities will not run afraid of Federal regulations which require a least cost contract if the costs of a State or municipal contractor are raised as a result of complying with the State or local law imposing restraints with respect to their activities and relations with the South African Government.

We ask that this be permitted under Federal law with the specific condition that any excess costs, any increased costs be covered by the jurisdiction that chooses or has chosen to impose that restraint.

Senator D'AMATO and I are clear in this matter. This does not impose a penny of additional cost on the Federal Government. But it does enable other jurisdictions in the Federal system that wish to go beyond our measures to do so and not run into technical difficulties with Federal contracts.

That is our sole purpose. It is an enlightened purpose. It is one which surely in our view the Senate would be able to accommodate.

Mr. President, I ask unanimous consent that my statement in full be printed in the Record at this point.

STATEMENT BY DANIEL PATRICK MOYNIHAN

Mr. President, the bill we have been debating today, S. 7701, would provide for actions and sanctions by the Federal Government against apartheid in South Africa. Today I join with my able colleagues from New York in offering an amendment that would permit state and local governments to enforce their own anti-apartheid laws as they pertain to contracts funded in whole or in part by funds provided by the Federal Government. The language of this amendment is identical to that in S. 3464, which

August 15, 1986

CONGRESSIONAL RECORD—SENATE

21803

Senator D'Amato and I introduced on July 17, 1984.

In important part, this amendment will allow localities to enforce anti-apartheid bidding standards that differ from those set forth in the Federal statutes and regulations, without the loss of Federal funds, if they agree to pay for any additional costs that result.

Last year, New York City passed an anti-apartheid law that modified the competitive contract bidding process. Known as Local Law 18, it requires companies seeking to work for the city to declare that they do not conduct business directly with agencies responsible for enforcing apartheid and will not supply the city with goods originating in South Africa.

Mr. President, the citizens of New York City had taken a stand. Local Law 18 grants preferential treatment to bidders who comply with its anti-apartheid provisions. If the bid from such a company is within 5 percent of a bid from a company who does not, as a company, the bidder who does adhere to these principles will be awarded the contract.

Now if this law comes into conflict with Federal competitive-bidding regulations (as the Department of Transportation and the Department of Justice so found), the only reasonable solution is for the city to be able to choose which ever contract they find appropriate—as long as they agree to pay any increase in cost that results.

The solution is eminently fair. As long as it involves no added cost to the Federal agency, States and localities should have the right to make their own decisions regarding their own individual involvement with the South African regime without the threat of Federal penalty. The amendment I cosponsor today guarantees this right.

On July 23, 1986, the Senate Environment and Public Works Committee approved a similar provision that I offered to the Federal-Aid Highway Act of 1986. The provision prevents the US Department of Transportation from denying Federal funds to States and localities that give contractual preference to firms that do not conduct business with South Africa. By approving the amendment before us today, we would give such wider scope to such measures for combating apartheid.

As I stated when Senator D'Amato and I introduced S. 1644, "If our cities and States stand up to say they can no longer abide a racist, repressive regime, and are willing to stand behind those sentiments, then the Federal government has no right to interrupt their moral stance."

Mr. President, I hope my colleagues will support this amendment.

Mr. President, I also ask unanimous consent to have printed in the Record a letter from Mayor Koch of New York City, expounding the concerns of that particular jurisdiction.

There being no objection, the letter was ordered to be printed in the Record, as follows:

The City of New York,

Office of the Mayor,

New York, NY, August 14, 1986.

DEAN BROWNE: I am willing to urge you to support the D'Amato-Moyrhan amendment to the proposed Comprehensive Anti-Apartheid Act of 1986, to protect the right of States and local governments to regulate their own business relationships with companies doing business in South Africa.

New York City and many other municipalities throughout the country have adopted legislation whose aim is to ensure the expenditure of public monies in a manner consistent with the deeply-held moral values of the local community. For example, the local law adopted in New York City establishes a procedure whereby contractors are asked to certify that they will not do business with the instrumentalities of apartheid and will not supply the City with goods originating in South Africa and provides that, in certain narrowly-defined circumstances, a contract may be awarded to other than the low bidder if the low bidder will not make this certification. The D'Amato-Moyrhan amendment provides that a locality must pay for any increase in cost that results from the application of a local law of this type to a federally-aided contract.

While the terms of various local laws vary, the policy they embody represents the general concern of Americans in large and small communities throughout the nation for victims of apartheid, and the view that it is in the public interest to award public contracts to companies whose activities do not lend support to the racist policies of the South African government. It is, of course, proper for Congress to be concerned with action at the State or local level implicit in foreign policy. We recognize that under our system of government the federal government must speak for the nation.

However, the State and local action at stake here should not be a cause of concern to the Congress because it involves local decision-making on matters of local concern, i.e., the purchase of goods and services. Localities should remain free to express their abhorrence of apartheid in the manner provided by their own legislation, and should not be mandated by the federal government to cease implementing the policies and procedures that have been developed at the grassroots level to aid in the struggle for freedom in South Africa.

I urge you to vote against any motion to table the D'Amato-Moyrhan amendment.

Sincerely,

EDWARD I. KOCH.

Mr. LUGAR. Mr. President, I rise to oppose the D'Amato amendment. I do so respectfully knowing that the Senator has gone to great lengths in attempting to draft this in a form which is less objectionable. It is an old argument and that is essentially which branch of the Federal Government or which level ought to be preeminent in foreign policy.

I would just say, however drafted, the D'Amato amendment raises the question of Federal preemption. Does S. 2701, the bill in front of us, occupy the field with regard to U.S. law on apartheid and thereby supersede or preempt all State and local laws on that subject?

The answer to the question for the moment is it does. In the event the D'Amato amendment is adopted, it would not.

We are back into a situation in which local and State governments may express their viewpoints in law, in essence adopt their own foreign policies in my judgment.

Let me just say the reasons for Federal preemption of this field are clear:

foreign policy is the domain of the national Government. Foreign relations are national relations. We cannot have individual States and cities establishing their own foreign policies. As Madison said in Federalist No. 42:

If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

Although Congress could permit State and local governments to enforce their own anti-apartheid laws, the wisdom of Federal preemption is particularly sound in an area such as anti-apartheid policies where there are different approaches to the issue.

Some cities and counties believe the appropriate United States policy is total disengagement from South Africa by all United States firms; others believe United States firms are a force for change and should be encouraged to remain in South Africa. Suppose some States refused to do business with firms operating in South Africa while other States required firms wanting to do business with them to remain in South Africa? The message to South Africa would be unclear; the effect on United States commerce could be disastrous.

□ 1320

Even if the D'Amato amendment is narrowly drafted, it could still create problems for U.S. firms bidding for contracts with State and local governments. New York City may promulgate one list of South African Government entities which it believes it enforces the apartheid laws; another city or State might come up with a different list. Companies would be faced with inconsistent requirements.

Let me just say, Mr. President, the administration strongly opposes all State and local efforts to enact anti-apartheid laws. Perhaps the major positive aspect of this legislation that we now have before us is that administration point of view; namely, it clears up the terrain.

Mr. President, I appreciate that Senators have argued that the administration is not enthusiastic about the legislation. I think that we know. But I can only point out that the administration will be much less enthusiastic if the D'Amato amendment is adopted.

Let me just make the general argument, Mr. President, that I appreciate the fact that Senators have passionate arguments for many things they deeply believe in, and we are being visited with one after another. Each Senator believes that he or she is improving this legislation, strengthening it. That may be so. The will of the body, I certainly respect.

But I would just say, Mr. President, we are getting dangerously close to the point in which there become very, very great difficulties for this legislation in terms of its overall support in

September 15, 1986

CONGRESSIONAL RECORD—SENATE

23291

So it is important that we understand that the OMB/CBO average forecast is a far cry from the true average as reflected in the Blue Chip consensus.

The true average would reflect the views of both the optimistic and pessimistic forecasters.

Basically, Dr. Penner, if the consensus is correct and we grow 7 percent slower than CBO says, how much larger would the 1987 deficit be?

Dr. Penner. Well, first let me make the point, Senator, that while our friends at GAO were quite kind to us in the January report with regard to our forecasting record, which stands up pretty well compared to private forecasters, nevertheless, it is such an uncertain business, that our average forecast error for the summer forecast for the following calendar year, for real growth, during the history of CBO, is slightly more than one percentage point. So neither the OMB nor the GAO forecast, nor the consensus forecast can be said to be really significantly different from ours. But taking you very literally, and assuming that all else, interest rates, and so on, remain the same, a one percentage point reduction error on our part in the real growth estimate for 1987 would lead to an \$8 billion error in the deficit estimate.

A drop of 7 percentage points; therefore it would be about \$ billion. Extrapolating that to 1988, a 7 percent carried through, it would be worth.

Chairman DOMENICI. Could I interrupt?

Dr. Penner (continuing). 16 billion.

Senator DANFORTH. I believe that the enactment of the Tax Bill necessarily renders Gramm-Rudman-Hollings as "dead duck" after the 1987 fiscal year.

The reason I believe that is that for 1987, we will not end up with sequestration. We will end up hitting a target net of \$144 billion, but, \$184 billion, and we will use to meet that enlarged target a projected first-year revenue windfall from the Tax Bill of \$11 billion.

So the comment that I would make is this: I believe that between the regular, what we have agreed to, reduction in the deficit between 1987 and 1988, and the fact that we are using, will be using a front-end load from the Tax Bill, whereas, there will be a shortfall in the following years; plus what we know is clear funny money in the Tax Bill; plus the economic consequences of repealing the Investment Tax Credit, taking more money out of depreciation, and other changes, the effect that that will have on economic projects—I think that it is a matter of certainty, that Gramm-Rudman-Hollings is a one-year phenomenon, and that it will be of no value at all.

CHARLES A. ROWSENER, COMPTROLLER GENERAL OF THE UNITED STATES

Mr. Rowsener, I would like to comment just a little bit on the expenditure side, too, because I share Senator Danforth's concern, and one of the concerns we put in our GAO report was, that as you push these expenditures into the next fiscal year, that might help for it to make this target. But both in the defense area, and the agriculture area, and things like that, what you are doing is, you are building up a bigger and bigger problem for the succeeding years.

JAMES C. MILLER, III, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Dr. MILLER. Let me say of course we have got to get ten—excuse me—\$9.4 billion to get within the 1% margin of error. So that is the total that we have to have. Our pos-

tion is yes, we cannot accept any further reductions in the defense and international affairs budget.

In other words, we have to have what is in the mid session review, is what has come in under the Congressional Budget Resolution, which is a substantial cut, as you know, in defense and international affairs.

The President cannot accept anything less than that, and so we have—and the President has been adamant against any increase in taxes.

SENATOR PATTI DOMENICI, CHAIRMAN, SENATE BUDGET COMMITTEE

Yes, we will try to reduce the deficit with the reconciliation bill. I don't believe that there is any way to find what's necessary in the reconciliation bill. I have ten or twelve ideas. I've talked to the administration about them; I've searched around with everybody that has them. Let me suggest, I don't think they're there.

And in addition, there too, most of them are one shot events. Everybody is joyous that we're going to tell Conrail, maybe. We don't get any impact in 1988 and 1989 from those kind of events, and we're right back in the muddle.

My prediction is that with the passage of the tax bill as is, with deficit reduction as pushed on us by Gramm-Rudman-Hollings, and the way we will comply, that it will become common, ordinary knowledge by January, February, March of next year that we cannot reach the totals prescribed by Gramm-Rudman-Hollings.

But I think we're getting very close, very close to abandoning a notion of truly ever getting to a balanced budget, and I believe we're going to end up very close to abandoning the notion that we'll be on that path, as prescribed by that law.

Nonetheless, it's serving a good purpose. This year it will force us to do some things that we wouldn't otherwise do—frankly not an awful lot. It's just forced us not to spend some things. But in terms of reductions that are permanent in nature—I mean, what have we done? We have passed nothing. That's why the deficit is lower.

If we do the tax bill as is, if we intend to stay with Gramm-Rudman-Hollings, I just don't believe we can do it. Now, everybody can decide what that means, and you apparently have decided there's another policy that you think is very good, tax reform bill, that it's necessary. No criticism from my side. The time has come when you have to do something. Just don't have any doubt about it—it's not going to make Gramm-Rudman-Hollings miraculously get us down to 108 billion and a balanced budget three years thereafter. I mean, it just can't. It's an absolute impossibility.

SANCTIONS AGAINST SOUTH AFRICA—SENATE BILL DOES NOT PREEMPT STATE AND LOCAL ACTION

Mr. KENNEDY. Mr. President, in recent days, a question has arisen as to whether the Anti-Apartheid Act of 1986 adopted last month by the Senate might have the effect of preempting State and local action against apartheid.

In my view, it would have no such effect, and the lack of any such effect is strengthened by the overwhelming vote in the House of Representatives last Friday in passing the Senate bill

while simultaneously adopting House Resolution 549 expressing the explicit intent of the House against preemption.

Indeed, it was with some surprise that the possibility of preemption is being pressed at all, because the case for preemption is so tenuous. True, Senator Lugar, in opposing the D'Amato amendment, expressed his view that State and local anti-apartheid laws would be preempted. But he cited no language in the statute to justify that view, and the view is contrary to the premise of the D'Amato amendment, which was designed to mitigate the effect of State and local anti-apartheid laws on contracts involving Federal aid.

The D'Amato amendment was defeated, but a revised fall back amendment was immediately accepted deferring Federal penalties on such contracts for 90 days, so that State and local governments could modify their anti-apartheid laws if they chose to do so.

Obviously, if Senator Lugar's argument were correct that the Senate bill preempted State and local anti-apartheid laws, there would have been no need for either the original or the revised D'Amato amendment, since the State and local laws would be invalid anyway.

Further, the preemption issue must, of course, also be analyzed in terms of the Senate debate last year on the Anti-Apartheid Act of 1985. The issue was clearly raised in an amendment—circulated by Senators Roth but never called up for debate—that would have added specific language requiring preemption to the 1985 Senate bill. In the end, after extensive lobbying against the amendment, the proponents of preemption chose not to raise their amendment in the face of certain defeat; and the legislative history at the time of passage was clear that the bill as adopted by the Senate would not preempt State and local laws.

Four days after Senate passage, Senator Lugar and McConnell engaged in a colloquy attempting to salvage their position by arguing that the bill, even without the Roth amendment, would still preempt State and local laws; but it is unlikely that any court would take this argument seriously in the face of the strong legislative history to the contrary and the decision of the advocates of preemption not to press the Roth amendment.

Curiously, in the 1986 South Africa debate, Senator Lugar chose not to raise the preemption issue again until the last day of Senate floor debate, at a time when the unanimous-consent agreement governing debate on the bill prevented any further amendments from being raised.

In light of this sudden 11th hour claim of preemption, I asked Prof.

23292

CONGRESSIONAL RECORD—SENATE

September 15, 1986

Laurence Tribe of Harvard Law School, one of the most distinguished and respected constitutional scholars in the Nation, to analyze the issue. I have received Professor Tribe's analysis today and his conclusion is clear:

The Anti-Apartheid Act would not preempt state and local measures to divest holdings in South Africa or to limit dealings with companies doing business there. (Emphasis in original)

Mr. President, I ask unanimous consent that a letter from Professor Tribe and his accompanying memorandum may be printed in the Record.

There being no objection, the letter was ordered to be printed in the Record, as follows:

SEPTEMBER 15, 1986.

Hon. Edward M. Kennedy,
U.S. Senate, Russell Senate Office Building,
Washington, DC.

DEAR SENATOR KENNEDY: As you requested, I have studied the Comprehensive Anti-Apartheid Act of 1986, as first passed by the Senate this August and then by the House this September, to determine whether this federal legislation would preempt state and local efforts to sever economic links to the South Africa regime. Particularly in light of statements favoring preemption by Senator Lugar and a few others, I appreciate the importance of carefully assessing this issue so that the debate on whether to override the anticipated veto of the measure is as fully informed as possible. For the reasons set forth in the accompanying memorandum, I have concluded that the Anti-Apartheid Act would not preempt state and local measures to divest holdings in South Africa or to limit dealings with companies doing business there.

The provisions of the Anti-Apartheid Act bind states and localities every bit as much as they bind private companies; like private companies, state and local governments are forbidden by the 1986 Act to import South African uranium or kugarranks, for example, and are forbidden to make new direct investments in South Africa. But nothing in the Act purports to place a ceiling on the range of further steps private institutions might take to express their disapproval of apartheid or their lack of confidence in the political and economic future of the regime currently in power in South Africa. Thus, even though the Act does not require any private body to divest its portfolio of existing holdings in South Africa, it leaves private bodies—such as colleges and universities, for example—completely free to divest. Public universities and other public entities, whether linked to municipal governments or to state governments, are left equally free, in their proprietary role as market investors and market participants, to reduce their dependence upon, or their complicity with, the apartheid regime.

A decision by Congress to saddle states and localities, acting in such proprietary capacities, with unique limits on their freedom is, of course, conceivable. But such a decision would be most unusual and would pose a host of problems that no court would likely assume Congress was eager to create. Among other things, legislation leaving state and local bodies less free to divest than private bodies are would place courts in an extraordinarily difficult and delicate position, requiring them to discharge a number of tasks hard to square with a suit-

ably limited conception of federal judicial authority.

As the accompanying memorandum explains, only the clearest evidence that Congress in fact intended such unusual results could persuade the courts, under existing preemption standards, that states and cities had lost, by virtue of the recently enacted legislation, a freedom of choice that they had previously enjoyed and that private actors continue to enjoy under the 1986 Act. The text, structure, and legislative history of the Act completely fail to provide such evidence. It follows that state and local laws and policies that complement the anti-apartheid thrust of the new federal law, far from being preempted by it, would be welcomed by courts, and should be welcomed by lawmakers, as helping to carry forward the purposes of this landmark statute.

Sincerely yours,

LAURENCE H. TRIBE,
Tyler Professor of Constitutional Law,
Harvard Law School.

MEMORANDUM ON THE NONPREEMPTIVE EFFECT OF THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 UPON STATE AND LOCAL MEASURES

From: Laurence H. Tribe.

To: Concerned Members of the House and the Senate.

Date: September 15, 1986.

On September 12, 1986, the House of Representatives passed a measure already approved by the Senate establishing a broad regime of sanctions against South Africa. The question addressed in this memorandum is whether this legislation might to some degree preempt state or local legislation. This memorandum concludes that the federal statute would have no such preemptive effect.

I. THE DIVERSITY OF STATE AND LOCAL ANTI-APARTHEID MEASURES

Spurred by events in South Africa, states and cities have taken a broad range of steps to limit their economic links to that country. These actions take a wide variety of forms; the most common practices are divestment of public ownership of shares in corporations directly operating in South Africa, and "selective purchase ordinances" restricting city contracts with companies operating there. See N.Y. Times, Sept. 8, 1986, at A1, col. 5.

Restrictions on investments may take the form used by Maryland, which imposed a moratorium on investment of state funds in companies that do not receive the highest ratings of the Sullivan Principles. See *id.* Or these restrictions may go further, and require the sale of state or local investments currently held by state or municipal entities in any such company. See, e.g., Conn. Gen. Stat. Ann. § 3-134f (West Supp. 1985).

These restrictions may go further still, and require divestment of all holdings by state or local public universities or other bodies in any company operating in South Africa. See, e.g., D.C. Code Ann. § 47-342 (Supp. 1986). Last month, for example, California passed a measure requiring the sale over the next four years of more than \$11 billion in state securities in companies doing business in South Africa. See N.Y. Times, Sept. 8, 1986, at D8, col. 2. New Jersey's decision to sell its holdings of \$3.8 billion was the largest previous divestment program undertaken by a state. See N.Y. Times, July 21, 1986, at A5, col. 2.

Restrictions on investments also vary in their generality; most are directed specifically at South Africa, but some bar public

investments in any company that "condones through its actions discrimination on the basis of race." E.g., Wis. Stat. Ann. § 30.26(1) (West Supp. 1986) (regulating investment of university funds).

At least thirty cities, mostly within the last year, have passed laws to curtail the awarding of public contracts to corporations operating in South Africa. These bidding preferences may allow such awards if other bids are at substantially higher prices—e.g., eight percent (as in Chicago), six percent (as in Washington), or five percent (as in New York City). Or they may ban the purchase by city agencies of goods and services from such companies altogether, except where accepting the lowest bid is required (as Los Angeles stipulates), or unless the company can demonstrate that it does not discriminate or that its products are essential or unavailable elsewhere (as Maryland stipulates). See N.Y. Times, Sept. 9, 1986, at D8, col. 5.

Finally, the motivations for such steps are as diverse as the various measures themselves. Some states have promulgated statutes in order to break ties with a regime they detest. Others have passed laws to conform with their overall investment or educational policies. See, e.g., Conn. Gen. Stat. Ann. § 3-134(d) (West Supp. 1986). In some instances, general civil rights statutes have been interpreted to require divestment from South Africa. See Op. Atty. Gen. Wisconsin (Jan. 31, 1978). Of course, even cities and states that pass no formal divestment measures are likely to take account of the situation in South Africa in deciding upon routine issues, including what equipment to purchase or what funds are the most prudent in which to invest. Such decisions are made by a myriad of officials at all levels of government and bureaucracy. And all will share the difficulty of determining the degree to which they were based on a straightforward rationale of economic prudence. For whatever one's moral perspective on the South African regime, no prudent investor could fail to see the economic implications of investing in a country undergoing a profound political and social upheaval.

II. THE RELEVANT CONSTITUTIONAL FRAMEWORK

Although the setting of the foreign policy of the United States is an exclusively federal prerogative under the Constitution and cannot be usurped by state or local bodies with or without the consent of the U.S. Department of State, see *Zschernig v. Miller*, 389 U.S. 429, 436 (1968), it is equally fundamental that states and their public subdivisions are assigned the responsibility, under our Constitution, of deciding where and how to invest the public resources they collect through taxing and other sovereign measures. The Congress, in which the sovereign interests of states and localities are represented, see *Garcia v. San Antonio Metro. Transit Auth.*, 108 S. Ct. 1005, 1018 (1985), may choose to displace this historically localized responsibility by entrusting some suitable federal authority with control over the economic choices of state or local bodies. But absent such a congressional choice, there is nothing in federal constitutional law that could conceivably support taking from state legislatures and municipal authorities this basic control over their own economic destinies.

It is, of course, true that an Act of Congress dealing with the relations of the United States with a particular nation—in this instance, South Africa—might serve to limit the options open to states or localities.

September 15, 1986

CONGRESSIONAL RECORD—SENATE

23293

To the extent that federal legislation has this effect, the Supremacy Clause of Article VI renders contrary state or local choices null and void. But no court could find the requisite preemptive effect in a Congressional measure that is ambiguous on this score. As the Supreme Court has repeatedly held, there must be compelling evidence of preemptive intent by Congress before courts may "infer that Congress has deprived the States of the power to act," see *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 235, 244 (1959), in any area that, like local taxing or spending, see *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 40-55, (1973), is infused with "deeply rooted . . . local feeling and responsibility," *Garmon*, 359 U.S. at 244; see *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983). There is, in other words, a strong presumption against finding federal preemption by mere implication—absent, of course, a direct conflict or contradiction between the federal statutory mandate and a particular state or local measure. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The presumption against preemption operates fully in the context of state and local divestment decisions, whether those give effect to a policy's sense of how to deploy its public funds most prudently or to its convictions as to the moral obligations that compel it to avoid association with a repugnant regime. Nothing in the legislation passed by the Senate on August 16, 1986, and approved by the House on September 17, 1986, conflicts with the acts of state and local divestment measures sketched in the introductory portion of this memorandum, and nothing in the recently enacted federal legislation evinces a decision by Congress to oust states and localities altogether from this area.

III. THE TEXT AND HISTORY OF THE FEDERAL STATUTE

State and local divestment measures of the sort thus far enacted would neither interfere with the national conduct of our foreign policy nor conflict with the operation of the recently enacted statute. The federal statute includes an array of complex limitations, and any state or local law that conflicts directly with these limitations of course would be preempted, but nothing in the measures described above in Part I of this memorandum would create such a conflict.

Courts will find preemption premised on "actual conflict" only when it is difficult for a party to comply fully with both local and federal laws. See *Pacific Gas & Electric v. Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 204 (1983); *Jones v. Roth Packing Co.*, 439 U.S. 519, 532 (1977). Further, courts will not infer preemption based on speculative conflict; the conflict must be real and actual. See *Axon Corp. v. Governor of Md.*, 437 U.S. 117, 131 (1978); *Huron Cement Co. v. Detroit*, 382 U.S. 446, 448 (1966).

The statute at issue here poses no such conflict. The Act lists measures by the United States to undermine apartheid, including numerous specific restrictions that would apply to the actions of private parties. These include prohibitions on the importation of kruggerands, see H.R. 4868, 99th Cong., 2d Sess. § 301 (1986), on the importation of uranium or coal from South Africa, see id. § 308, and on new investment in South Africa, see id. § 310. But the statute includes no explicit prohibitions that apply to states or local governments as such. If

the alleged preemptive effect of the federal statute would reach all state and local actions taken in whole or in part to impose pressure upon, or express disapproval of, South Africa, this effect would have to encompass decisions to accelerate the rate at which they sell interests in assets related to South Africa under a preexisting divestment program, or decisions to purchase goods or services from one company rather than another based partly on each company's ties to South Africa.

Yet the new legislation regulates the states and cities in their capacities as "market participants" only in the same way that private parties are regulated. For example, a state could not invest directly in South Africa or import South African uranium or kruggerands without violating sections 310, 308, or 301, respectively. But as market participants, states and cities are left just as free to disassociate themselves still more from the South Africa regime as private parties are. Compare *Reyes, Inc. v. State*, 447 U.S. 429 (1980) (accordance greater freedom to states as "market participants" than as regulators of private actors); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1975) (same).

The only conceivable argument for preemption would follow if the statute were construed as setting a ceiling on the permissible means of divesting economic assets related to South Africa. But this the statute does not do, not for private parties, nor for state and local governments; the statute draws no distinction between state and local governments as market participants, on the one hand, and private parties on the other. In this regard, it would be highly unusual for Congress to impose greater restrictions on state and local public actors than it imposes on private actors. Particularly in light of the proprietary actions at issue, such a public-private distinction would pose difficult problems for the courts in identifying "state actors." Although courts deal with such questions in constitutional cases, it would be unusual for Congress to throw such a question to the courts through statutory preemption.

The federal statute has no provision preempting local legislation. The preamble simply states that the Act's purpose is "to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa;" this language merely indicates congressional intent to coordinate foreign policy among the branches and agencies of the federal government. See H.R. 4868, 99th Cong., 2d Sess. § 4 (1986). All of the provisions dealing with government procurement and investment decisions refer specifically to the "United States Government." See id. §§ 314, 318. This silence regarding the states and cities reveals an intent not to preempt state and local action.

The legislative history of anti-apartheid bills before Congress buttresses this inference. Senator Cranston explained in 1985 discussing anti-apartheid legislation then pending, "[W]e have no such intention [to preempt local legislation] in this bill otherwise the Senate would have put a preemption provision in the bill." Cong. Rec. S9388 (July 11, 1985). As Senator Moynihan asserted regarding the legislation this year, "States and localities should have the right to make their own decisions regarding their own individual involvement with the South African regime." Cong. Rec. S9385 (July 17, 1986). The House vote of September 12, 1986, expressly endorsed this non-preemption view.

Senator Lugar, to be sure, expressed a different view of the matter. See Cong. Rec. S11,817 (Aug. 15, 1986) (comments of Sen. Lugar). But Senator Lugar, by himself or by citing isolated comments from the floor, should not be able to deter states from deciding how to invest or spend their own funds. If a few legislators could insert calculated snippets of legislative history and thereby instruct the courts to regulate the finances of states and cities, they could circumvent the need to articulate that scheme of regulation through the usual legislative process. Such a result would violate the spirit of Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), which struck down the legislative veto as a circumvention of the bicameralism and presentment requirements. Chadha noted that the Constitution had set forth "a single, finely wrought and exhaustively considered, procedure," id. at 951, to ensure "that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials," id. at 949. The legislative history of the bill at hand reveals nothing resembling full legislative consideration and adoption of a preemptive federal scheme.

The only section of the statute dealing with state and local anti-apartheid laws is section 608 added by Senator D'Amato. See Cong. Rec. S11,818 (Aug. 15, 1986). This section states: "(1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and (2) no other penalty may be imposed by the Federal Government, by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of enactment of this Act." H.R. 4868, 99th Cong., 2d Sess. § 608 (1986). This provision implies that after ninety days, states and localities could be prevented from following their anti-apartheid policies in procurements using federal funds if these policies were contrary to federal law. This leaves the negative implication that investment decisions are not preempted, nor are disbursements not using federal funds. Indeed, even if cities were to apply their anti-apartheid laws using federal funds, the laws themselves would not be preempted by the federal statute. For if Congress intended such preemption, this provision would have been entirely superfluous. There would be no need to penalize states and localities for following their own laws if these laws were invalidated by the federal legislation.

In all, the statutory language and legislative history fall far short of the compelling evidence of preemptive congressional intent required for a court to sustain a preemption attack upon state and local laws. See *New York Telephone Co. v. New York Dep't of Labor*, 440 U.S. 616, 640 (1979). If Congress intended to force states and municipalities to continue doing business with a regime they find morally repugnant or in a nation whose future they deem unstable, this intent has not been expressed in a manner sufficient to preempt local legislation. See *Troyer, Stacomb & Baigrie, Divestment of South Africa Investments*, 74 Geo. L.J. 127, 150 n.135 (1985).

Moreover, a finding of no preemption is wholly consistent with the conceded primacy of the federal government in foreign affairs and international relations. The fact that the federal statute here deals with foreign policy does not create a conflict with state and local actions where there would other-

22294

CONGRESSIONAL RECORD—SENATE

September 15, 1986

wise not be one. Under the supremacy clause of the Constitution, local regulations must give way if they conflict with any federal statute, treaty, or executive agreement. The state and local measures at issue here, however, affect no pact with any foreign nation and are broadly consistent with the federal anti-apartheid act presently under consideration.

In virtually every instance in which the Supreme Court has invalidated an action by a state as unduly impeding the national government's foreign relations authority, it has done so because that action unambiguously clashed with a federal statute, treaty, or agreement. See, e.g., *United States v. Pink*, 315 U.S. 203 (1942) (invalidating a state policy of refusing to honor the Soviet Union's claim to assets because this policy conflicted with the Litvinov Agreement with that nation); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (invalidating state alien registration system that conflicted with the federal statutory system). In the absence of such authority, courts have been reluctant to presume a conflict between a state's action and foreign policy. See *Pink*, 315 U.S. at 231 (observing "the power of a state to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum" when no federal statute or treaty specifies otherwise).

Thus, in the recent case of *Contafner Corp. v. Franchise Tax Board*, 483 U.S. 169 (1983), the Supreme Court upheld a state corporate tax that included foreign subsidiaries in the calculation of income in spite of the fact that this action had "foreign repercussions." *Id.* at 164. The Court found that the tax ran afoul of no act of Congress nor any treaty, and thus did not "seriously threaten" federal foreign policy. *Id.* at 166. For other examples of state measures upheld in spite of their potential impact upon foreign affairs, see *Clark v. Allen*, 331 U.S. 503 (1947) (upholding state reciprocal legislation conditioning the right of an alien to inherit property on the grant by the alien's country of similar rights to United States citizens); *R.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977) (upholding buy-American statute against commerce clause challenge), cited with approval in *Recess, Inc. v. Stake*, 447 U.S. 429, 446 (1980); *J. Zerul & Sons, Ltd. v. Grindley's Bank Ltd.*, 37 N.Y. 2d 223, 371 N.Y.S.2d 892, 353 N.E.2d 168, cert. denied, 423 U.S. 869 (1975) (upholding state court's examination of fairness of judicial process of a foreign country to determine if it will enforce a judgment of that country's courts).

IV. THE UNRESOLVED PUZZLES A PREEMPTION HOLDING WOULD ENTAIL

Indeed, a decision to oust states and localities from this sphere would leave in place an ominous economic and political vacuum that no court could comfortably create. The Supreme Court has often stressed its reluctance to read federal legislation in such a way as to leave a sphere of activity entirely beyond deliberate public control in any suitable forum. See, e.g., *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Den. Comm'n*, 461 U.S. 190, 207-08 (1983); *Parker v. Brown*, 317 U.S. 341, 362-63 (1943). Yet that would be the inevitable result of inferring from the legislation at issue here an intent to occupy the field. For Congress has most assuredly put in place no mechanism of its own to replace, with some appropriate federal authority, the state and local officials and authorities who currently shape the investment decisions of public

universities, pension managers, and other bodies.

Construing the federal statute in such a way as to subtract from state and local authorities the power to deflect investments from South Africa—perhaps power to divest prior holdings, or power to decline to expand such holdings, or some combination of these powers—without adding any new body to govern such matters would leave such power with no locus at all other than the federal courts themselves. To those courts would then fall such extraordinarily touchy and complex questions as whether a particular state or city acts improperly when it decides to slow down its rate of investing pension funds in a particular company doing business in South Africa. Is the state or city acting in a preempted manner if it is motivated wholly or partly by moral concerns about apartheid? What if its concerns are purely prudential but are influenced, as even prudence must be these days, by recognition that the situation in South Africa is unstable in part because of apartheid and the world's reactions to it? If a decision to slow down the rate of future investments is not preempted, what of a decision to diversify existing investments?

For federal judges to review state and local investment portfolios from this perspective would be difficult at best and incompatible with the Article III judicial power at worst. As the Supreme Court has observed on numerous occasions, such judicial line-drawing is strongly disfavored in the foreign policy realm, an area of particular executive and legislative expertise. See, e.g., *Contafner Corp. v. Franchise Tax Bd.*, 483 U.S. 169, 184 ("[T]his Court has little competence in determining precisely when foreign nations will be offended by particular acts"). The decision as to what types of anti-apartheid measures should be preempted is a quintessentially legislative one, for as the Court has long noted, the conduct of foreign relations is largely immune from judicial control. See e.g., *Regan v. Wald*, 104 S. Ct. 3052, 3039 (1984) (noting "classic deference to the political branches in matters of foreign policy"); *Fiallo v. Bell*, 430 U.S. 787, 792-93 (1977); *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953); *Harilaides v. Shaughnessy*, 342 U.S. 580, 586-89 (1952); *Goldwater v. Carter*, 464 U.S. 996, 1002-04 (1970) (Rehnquist, J., concurring); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-28 (1964). Divil) or unless Congress explicitly demarcates which of the broad array of state and local measures affecting South Africa it intends to preempt, the judiciary should not be forced to pick and choose without more guidance.

To infer preemption in such circumstances would entail a delegation of extraordinary power to the courts. Such an interpretation would force courts to employ their own notions of state sovereignty in delineating the boundaries of the preemption by the federal government. This role would be at odds with the view of federalism espoused by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1006 (1985), which envisioned a scheme that relies upon the political branches of the federal judiciary to protect state sovereignty. See *id.* at 1017-18.

Whether or not Congress could constitutionally entrust such a role to federal judges, it is plain that it has not done so. And no amount of language, either in a statute's preamble or in the Congressional Record, referring to the virtues of having the nation speak with a single voice on this

complex subject could possibly substitute for a decision by Congress to supplant local authorities with federal authorities, judicial or otherwise, in carrying out these delicate decisions.

TRIBUTE TO THE MINORITY LEADER

Mr. GORE. Mr. President, one Senator in particular deserves credit for opening the Senate's doors to television—Minority Leader ROBERT BYRD.

No Member of this body has a better understanding of Senate rules or a deeper respect for the Senate institution than the distinguished minority leader. When Senator BYRD began the long, uphill battle to bring TV to the Senate, we all knew that he had carefully weighed the consequences, with the institution's best interests foremost in his mind. Perhaps no other Member could have coaxed the Senate forward with such success.

It was an honor and a pleasure to work with the minority leader in launching a new era in representative democracy. The experiment is already a success. As the Senate approaches its 200th birthday, it remains as fresh and vital as our forefathers imagined, and more responsive than they could ever dream.

Last month, the Radio and Television News Directors of America recognized the minority leader for his contribution to open government. He received the organization's Distinguished Service Award at the RTNDA International Conference in Salt Lake City on August 27, 1986.

I ask unanimous consent that the minority leader's address to that conference be inserted in the Record.

There being no objection, the address was ordered to be printed in the Record, as follows:

AWARD INTERNATIONAL CONFERENCE OF THE RADIO AND TELEVISION NEWS DIRECTORS OF AMERICA

(By Senator Robert C. Byrd)

I am honored that you have staged me out to receive your Distinguished Service Award. In all sincerity, I thank you for this signal recognition.

In fact, however, I want to share the distinction of this award with you—the Radio and Television News Directors of America.

Bringing about regular live and recorded coverage of the day-to-day proceedings of the U.S. Senate was not an easy task. Over many long months, and in many hours of debate with our colleagues, I and other Senators had to labor long and hard to make the case for regular television and radio coverage of the Senate.

But in that effort, you were among our best allies. You, as individual broadcasters, and as an organization, also helped to bring about electronic media coverage of the Senate. Your persuasiveness, your earnestness, and your professional integrity as journalists and reporters helped to assuage the anxieties of many Senators, and to melt much of the opposition toward daily Senate broadcasts. For myself and for the American people, I thank you for helping to make

THE WHITE HOUSE

Office of the Press Secretary
(Sioux Falls, South Dakota)

For Immediate Release

September 29, 1986

TEXT OF A LETTER FROM THE PRESIDENT
TO THE MAJORITY LEADER OF THE SENATE AND
TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Dear Mr. Majority Leader (Mr. Speaker):

I understand and share the very strong feelings and sense of frustration in the Congress and in our Nation about apartheid, an un-conscionable system that we all reject. The ongoing tragedy in South Africa tests our resolve as well as our patience. None of us wants to aggravate that tragedy.

In the last several months, the South African Government, instead of moving further down the once promising path of reform and dialogue, has turned to internal repression. We all know that South Africa's real problem traces to the perpetuation of apartheid. And we know that the solution to this problem can only be found in lifting the present State of Emergency, repealing all racially discriminatory laws, releasing political prisoners, and unbanning political parties--necessary steps opening the way for negotiations aimed at creating a new, democratic order for all South Africans. The South African Government holds the key to the opening of such negotiations. Emerging from discussion among South Africans, we want to see a democratic system in which the rights of majorities, minorities, and individuals are protected by a bill of rights and firm constitutional guarantees. We will be actively pursuing diplomatic opportunities and approaches in an effort to start a movement toward negotiations in South Africa.

I outlined in my message to the House of Representatives on Friday my reasons for vetoing the Comprehensive Anti-Apartheid Act of 1986, principally my opposition to punitive sanctions that harm the victims of apartheid and my desire to work in concert with our Allies. I also indicated in that message that I am prepared to sign an expanded Executive Order that strongly signals our rejection of apartheid and our desire to actively promote rapid positive change in South Africa. I am prepared to expand the range of restrictions and other measures that will characterize our relations with South Africa. There would be strong sanctions in my new order, sanctions that I earnestly wish were unnecessary. These sanctions, directed at the enforcers not the victims of apartheid, encompass measures recently adopted by many of our Allies, as well as many elements of the original Senate Committee version of the bill. They are incontestably necessary in today's circumstances. My intention is to make it plain to South Africa's leaders that we cannot conduct business-as-usual with a government that mistakes the silence of racial repression for the consent of the governed.

My new Executive Order will, therefore, reaffirm and incorporate the measures I imposed last year (i.e., bans on loans to the South African Government and its agencies, all exports of computers to apartheid-enforcing entities and the military and police, all nuclear exports except those related to health, safety, and IAEA programs, imports of South African weapons, the import of Kruggerands, and a requirement for all U.S. firms to apply fair labor standards based on the Sullivan principles). The Executive Order will also add:

- a ban on new investments other than those in black-owned firms or companies applying the fair labor standards of the Sullivan principles;
- a ban on the import from South Africa of iron and steel;

END

South Africans
friends should
in South Africa
propose today
intentions and
so that U.S. foreign
of good will and
a better, just, and de

- a ban on bank accounts for the South African Government and its agencies;
- a requirement to identify countries taking unfair advantage of U.S. measures against South Africa with a view to restricting their exports to the United States by the amount necessary to compensate for the loss to U.S. companies;
- a requirement to report and make recommendations on means of reducing U.S. dependence on strategic minerals from southern Africa;
- a requirement to provide at least \$25 million in assistance for scholarships, education, community development, and legal aid to disadvantaged South Africans with a prohibition on such assistance to any group or individual who has been engaged in gross violation of internationally recognized human rights;
- the imposition of severe criminal and civil penalties under several statutes for violation of the provisions of my Executive Order;
- a requirement to consult with Allies in order to coordinate policies and programs toward South Africa;
- a requirement to report on whether any of these prohibitions has had the effect of increasing U.S. or allied dependence on the Soviet bloc for strategic or other critical materials, with a view to appropriate modifications of U.S. measures under my Executive Order should such dependency have been increased;
- and a clear statement that the Executive Order constitutes a complete and comprehensive statement of U.S. policy toward South Africa, with the intent of preempting inconsistent State and local laws which under our Constitution may be preempted.

Sanctions, in and of themselves, do not add up to a policy for South Africa and the southern Africa region. Positive steps as well as negative signals are necessary. This unusually complex and interrelated part of the world is one that cries out for better understanding and sympathy on our part. We must consider what we can do to contribute to development of healthy economies and democratic institutions throughout the region and to help those who are the victims of apartheid.

Following the Congress' lead and building on existing programs, I plan to expand our assistance to those suffering the cost of apartheid and to help blacks as they prepare to play their full role in a free South Africa. We spent \$20 million in FY 86 and have requested \$25 million in FY 87. We will do more, much of it along the lines incorporated in the South Africa bill.

I am also committed to present to the next Congress a comprehensive multi-year program designed to promote economic reform and development in the black-ruled states of southern Africa. We intend to seek the close collaboration of Japan and our European allies in this constructive effort. Our goal is to create a sound basis for a post-apartheid region--a southern Africa where democracy and respect for fundamental human rights can flourish.

I believe the United States can assist responsibly in resolving southern Africa's tragic dilemma. Many observers in and outside South Africa regard present trends with despair, seeing in them a bloody inevitability as positions harden over the central question of political power. This is a grim scenario that allows no free choice and offers a racial civil war as the only solution. It need not be so if wisdom and imagination prevail.

more

THE SOUTH AFRICAN
COUNCIL FOR
HUMAN RIGHTS
REPORT

- 3 -

South Africans continue to search for solutions. Their true friends should help in this search. As I have said before, our humanitarian concerns and our other national interests converge in South Africa as in few other countries. With the actions I propose today, I believe it is clear that my Administration's intentions and those of the Congress are identical. May we unite so that U.S. foreign policy can be effective in bringing people of good will and imagination in South Africa together to rebuild a better, just, and democratic tomorrow.

Sincerely,

/s/ Ronald Reagan

...e on Sanc

...thern Africa that depend
for transportation, energy,
and food. An estimated 10
million foreign workers, legal
or live in South Africa.
...ature of the bill would re
...Administration to publicly
...six months and all
...chosen not to join us
...U.N. arms embargo
...with a view to
...States military
...countries."
...will not re
...policy of
...nd unfor
...lona se
...uld be
...ns of
...ter to
...c

15
16
17

Wall St Journal 12/10/86

Firms With Ties to South Africa Strike Back at Colleges That Divest

By DENNIS KNEALE

Staff Reporter of THE WALL STREET JOURNAL

Some U.S. companies are quietly fighting back against universities critical of a corporate presence in South Africa by hitting the schools where it hurts most—in the bank account.

As more colleges sell off shares of companies with South African ties, some of the corporations under fire are refusing to contribute grants, scholarships and faculty banquets to the schools.

The actions are intensifying the already-bitter debate over South Africa now spilling from campuses to corporate boardrooms. Even as some of the strongest advocates of operating in the troubled land—such as International Business Machines Corp., Coca-Cola Co. and General Motors Corp.—reverse course and set plans to leave, others are growing more combative about staying behind.

Although the extent of the corporate moves is still unclear, the stakes involved are huge. U.S. companies gave \$1.57 billion to some 3,000 colleges and universities in 1984-85, according to the Council on Financial Aid to Higher Education in New York. And many of the biggest, most generous givers are big-name concerns with high-profile units in South Africa.

Hypocrisy on Campus?

Critics of apartheid say companies that withhold or implicitly threaten to withhold contributions—such as FMC Corp., Marathon Oil Corp., Mobil Corp. and several others—are imperiling academic freedom and campus debate. But some business executives counter that the schools are getting what they deserve and accuse them of hypocrisy for shedding company stocks while keeping a hand out for donations from the same corporations.

"In other words, if our corporation isn't good enough for you, you aren't good enough for our corporation," says a spokesman at FMC, a Chicago maker of food-processing equipment that in recent months has ended grants to six schools and has threatened action against several others.

The combative approach appears to be gathering momentum at a critical time. U.S. companies are fleeing South Africa in droves, further pressuring those that stay. South Africa's political and economic climate is widely expected to deteriorate further, fueling calls back home for wholesale U.S. disinvestment.

Moreover, the latest round of annual evaluations of corporate performance in upholding fair-employment principles in South Africa was released yesterday. (See accompanying story.) Lower corporate ratings could trigger "partial-divestment" rules at some colleges, which require selling only the stocks of companies that get poor grades in fair-employment practices. A new spate of stock sales could increase tensions and prompt more companies to

Few Firms Get High Marks For Meeting Sullivan Goals

By JOE DAVIDSON

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—Fewer than one-third of the signatories to the Sullivan Principles, a code of conduct for U.S. businesses operating in South Africa, have made "good progress" in meeting the requirements of the non-discrimination code, according to a report released yesterday.

The Rev. Leon Sullivan, pastor of Zion Baptist Church in Philadelphia, who developed the principles in 1977, said the "good progress" category had so few members "because the requirements are tough." He also complained that some companies lack the will to do better.

The requirements, however, were eased a bit when companies complained about the amount of money Rev. Sullivan expected them to spend on "social justice." Spending levels were lowered to improve the grades for some firms, according to D. Reid Weedon, senior vice president of Arthur D. Little Inc., the Cambridge, Mass., consulting firm that monitors compliance with the principles.

Officials at Little don't check each company's South African operations to verify the responses, but do require each company to provide an independent auditor's statement confirming the companies' stated spending levels on such areas as medical care and housing.

Of the 129 reporting companies, 39 are "making good progress" in meeting the Sullivan Principles, according to the report, while 72 are "making progress" and 18 "need to become more active."

Sullivan signatory companies fall into five groups, under three main categories. To be in the top two categories, a company must meet nine basic requirements including equal pay for equal work, desegregation of all company facilities and freedom for black workers to join trade unions.

Category 1—"making good progress"—includes those firms that score high on a point system that judges a company's involvement in four "action areas": training and advancement, community development, social justice and education for non-employees.

Companies "making progress" have lower, yet acceptable scores. They are assigned to Category IIA if they submit a long, detailed report of their activities. They are assigned to Category IIB if they file a short reporting form. Category IIIA firms passed the basic requirements, but received a low point rating in the action areas.

Since the principles were developed, companies have used the code to demonstrate their opposition to racial oppression and to justify their presence in South Africa. Apartheid opponents have accused the firms of hiding behind the code while supporting South Africa's white minority regime by bolstering its economy.

The report covers a reporting period that ended June 30. Some companies listed in the report—such as General Motors Corp., International Business Machines Corp., Eastman Kodak Co. and Coca-Cola Co.—have pulled out of South Africa or have announced withdrawal plans.

Anti-apartheid activists have criticized withdrawal schemes that permit the U.S. companies to continue supplying parts and equipment to South Africa. Mr. Sullivan said that type of withdrawal was an important step, because it maintained jobs for blacks.

He repeated, however, a call for a total U.S. trade embargo against South Africa if statutory apartheid is not stopped by next May 31. His main objective is to end apartheid, Mr. Sullivan said, "not to protect businesses or keep them there."

CATEGORY I

MAKING GOOD PROGRESS

Baker International
Baltimore Aircraft Co.
Black & Decker Corp.
Borg-Warner Corp.
Butterick Co.
Cigna Corp.
Caltex Petroleum Corp.
Carrier Corp.
Caterpillar Tractor Co.
Champion Spark Plug Co.
Combustion Engineering Inc.
Deere & Co.
Dow Chemical Co.
Dresser Industries Inc.
Eastman Kodak Co.
Ford Motor Co.
Franklin Electric Co.
Gillette Co.
W.R. Grace & Co.
Hewlett-Packard Co.
ITT Corp.

Upjohn Co.
Warner Communications
Warner-Lambert Co.

IIB BASED ON

SHORT-FORM REPORTING

American Cyanamid Co.
(See also Category IIA)
Chase Manhattan Corp.
Coca-Cola Co.
(See also Category I)
Cummins Engine Co.
Dow Corning Corp.
Firestone Tire & Rubber
Intergraph Corp.
JWC Group Inc.
NCR Corp.
Raytheon Co.
(See also Category IIIA)
Time Inc.
Video Vision Enterprises

upholding fair-employment principles in South Africa was released yesterday. (See accompanying story.) Lower corporate ratings could trigger "partial divestment" rules at some colleges, which require selling only the stocks of companies that get poor grades in fair-employment practices. A new spate of stock sales could increase tensions and prompt more companies to withhold donations.

Finally, the number of colleges and universities adopting new stock-divestment rules—a response to fierce pressure from students and faculty—is rising rapidly. And those rules are far tougher than the partial-divestment policies of past years. The Investor Responsibility Research Center in Washington says 100 universities have sold off stock because of the South Africa issue since 1977; 39 schools have toughened their policies since last March alone, and 18 of those decided to divest altogether, regardless of a company's record in the country.

'Backfire Is Just Beginning'

Educators are uncertain how far the corporate campaigns will go. "That kind of backfire is just beginning," says Ester Elphick, a researcher with a consortium of 46 universities tracking the South African debate. Marathon's corporate foundation adopted a policy against contributing to divesting schools, partly due to cost cutting. It has ended donations to "under 25" schools, according to a company spokesman who won't elaborate. FMC ended \$36,000 in grants to the University of Minnesota, won't renew awards totaling \$24,000 to four California universities and cut off grants to schools in Michigan, Wisconsin, Iowa and Arizona.

Though the FMC contributions might seem relatively small, the company's moves may have far-reaching effects. "It removes (those colleges) from future consideration, too," says an FMC spokesman. "Right away, a whole flock of schools won't be eligible for donations." But individual students may be hurt worst of all. Included in the grants that FMC canceled were four \$1,000 scholarships for minority engineering students.

Other companies are turning up the heat without ending grants outright. Johnson & Johnson Co. Chairman James Burke resigned as head of a fund-raising effort at Rutgers University in New Jersey after the school adopted a tough divestment policy. And Mobil made clear its misgivings about the University of Wyoming's divestment policy in a letter to the school's president. "We are deeply distressed and confused," wrote Mobil's chairman. "We write to you as a company that has contributed financially to the University of Wyoming and has employed your graduates." The letter called the school's new total-divestment rule "unfair and counterproductive."

"There's no blatant threat there, but they're saying something," says Agnes Kubik, a reporter for the Branding Iron student newspaper who obtained a copy of the letter. A Mobil spokesman says the company doesn't have a formal policy on whether to give money to schools that won't hold Mobil shares but declines to comment further.

Some U.S. companies refuse to penalize colleges for their divestment strategies by cutting financial aid. "They are two entirely separate issues," says a spokesman

at General Motors, which doles out \$30 million a year to higher education and is in the process of leaving South Africa. His comments are echoed by officials at IBM and at Xerox Corp., which still operates in South Africa.

But the funding cutoffs may be larger than anyone knows because "it behooves neither side to go public," says Brian Rom, a New York consultant to institutional investors. Companies aren't anxious to publicize their tough stand, fearful of bad public relations. Schools don't want to draw attention to the grants they have lost and hope to salvage relationships with the companies.

CATEGORY II MAKING PROGRESS

IAA BASED ON
FULL REPORTING
Aramco Corp.
American Cyanamid Co.
(See also Category IIB)
American International Group

Combustion Engineering Inc.
Deere & Co.
Dow Chemical Co.
Dresser Industries Inc.
Eastman Kodak Co.
Ford Motor Co.
Franklin Electric Co.
Gillette Co.
W.R. Grace & Co.
Hewlett-Packard Co.
ITT Corp.
In'l Minerals & Chemical
Interpublic Group of Cos.
Johnson & Johnson
(See also Category II)

Ill. Lilly & Co.
Masco Corp.
Mobil Oil Corp.
NCR Corp.
Nalco Chemical Co.
Otis Elevator Co.
Phepsi Dodge Corp.
RJR Nabisco Inc.
(See also Category I)
Reader's Digest Association
Revlon Inc.
Resound Inc.
Schering-Plough Corp.
Shak Systems Inc.
Smithline Beckman Corp.
(See also Category II)

Sperry Corp.
Standard Oil (Ohio)
Sterling Drug Inc.
Sunland Foods Pty. Ltd.
Tambrands Inc.
Tenneco Inc.
Tolmet Corp.
Union Carbide Corp.
(See also Category I)

Coca-Cola Co.
(See also Category I)
Cummins Engine Co.
Dow Corning Corp.
Firestone Tire & Rubber
Intergraph Corp.
JVT Group Inc.
NCRB Corp.
Raytheon Co.
(See also Category IIA)
Tuna Inc.
Video Vision Enterprises
Westinghouse Electric

CATEGORY III NEEDS TO BECOME MORE ACTIVE

IIA. PASSED BASIC
REQUIREMENTS BUT RE-
CEIVED LOW POINT RATING
Becor Western Inc.
CPC International Inc.
Crown Cork & Seal Co.
Dowdell Co.
Federal-Mogul Corp.
Ferro Corp.
Foster-Wheeler Corp.
Goodyear Tire & Rubber Co.
Hoover Co.
Ingersoll-Rand Co.
Int'l Correspondence Schools
Johnson Controls Inc.
Joy Manufacturing Co.
Midland-Ross Corp.
Mine Safety Appliances Co.
Ogilvy Corp Inc.
Raytheon Co.
(See also Category IIB)
Wibaur-Ellis Co.

at General Motors, which doles out \$30 million a year to higher education and is in the process of leaving South Africa. His comments are echoed by officials at IBM and at Xerox Corp., which still operates in South Africa.

But the funding cutoffs may be larger than anyone knows because "it behooves neither side to go public," says Brian Rom, a New York consultant to institutional investors. Companies aren't anxious to publicize their tough stand, fearful of bad public relations. Schools don't want to draw attention to the grants they have lost and hope to salvage relationships with the companies.

The measures are already affecting debate on some campuses. A recent survey by the Investor Responsibility Research Center of 70 schools with divestment policies found that eight had been threatened with lost contributions; seven said fears of lost aid prevented them from adopting tougher stock-sale rules. The study also noted that many schools didn't want their names or their recent stock sales revealed—and for good reason. Ten companies had pre-ordered the report listing what schools sold which stocks.

Fears of lost contributions or strained relations with the corporate world concern tiny and big-name schools alike. "Many of these (South Africa-related) companies are substantial benefactors to U.S. universities," says John Deutch, provost at Massachusetts Institute of Technology. MIT hasn't yet adopted aggressive divestment rules for an \$800 million portfolio that includes \$150 million in South Africa-related investments. One reason: a wholesale sell-off by any school might prompt leading companies to "reevaluate their attitude toward that particular school and toward higher education generally," he says.

"It's a compelling dilemma for a college president," says Nannerl O. Keohane, president of Wellesley College, a 2,200-student women's college in Massachusetts

that just rejected a tougher stock-sale policy. She says she is pulled in several directions. She must promote open campus debate, yet defend the university's stand—despite her own support for the tougher policy. Moreover, she has just joined the IBM board of directors and had warned the company that Wellesley might embrace total divestment. (IBM appointed her anyway.) Above all she must ensure the college's financial health. "All other moral vision has to be kept in perspective," she says.

Like most university officials, Ms. Keohane insists that a school's stock-sale rules don't brand a company as morally corrupt; rather, she says, such rules reflect disagreement with just one policy. Thus, a school isn't being hypocritical when it takes money from the same company. Few schools have policies that both push divestment and refuse grants. Princeton University does but has sold shares of only one company rated poorly in fair-employment practices—and that company wasn't a contributor, anyway.

But many business executives say that schools do want to have it both ways and that divestment is "an absurdity" that does nothing to end apartheid thousands of miles away. "If it's a moral issue, how in the world can you be selective about it—you're being hypocritical," says Alan Pifer, former president of the Carnegie Corp. of New York foundation and a divestment opponent. If schools want to get moral, he asks, why don't they boycott products, refuse donations, deny corporate recruiting and the like?

Still, critics fault companies for retaliation and predict coming confrontations. "That kind of blackmail drastically jeopardizes universities' academic freedoms," says Richard Knight of the American Committee on Africa. If the corporate counter-punches increase, he adds, "universities will have to stick together on this one—and they probably will."

City pension trustees sue over new divestment law

By Sandy Banisky

The trustees of Baltimore's municipal pension systems sued City Hall yesterday in a case designed to test the legality of the city's new divestment law, which requires the sale of all pension investments in companies doing business in South Africa.

The suit, which the pension trustees had been planning for months, contends that the divestment law illegally restricts the trustees' ability to invest in some secure, blue-chip companies that offer safe, steady returns, because those firms are connected to South Africa.

By law, the trustees have a "fiduciary responsibility" that obligates them to make the best and safest investments for the retirees in the city's three municipal pension

funds.

The suit, filed yesterday in Circuit Court, alleges that the divestment law abridges their powers and is "inconsistent with the fiduciary responsibilities of the Trustees" in requiring them "to make investment decisions based on considerations other than rate of return and risk of investment."

The divestment law, passed by the City Council in June, becomes effective today. It gives the city's pension systems, which have \$1.1 billion in holdings, two years to sell off all holdings in firms that have ties to South Africa. By last summer's estimates, that would amount to about \$309 million in stocks, bonds and other securities.

The law also prohibits, beginning

See **PENSIONS**, 4B, Col. 6

Pension trustees file suit over divestment law

PENSIONS, from 1B

today, the purchase of any new stocks from companies doing business in South Africa.

The trustees have never been comfortable with the measure, always worried that a pensioner might file suit against them should investment revenues fall.

Council sponsors of the measure said they were mindful of that concern. They said their bill, passed after months of negotiation, protects the trustees and will stand up to any court challenge.

In October, the trustees took their first steps toward testing the divestment law by winning Board of Estimates' approval to bring the case to court. Since then, a judge has assigned independent attorneys to represent the trustees on one side and the mayor and City Council on the other.

Melvin J. Sykes was appointed to represent the city.

The suit was filed yesterday by George A. Nilson and Lee Baylin on behalf of the trustees and two Baltimore pension fund members: Mildred Zink, a retired city employee who receives a pension for her 30 years' work in the payroll office and

more pension fund members. Mildred Zink, a retired city employee who receives a pension for her 30 years' work in the payroll office and a payment from the Fire and Police Employees Retirement System based on her late husband's service as a lieutenant in the city fire department; and Gary W. McLhinney, a city police officer.

Besides alleging that the law violates the trustees' fiduciary responsibility, the suit contends that the divestment ordinance interferes with the federal government's exclusive authority over the making of foreign policy. It also interferes with Congress' right to regulate interstate commerce, the suit claims.

And, in potentially restricting returns to the pension funds, the law violates the contract that the trustees have with the pensioners, the suit says.

City Councilman Timothy D. Murphy, the chairman of the committee that held hearings on the bill, said yesterday that the suit comes as no surprise. "I think this is a technical exercise on the part of the trustees," he said.

"They are attempting to protect their position by asking the court for an affirmation of the law," Mr. Murphy said.

He called the counts that allege the City Council violated the federal government's right to control foreign policy and interstate commerce "fallacious and not germane. We passed a bill which give guidelines for the management of local retirement funds, not the setting of foreign policy," Mr. Murphy said.

~~SECRET~~

SNIE 73-3-87

WESTERN VULNERABILITY TO A CUTOFF OF
KEY SOUTH AFRICAN MINERALS [REDACTED]

Information available as of 6 February 1987 was used in the preparation of this Estimate, which was approved by the National Foreign Intelligence Board on 6 February 1987.

~~SECRET~~

~~SECRET~~

CONTENTS

	<i>Page</i>
SCOPE NOTE	1
KEY JUDGMENTS	3
DISCUSSION	7
Foreign Dependence	7
Security of Southern African Supplies	7
Government Suspension of Mineral Sales	7
Spontaneous Interruptions	8
Threats From a Regime Change	9
Vulnerability to Supply Disruptions	10
Reactions by Western Europe and Japan	13
Could Moscow Capitalize?	13
Costs to Suppliers	14
South Africa	14
The Stake for the Regional States	14
 ANNEXES	
A. Potential Production Capacity Outside Southern Africa	17
B. Key Metals Uses and Substitutes	21
C. Private Stockpiles	23
D. Government Stockpiles	25
E. South Africa's Transportation Leverage	27
F. Soviet Position in Strategic Minerals	29
G. Analysis by Mineral	33

iii
~~SECRET~~

~~SECRET~~

SCOPE NOTE

In the past two years the stability of the Botha regime has been shaken by the worst outbreak of black unrest in modern South African history, growing international pressure to abandon apartheid, a faltering economy reflecting a lack of investor confidence in South Africa's economic future, and, more recently, by the imposition of economic sanctions against Pretoria by most Western nations. These conditions have jeopardized the perceived reliability of South Africa as an exporter of a large portion of the West's supplies of "strategic" minerals. In light of these developments, this Estimate assesses the potential impact over the next five years of a temporary or long-term loss of South African supplies that could be brought about by:

- Countersanctions by Pretoria against neighboring exporters of strategic minerals.
- A boycott of minerals sales to the West by the Botha regime.
- Effective labor strikes by the National Union of Mineworkers.
- Sabotage of mining facilities by internal or external forces, including guerrilla attacks by African National Congress forces or a rise in domestic factionalism.
- Widespread civil strife
- A change in power to a rightwing, black, or pro-Soviet government.
- Soviet collaboration with any white regime in Pretoria to deny strategic minerals to the West.

The Estimate does not address potential Western sanctions aimed at boycotting imports of strategic minerals from South Africa under the assumption that such a policy is not likely to be supported by more than a handful of countries, and could be rendered ineffective by third countries, dummy corporations, and middlemen anxious to turn a profit by serving as brokers between exporters and importers.

The Soviet role as a supplier is not considered in the context of a major East-West military conflict. Under such circumstances, availability of supplies for military needs would presumably be met through stockpiles and such supplies as were available outside of the Soviet Bloc.

†The study excludes two minerals—andalusite and chrysotile asbestos. (v)

1

~~SECRET~~

~~SECRET~~

KEY JUDGMENTS

We believe there is a better-than-even chance during the next five years there will be a reduction in supply of one or more strategic minerals (chromium, cobalt, manganese, platinum group metals, and vanadium) from southern Africa:

- Should Western governments take or appear prepared to implement stronger actions against South Africa, there is a better-than-even chance that Pretoria will retaliate by disrupting, at least temporarily, the flow of some strategic minerals—most likely one or more of the platinum group metals. As long as gold sales continue, such actions would not be costly to South Africa in the short run, but would damage South Africa's reputation as a reliable supplier.
- There exists a substantial likelihood that South Africa will again disrupt trade from neighboring states (including shipments of strategic minerals) in reaction to sanctions imposed by its neighbors, or to other developments that strain relations.
- There is also at least an even chance that events outside of Pretoria's control, such as guerrilla attacks sponsored by the African National Congress, strikes, sabotage, or factional violence in the mines, will result in brief disruptions in production and perhaps exports of some strategic minerals during the time frame of this Estimate.

In the unlikely event of intense, nationwide strife approaching civil war, mine production could be reduced sufficiently to effect exports. We consider this scenario highly unlikely during the time frame of this Estimate.

A change in regimes, which we also consider highly unlikely during the time frame of the Estimate, could pose problems for minerals exports:

- A staunchly rightwing government would be more likely than the present regime to undertake symbolic reductions in mineral exports to demonstrate its resolve.
- Any black government coming to power in South Africa probably would not deliberately reduce strategic mineral exports to the West. However, a black government coming to power in revolutionary circumstances would be pledged to

3

~~SECRET~~

~~SECRET~~

nationalize the mines and heavy industry. Should it decide to press forward rapidly with nationalization, disruptions could occur as a result of loss of trained personnel and scattered incidents of sabotage.

We do not believe there is a significant threat to US military production from a reduction or cutoff in South African mineral supplies, owing to the existence of public and private stocks and the ability of the US Government to control available supplies under existing laws.

The impact of reduced supplies to the civilian sector depends primarily on the extent and duration of any disruption. Short-term disruptions would result mainly in higher mineral prices with only marginal overall economic effect. As to larger, longer term disruptions, loss of chromium and platinum group metals would entail the greatest overall economic costs. In the extreme case, a Department of Interior study estimates that a total cutoff of chromium exports from South Africa lasting three years with a concurrent loss of 90 percent of Zimbabwe's exports would cost the United States about \$5 billion. We caution that such estimates are rough because of the many uncertainties surrounding the calculations. A long-term cutoff in platinum supplies would cause significant adjustment problems for the automotive sector, for example, requiring a shift away from the catalytic converter method of reducing exhaust emissions.

On balance, we believe it most likely that *sporadic supply reductions or threatened reductions* will generate temporary and, perhaps, sharp increases in price. These disruptions *will be insufficient to trigger substantial changes in Western industry, patterns of consumption, or supply.*

We believe it probable that, *in the event of a major South African supply interruption, Moscow would attempt to satisfy unmet Western demand to the extent possible, cashing in on higher prices. Officials in Moscow understand that efforts to limit significantly the availability of minerals, although profitable in the short run and costly to the West, would cause the West to reduce dependence on these minerals over the longer term, and lessen the value of these Soviet resources.*

An extended cutoff or sharp reduction in mineral exports from southern Africa would give Moscow significant leverage in platinum group metals that would impinge on Western consideration of political and/or economic actions against the USSR. We think it most likely that Moscow would seek to perpetuate this leverage by continuing their sales and thus preventing market pressure from forcing Western industry to reduce its reliance on the Soviet Union. This tack would

4
~~SECRET~~

~~SECRET~~

allow the Soviets to cash in on somewhat higher prices while maintaining a degree of leverage. If the cutoff from South Africa were to last a long time, Western Europe and Japan would develop other sources of strategic minerals, preferably in Third World countries, but also, possibly, in the Soviet Union.

There is a possibility that the Soviets would seek to use their leverage in some future confrontation with the West. The most likely scenario for denial would be a reduction in supply that could plausibly be attributed to mining or transportation problems but that would send a signal of possible overt denial in the future. *We certainly cannot rule out, however, a major reduction in supplies from the USSR in the face of some future East-West confrontation.* While such denial would trigger an eventual reduction in reliance on the minerals, their sale accounts for only a small portion of Soviet earnings.

We believe it unlikely that Moscow could find ways to collaborate effectively in a minerals denial strategy either with a besieged apartheid regime or with a new black government. The only significant possibilities for denial are in the platinum group metals. Hence, while a new South African black government or white rightwing regime may participate with Moscow in market sharing discussions, we do not believe such discussions would lead to effective collusion.

Analysis of Soviet domestic needs for strategic minerals (given abundant reserves and adequate access to third country resources) does not indicate that the Soviets have their eyes on southern African strategic minerals as a major source of imports to meet future internal needs.

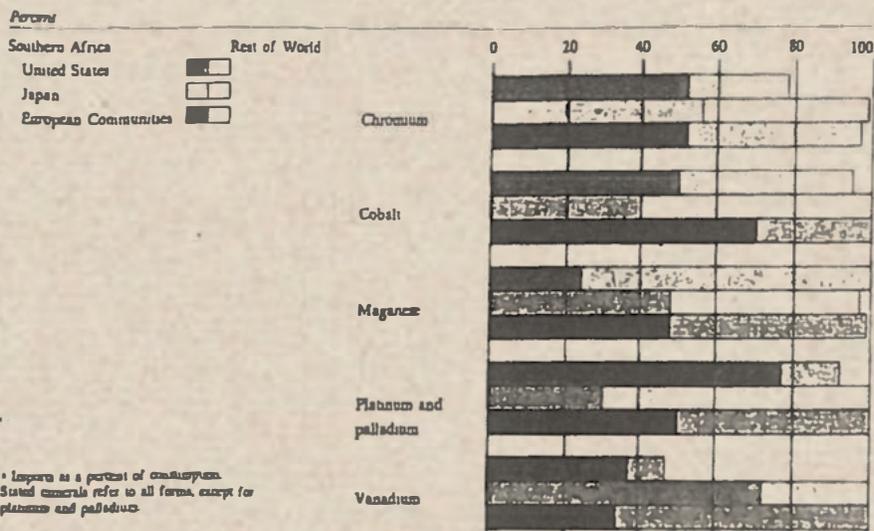
This information is Secret

5

~~SECRET~~

SECRET

Figure 1
Industrial Countries: Mineral Import
Dependence, 1985 *



Unclassified

SI 177 0-07

South Africa: Minerals (1 of 3)

SECRET

SECRET

DISCUSSION

Foreign Dependence

1. The United States and other industrial countries are currently dependent on five strategic minerals (see inset) originating in or shipped through South Africa. In terms of imports, the United States relies most heavily on South Africa for platinum group metals and chromium. Also, half of its present consumption of cobalt originates in Zaire and Zambia. The United States is also highly dependent on southern Africa for supplies of ferroalloys, particularly ferrochromium and ferromanganese.¹ (u)

2. The pattern of dependence for Western Europe and Japan is similar to that of the United States, but Western Europe has a somewhat greater reliance on South African manganese and Zairean cobalt. Japan is more heavily dependent for manganese and vanadium and less reliant for platinum group metals, which it gets in large quantities from the USSR. (u)

3. In contrast, the Soviet Union is virtually self-sufficient in strategic minerals. The Soviet Union is the world's largest producer of chromium, manganese, and platinum group metals, second (to South Africa) in vanadium, and third in cobalt (behind Zaire and Zambia). However, of these five, the USSR is a major exporter of only platinum group metals. The USSR supplies roughly 30 percent of US palladium and 2 percent of US platinum requirements. The USSR is also a large supplier of platinum group metals to Western Europe and Japan. More than one-third of Japanese needs are supplied by the Soviet Union. [REDACTED]

Security of Southern African Supplies

Government Suspension of Mineral Sales²

4. Should Western governments take or appear prepared to implement stronger actions against South

¹ These alloys, containing iron and carbon, are produced by the smelting of ores of the primary metal, generally in the countries where the ores are mined. They are particularly significant because most of the chromium, manganese, and vanadium used in steel production is introduced into the manufacturing process in ferroalloy form. (u)

² See Memorandum to Holders of SNIE 73.2-85, February 1987, [REDACTED] Prospects for South Africa: Stability, Reform, and Violence. [REDACTED]

Key Minerals Defined

As defined by the Strategic and Critical Materials Stockpiling Act of 1979, strategic and critical materials are those that would be needed to supply the military, industrial, and essential civilian needs of the United States during a national emergency, and are not found or produced in the United States in sufficient quantities to meet such need. For purposes of this Estimate this definition is narrowed using the following criteria:

- Supplies, both production and reserves, of these minerals are heavily concentrated in southern Africa and the USSR.
- The industrialized West or Japan is dependent on imports of these minerals for more than 50 percent of its total consumption.
- These minerals have important end uses in military and aerospace systems and essential US industries such as steel and petroleum. [REDACTED]

The minerals meeting these combined criteria include chromium, cobalt, manganese, platinum group metals (platinum, palladium, iridium, osmium, rhodium, and ruthenium) and vanadium. Also included are the ferroalloys derived from these minerals, ferrochromium and manganese ferroalloys, because of their importance to the metal processing industries in the West. [REDACTED]

Africa, we believe it probable that during the next five years Pretoria will retaliate against new Western sanctions by disrupting—at least temporarily—the flow of some strategic minerals to the West. A symbolic measure, such as suspending the sale of rhodium (which is needed for most catalytic converters) would have little economic consequence for South Africa or, in the near term, for the US automobile industry, which has an inventory of less than two years. In the longer term, a suspension would drive prices up sharply and reinforce antisandctions arguments by demonstrating the costs of South African retaliation. [REDACTED]

5. In addition to new Western sanctions, other developments could lead to such a decision by Pretoria:

- Attachment of South African foreign assets

7

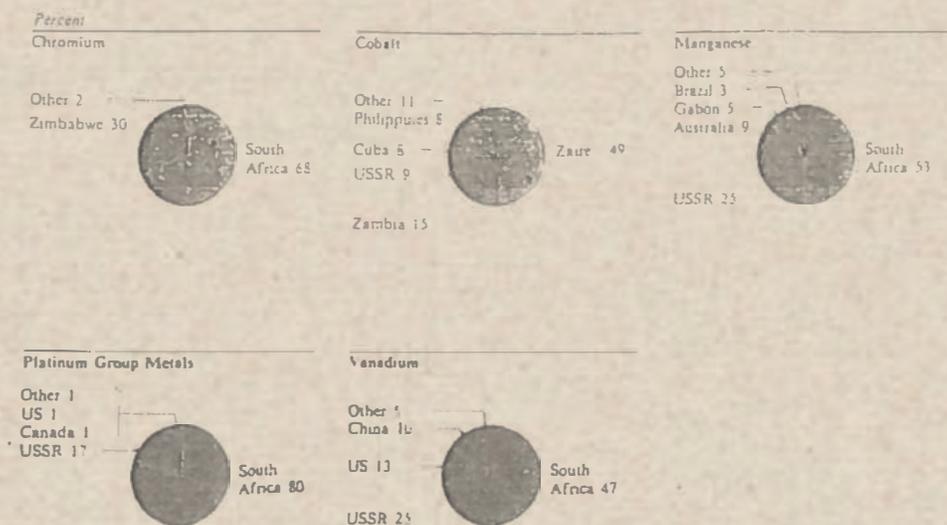
SECRET

Africa Minerals (1985)

[Handwritten notes and markings on the right margin]

SECRET

Figure 2
Estimated Percentage of Total World Reserves, 1985



Unclassified

31191287

- Deteriorating relations with the West, such as US official actions to restrict or remove South African diplomats
- Political gains by the right that force the governing National Party to placate its critics and prove its toughness by retaliating against the West

6 Actions Against Regional States There is also a substantial likelihood that transportation of mineral exports from neighboring states—particularly Zaire, Zambia, and Zimbabwe—will be disrupted by Pretoria in retaliation for sanctions by these states or by the West. This would have costs to both sides. Nevertheless, if sanctions by neighboring states become too draconian—such as the nationalization of South African assets in Zimbabwe—Pretoria will probably respond by fomenting additional political dissent there, expelling most Zimbabwean migrant workers, and

intensifying pressure on alternate transportation links such as the Beira Corridor through Mozambique. South Africa temporarily impeded the free flow of trade with Zambia and Zimbabwe following the Commonwealth summit in August 1986 to demonstrate that even advocacy of sanctions by Pretoria's neighbors would be sufficient provocation for counteractions

Spontaneous Interruptions

7 There is at least an even chance that domestic events outside of Pretoria's control will result in brief disruptions in production of some strategic minerals, possibly resulting in a disruption of supplies during the five year time frame of this Estimate. Black labor unions, guerrilla groups, factional violence in the mines, or a major domestic upheaval all have the potential (in varying degrees) to damage South Africa's mineral production for short periods of time. A

8

SECRET

SECRET

lengthy, extensive disruption of supplies from such sources is unlikely, however.

8 *Organized Labor Action* We believe protest activity by members of the National Union of Mineworkers (NUM) is the most likely cause of potential disruptions of mineral production and perhaps supplies to the West. The NUM, an affiliate of the increasingly politicized Congress of South African Trade Unions, is likely to try repeatedly to demonstrate its growing influence in the mines. A wage dispute, a major accident such as the recent Kinross mine disaster, or a repressive action by the government against opposition forces could serve as a catalyst for largescale and lengthy work boycotts or for sabotage efforts by disgruntled black miners. Although we doubt that NUM leadership itself will deliberately seek to disrupt supplies for a long period and that union leaders would work to limit any maverick activity by its members, the leadership may not be able to control the flow of events.

9. If protest activity against the mines were to jeopardize South Africa's mineral export commitments, the government almost certainly would take swift action to reduce the power of the NUM. An overly harsh reaction, such as banning the NUM, might backfire by intensifying black anger and creating more problems for mine owners attempting to maintain a constant flow of mineral exports.

10. *Factional Violence.* Outbreaks of factional violence in the mines, spurred by ethnic and racial differences as well as rivalries among black unions, are likely to increase during the next five years, resulting in temporary disruptions of mineral production in some sectors. There are sharp ethnic cleavages among the largely black labor force in the mines, tribal allegiances are strong, and many clashes have already occurred.

11. The emergence this year of the United Workers' Union of South Africa (UWUSA), the labor wing of Chief Buthelezi's *Inkatha* Zulu organization, enhances prospects for sporadic outbreaks of factional violence in the mines. UWUSA, with 50,000 members, is intent on gaining a major foothold in the mining industry and is making headway in new areas. In addition to its Natal Province stronghold, it is making inroads in the Transvaal and Orange Free State. The organization is considering expanding its activities into Lesotho, the biggest single supplier of foreign black mine labor. The UWUSA and NUM leaderships have exchanged hostile rhetoric, and last June, 10 black miners died at a Natal coal mine when violence broke out between UWUSA and NUM members.

12 *Guerrilla Attacks* The African National Congress (ANC) may mount small-scale attacks against the mining industry during the next five years, resulting in some disruptions. The ANC might, for example, launch an attack against a mine embroiled in a labor dispute to show solidarity with the black miners' unions. Widespread disruptions are unlikely, however, owing to the security and quick repair capabilities of Pretoria and business interests. The ANC in the past has conducted some highly sophisticated operations, making it plausible that a single attack by the group could temporarily disrupt operations at a key mining site. The ANC, for example, exploded four bombs over a 12-hour period of 18-19 December 1982 at the Koeberg nuclear power plant near Cape Town less than a week before scheduled fuel loading. Damage was extensive and the plant opening was delayed for almost a year.

13 *Widespread Civil Strife.* In the unlikely event of intense, nationwide strife in South Africa approaching civil war, mine production could be reduced enough to effect exports. Black activists intent on shutting down the mines undoubtedly would try to intimidate black miners into striking. Black workers at key mining equipment manufacturing plants in South Africa, who do not have the protection afforded by living in isolated hostels, would be particularly vulnerable to intimidation. ANC guerrillas most likely would place a high priority on closing down the mining industry and may mount extensive sabotage despite heavy casualties among black miners.

14. The South African Government and the mine owners most likely would go to extremes to maintain the flow of minerals to the West during periods of major strife, although they probably would be unable to prevent serious disruptions in production. Mine owners would intensify efforts to stockpile minerals from their own mines as well as secure supplies from foreign mines to try to fulfill export contracts. Security at the mines would be significantly upgraded and Army units might be deployed to defend the most important mine complexes. The government probably would ban the black miners' unions and assist mine management in weeding out activist workers. The institution of martial law and strict curfews would facilitate mine owners' efforts to cut off virtually all contacts between black miners and the volatile black townships.

Threats from a Regime Change

15. Although we believe the National Party almost certainly will remain in power, there is a small chance

9

SECRET

SECRET

that a white rightwing government will emerge in the next five years. A black government could come to power in South Africa during this period only as a result of a tremendously violent domestic upheaval, which we regard as highly unlikely.

16. *The Right* In the unlikely event an extreme rightwing regime were to come to power during the next five years—for example, as a result of a scandal involving the National Party leadership, a debilitating succession struggle, or a sudden groundswell of Afrikaner opposition to National Party policies—Western strategic mineral supplies might be endangered. The right wing accuses President Botha of kowtowing to US demands to end apartheid and is becoming increasingly anti-Western with each successive round of sanctions against South Africa. Although a rightwing regime would be more likely to disrupt supplies than the current government, we think it most likely any actions would be limited to partial reductions in sales or symbolic cutoffs.

17. *The Left* Any black government coming to power in South Africa probably would not deliberately reduce or cut off supplies of strategic minerals to the West. Indeed, a new regime probably would seek Western aid and capital and would want to continue sales of minerals to the West both to support the economy and to finance imports.

18. Nonetheless, a black government coming to power in revolutionary circumstances would be pledged to nationalize the mines and heavy industry. Should it decide to press forward rapidly with nationalization, disruptions could occur as a result of loss of trained personnel and scattered incidents of sabotage. With the multiple serious problems a new black government would face, restoration of strategic minerals production would not be a top priority.

19. Were the government to be ANC-controlled, it might explore collaboration with the Soviet Union in exporting minerals.³ Members of the pro-Soviet South African Communist Party (SACP) today hold many important positions in the ANC leadership that give them considerable influence in ANC policymaking, and these SACP members almost certainly would attempt to expand South African-Soviet economic cooperation. While Moscow would probably try to exploit its SACP foothold in the new government to the fullest, it probably would not press for an extensive Soviet-South African mineral cartel.

³ See SNIE 73-86, July 1986, *Coast* [redacted] *The African National Congress of South Africa: Organization, Communist Ties, and Short-Term Prospects* [redacted]

Figure 3
Supply Disruption Scenarios: Probability and Impact

☉ High ☉ Low ☉ None

Event	Probability of occurrence	Length of disruption	Impact on West
Partial South African sales embargo	☉	Short	
Countersanctions against neighboring states	☉	Unknown	
Organized labor actions	☉	Short	
Internal factional disruption	☉	Short	
Full-scale South African sales embargo		Short	☉
ANC-led guerrilla attacks		Short	
New black regime	☉	Short	
Intense, nationwide civil strife	☉	Long	☉
New rightwing regime		Unknown	

Unclassified

311728 2-87

Vulnerability to Supply Disruptions⁴

20. Because of the multiplicity of scenarios and the unknowns surrounding the effects of supply reductions on prices, demand, and alternative supplies, assessments can only provide rough estimates of the overall impact of supply disruptions on the US economy. Historical experience indicates that for all of the more likely scenarios, supply disruptions would be temporary and relatively small. There would be large price

⁴ Strategic mineral dependence does not in itself imply vulnerability. Rather, vulnerability results from the magnitude of costs of adjusting to supply disruptions. Vulnerability to a cutoff of South African minerals will be mitigated by such factors as the potential of the market to allocate supplies in the short term, the existence of private and government stockpiles, substitution, technological innovation, Western conservation, the development of alternative sources of supply, and South African dependence on Western technology and trade—all of which would probably reduce the length of a strategic minerals cutoff and hence, Western vulnerability (u)

10

SECRET

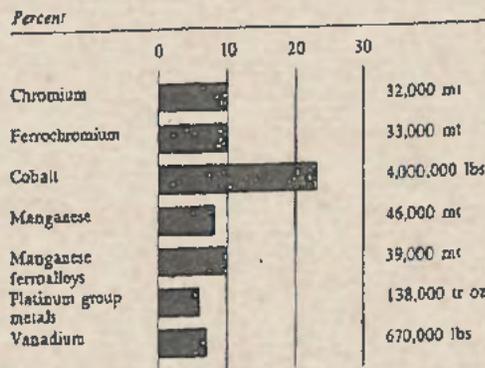
SECRET

increases for individual minerals owing to market uncertainty, but the effects on overall economic performance or on inflation in the West would not be substantial. Sufficient private stocks exist to assure supplies for civilian and military needs.

21. Accurately gauging the overall effects of large and lengthy supply disruptions on the United States or other industrial economies is difficult during the transition period, when new supplies are developed and conservation and substitution take hold. Defense needs can be met using substitution, reallocation, and draw-downs of minerals from the national defense stockpile even for major supply reductions, including a complete and lengthy cutoff of exports from southern Africa. Analysis by the US Department of Defense of the direct and indirect military demands for the five strategic minerals indicates that, with the exception of cobalt, defense-related consumption equals 10 percent or less of total US consumption; for cobalt the share is just below 25 percent. Hence, military needs could clearly be met—albeit at marginally higher cost—for major short-term disruptions. If there were substantial and persistent shortages, some government reallocation would be required to prevent production shortfalls, intensifying the impact of any supply reduction on the civilian sector.

22. Major extended supply disruptions would cause significant dislocations in some industrial sectors. A long-term cutoff of supplies of South African platinum group metals, for example, would cause significant adjustment problems for the US automotive industry. South Africa produces 80 percent of the world's supplies of platinum, and there are no other suppliers at this time capable of picking up the slack. Outside of South Africa, most platinum group metals are produced as a byproduct of the mining of other minerals. With little excess production capacity outside South Africa and relatively small private stocks, at present, the United States could find itself short of platinum for any interruption extending beyond about nine months. A US shortfall on the order of 25 percent and high prices would probably lead to substitution, first for medical and dental uses, then by the electronics industry. The rate of substitution in the electronics industry would depend on the relationship of gold and platinum prices. In the first year of the cutoff, the automotive industry—which normally relies on long-term contracts with South African suppliers—would probably be able to meet its needs through inventories and by outbidding other users for supplies. Palladium demand for industry could be met by private inventories and increased purchases from the Soviet Union.

Figure 4
US Defense-Related Consumption^a



^a 1983-84 average. Bars represent the percentage of strategic minerals consumed in the United States by defense-related industries. Numbers tell actual amounts consumed.

Unclassified

311729 2-87

Rhodium demand for converters could be met through private inventories for fewer than two years.

23. In the event of a long-term cutoff of platinum, (say three or four years) use of catalytic converters in the US auto industry could be continued only if US Government stockpiles were drawn down. After such a drawdown, even near total substitution for platinum in the medical and electronics industries, 60 percent recycling of scrapped catalytic converters, and US domestic production of 100,000 ounces of platinum per year still would not allow the US auto industry to meet its needs for converters under current emissions standards. Some changes in these standards or the way in which they were achieved would have to be made. While it is technically possible to meet standards without converters by using smaller engines and vehicles, the shift would probably cause substantial dislocations in US industry and, for a time, offer a competitive advantage to Asian producers of smaller autos, which can meet standards without converters. Platinum would remain available in sufficient quantity for high priority uses, such as in the petroleum industry.

24. Similarly, a complete cutoff of South African chromium supplies would be very disruptive to the steel industry. For a short-term disruption, sharply

SECRET

until Africa... 11/17/87... 12/1/87...

for... 11/17/87... 12/1/87...

SECRET

higher prices would bring on new supplies. We would expect prices to increase several orders of magnitude before declining as new supplies come onstream in roughly four to six months. These new supplies, coupled with a drawdown of public and private inventories, would mitigate for a time the full impact.

25. A cutoff lasting one or more years would cause major changes in the chromium market, spurred by sustained prices several times above current levels. With sharply higher prices, demand could fall by some 50,000 tons, or 15 percent within two years. Recycling of steel scrap containing chromium, recovery of a greater amount of chromium-containing slag in stainless steel processing, and conservation and substitution in alloy production could yield a saving of another 50,000 tons within three years. On the supply side, new capacity totaling some 800,000 tons would be added by the development of new mines in India, New Caledonia, and the Philippines and the expansion of existing mines in Brazil, Finland, Greece, India, Madagascar, and Turkey. Although private stockpiles are estimated at only four months of demand, the US Government stockpile has more than two years' worth of inventories at current consumption rates, which could be made available during the changeover period. Depending on the level of chromium prices and the availability of government subsidies, the United States over the longer term could be producing 235,000 tons of chromium ore from the Stillwater Complex in Montana and several sites in Oregon and California. US domestic production eventually could satisfy nearly 95 percent of domestic needs at prices perhaps four times the current level.

26. As to the effects on the overall US economy, past studies produce significantly different results owing to differing assumptions about responses to higher prices. These studies are useful, however, in establishing an order of magnitude for the impact. One of the most extensive studies done recently was prepared by the Department of Interior; it evaluated the economic costs of the loss of chromium and manganese supplies under three scenarios:

- A 25-percent reduction in South African supplies lasting one year and beginning in 1988.
- A 50-percent reduction lasting one year.
- A 100-percent cutoff lasting three years with a concurrent loss of 90 percent of Zimbabwe's chromium exports, a scenario we believe has a very low probability.

The cumulative three-year direct economic costs to the United States of higher import costs and the costs of reduced consumption or of using substitute materials was estimated at \$100 million for the first scenario, \$1.3 billion for the second scenario, and \$4.7 billion for the third. Roughly 70 percent of these direct costs were accounted for by the impact of lost chromium supplies.

27. The study also estimated the overall costs (including lost jobs in related industries) to the US economy of cutoffs in chromium and manganese supplies from southern Africa under a worst case scenario. For chromium, the analysis forecast a total GNP reduction over the three-year cutoff at \$15.2 billion and an average annual decline in employment of 146,000 jobs per year for three years. Manganese supply disruptions under all of the scenarios were estimated to have little or no impact on GNP or employment because of the availability of large private stocks and excess production capacity available in alternate supplying countries (u).

28. The analysis indicated that the price of chromium during a disruption would reach 15 times the base level, resulting in a decline in consumption of 50 percent. The analysis is based on a worst case outcome in that it assumes no drawdown from the defense stockpile. Current government stocks of chromium are 4.7 times annual US imports from southern Africa, and the President's proposed reduced chromium stockpile level would leave stocks equal to three times annual imports from southern Africa. The results also assumed that the socialist nations (primarily the USSR and Albania) would not shift present mineral exports in favor of the Western nations even at prices 15 times current levels (u).

29. Our own analysis shows that the impact on inflation of such scenarios would not be severe for the overall economy. For example, a tripling in the average prices of platinum, cobalt, and manganese would:

- Add \$80 to the cost of a catalytic converter (less than 1 percent to the price of a finished automobile).
- Increase the cost of an F-100 engine by \$26,000 or roughly 1 percent of the cost of that engine.
- Raise the cost of finished steel by \$5.50 per ton, again, about 1 percent.

As for foreign trade, a tripling in the cost of all five strategic minerals—unlikely given the availability of substitutes and alternative sources of supply—would

12

SECRET

SECRET

raise mineral import costs by just over \$5 billion, about 6 percent of the cost of the increase in the US oil import bill from 1973 to 1980* (u)

Reactions by Western Europe and Japan

30 Western Europe and Japan would respond to a supply cutoff in much the same way as the United States—securing alternate supplies, stepping up substitution, conservation, and recycling efforts, using private and government inventories, and attempting to circumvent any South African embargo by making purchases through third parties. We think it most likely that these governments would try to mitigate reduced supplies and increased dependence on Soviet sources by stockpiling some minerals (see annex D) rather than undertaking more fundamental and costly measures to reduce demand because they would believe that eventually South Africa again would become a supplier. Should the South African cutoff continue for an extended period, Western Europe and Japan would develop new sources, including perhaps those in the Soviet Union

Could Moscow Capitalize?

31 In the most likely scenario—sporadic supply reductions—we think it most likely that Moscow would try to cash in financially, as it has done in the past, rather than seek to exacerbate any shortage. Moscow's options are largely limited to platinum group metals.⁵ Platinum and palladium exports earned the Soviet Union some \$270 million in hard currency in 1985, and we believe the Soviets could continue to supply these metals at the same rate during the remainder of the decade. We believe Moscow does have some stocks of palladium and could increase sales for a time if it chose. Most of the production in the USSR of other strategic minerals is used domestically (see annex F), and we anticipate little change in this pattern of production and use during the remainder of the 1980s.⁶

⁵ Studies on the impact of strategic mineral supply disruptions include US Department of the Interior, Bureau of Mines, Division of Minerals Policy and Analysis Open File Report 76-86, July 1986, *South Africa and Critical Materials*, and Congress of the United States, Office of Technology Assessment, May 1985, *Strategic Materials: Technologies To Reduce US Import Vulnerability* (u).

⁶ In the platinum-group market, Moscow's options are constrained by the nature of Soviet platinum group ores. The ores now being mined are thought to be found in a palladium-to-platinum ratio of 5.5:1 while South African ores are mined in a ratio of 2.5:1, platinum to palladium. Soviet exports of platinum group metals support such a ratio; 1985 export estimates of 1.22 million troy ounces of palladium and 24 million troy ounces of platinum yield a ratio of 5:1. In contrast, South Africa exports 2.35 million troy ounces of platinum compared with 1.04 million troy ounces of palladium. The result is a bifurcated market dominated by South African platinum and a sharing of the palladium market with the Soviets. (u)

The Soviet Track Record

To date, the Soviets have followed a pragmatic course in minerals markets. They have, for example stuck to commitments and have not reneged on existing contracts because of changes in political relations. Only during the Korean war did the USSR cut off its strategic metals supplies, imposing an embargo on sales of chromium and manganese to the West. Since that time, Moscow has maintained or boosted strategic minerals sales to the West on several occasions when political or military actions presented them with opportunities to apply a clamp. Sales were maintained during the Vietnam war, during the UN embargo against Rhodesian chrome exports, and following the imposition of US trade sanctions against the USSR in January 1980. In the latter two instances, not only did Moscow maintain deliveries under existing contracts, but it also solicited additional transactions. Soviet policymakers understand that efforts to limit availability of minerals supplies significantly, although profitable in the short run, would, over the longer term, result in reduced Western dependence on these minerals and, hence, reduce the value of these Soviet resources.

The Soviets would, however, attempt to seize on opportunities to take advantage of a seller's market to garner additional profits. Moscow used the Rhodesian situation, for example, to repeatedly raise high-grade chrome ore prices from \$32 per ton in 1966 to about \$70 per ton by 1971.

During the substantial rise in platinum prices last year, the Soviets generally acted responsibly in the market. There are no indications Moscow either withheld supplies to push prices still higher or dumped platinum to make a quick killing. Soviet metals traders apparently realize the problems they created trying to manipulate the market in 1973-74 by withholding palladium supplies. This strategy drove prices up to \$300 per troy ounce, but resulted in substantial substitution in the West of other precious metals for palladium.

32 We believe it probable that, in the event of a major South African supply interruption, Moscow would attempt to satisfy unmet Western demand to the extent possible. Accurate projections of the hard currency earnings windfall a South African cutoff could have for Moscow are not possible because of uncertainties in prices and sales volumes, but earnings could rise by several hundred million dollars annually during an extended cutoff. Officials in Moscow understand that efforts to limit significantly the availability of minerals, although profitable in the short run and costly to the West, would result in the West reducing dependence on these minerals over the longer term.

13

SECRET

~~SECRET~~

Countries in Western Europe, for example, could reverse their decision to rely increasingly on catalytic converters, removing a major source of future increases in demand. Similarly, a sharp rise in prices for platinum group metals would put pressure on US auto producers to move toward alternatives to catalytic converters.

33 Concern over the long-term impact of reduced supplies of platinum on the value of its resources would also preclude significant cooperation with any new regime in South Africa. We think it is possible that a white rightwing or black regime might discuss market sharing or partial denial. Discussions alone, if made public, could boost prices, but we do not believe any such discussions could lead to effective collusion.

34 An extended cutoff or sharp reduction in mineral exports from southern Africa would give Moscow significant leverage in platinum group metals that would impinge on Western consideration of political and/or economic actions against the USSR. We think it most likely that Moscow would seek to perpetuate this leverage by continuing their sales and thus preventing market pressure from forcing Western industry to reduce its reliance on the Soviet Union. This tack would allow the Soviets to cash in on somewhat higher prices while maintaining a degree of leverage. If the cutoff from South Africa were to last a long time, Western Europe and Japan would develop other sources of strategic minerals, preferably in Third World countries, but also, possibly, in the Soviet Union.

35 There is a possibility that the Soviets would seek to use their leverage in some future confrontation with the West. The most likely scenario for denial would be a reduction in supply that could plausibly be attributed to mining or transportation problems but that would send a signal of possible overt denial in the future. We certainly cannot rule out, however, a major reduction in supplies from the USSR in the face of some future East-West confrontation. While such denial would trigger an eventual reduction in reliance on the minerals, their sale accounts for only a small portion of Soviet earnings.

Costs to Suppliers

South Africa

36 The economic impact on South Africa of a loss of strategic mineral exports would be significant but not catastrophic as long as gold production and exports could be maintained. Loss of all strategic mineral

exports would reduce total foreign exchange earnings by less than 10 percent and GDP by less than 3 percent. More damaging, however, under a long-term disruption scenario, would be the loss of earnings and markets as the West reduced its dependence on these minerals as a result of higher prices and as alternative supplies became available.

37 In the worst case scenario, in which protracted, major civil unrest caused serious damage to South Africa's mining facilities and also resulted in the coming to power of a black government, the need for substantial amounts of Western technical aid, equipment, and managerial training could result. Without such assistance, the chances would be slim that a majority government would be able to restore fully and manage mineral production in two to three years.

The Stake for the Regional States

38 There are two scenarios in which the export of strategic minerals from the regional states would be reduced: extended, severe civil unrest in South Africa and countersanctions by South Africa against the regional states. The greatest impact would probably occur in Zaire, Zambia, and Zimbabwe. Rail links to South African ports are the major export route for over half the mineral exports of these three countries. While cobalt is the major strategic resource of Zaire and Zambia, losses probably would not be felt immediately. Stockpiled cobalt could be supplied from European warehouses, flown from the cobalt refineries in Zaire and Zambia to the ports of Matadi and Dar es Salaam, or simply substituted for copper shipments over rail links to east coast and west coast ports. Nevertheless, with mineral exports accounting for 65 percent of exports earnings in Zaire, 95 percent in Zambia, and 33 percent in Zimbabwe, any major loss of mineral export earnings would create significant balance-of-payments problems for these economies and probably affect political stability.

39 The escalation of regional sanctions and countersanctions would affect strategic mineral supplies most severely in the case of Zimbabwe. Pretoria could stop supplying fuel for Zimbabwe's ferrochrome and steel industries and prohibit fuel transshipments by other suppliers, with the result that the industry would rapidly shut down.

40 In an attempt to break the transportation leverage held by South Africa, these countries have long-range plans to expand and reopen alternative shipping routes. A semipermanent cutoff of South Africa export

~~SECRET~~

SADCC Transportation Financing Progress

The SADCC established the Southern Africa Transportation and Communications Commission (SATCC) to deal with transport and communications issues. It published the following cost estimates for its various transport projects in a 1984 report. Because delays in implementing programs will increase costs, the estimated cost figures may be too low.

According to the SATCC, the status of projects in key sectors was

	Estimated Costs (Million US \$)	Additional Foreign Capital Needed (Million US \$)	Percent Pledged	Percent Under Discussion	Percent Remaining
Operational coordination and training	12.2		39	36	25
Roads	826	621	20	15	65
Railways	978	827	24	18	58
Ports and water transport	661	494	10	10	80
Civil aviation	100	80	52	16	32
Telecommunications	277	286	56	26	18

This table is ~~Confidential~~ [REDACTED]

Clearly, the need for money is greatest in the roads, railways, and ports. These tend to be capital intensive projects most crucial to the future trade of the region.

According to the SATCC, the status of projects by area was:

	Estimated Costs (Million US \$)	Additional Foreign Capital Needed (Million US \$)	Percent Pledged	Percent Under Discussion	Percent Remaining
Maputo Port System	716	571	22	10	68
Beira Port System	524	419	18	8	74
Nacala Port System	238	185	43	8	49
Dar es Salaam Port System	411	301	6	43	51
Lobito Port System	168	163	20		80

This table is ~~Confidential~~ [REDACTED]

This information is ~~Confidential~~ [REDACTED]

links would accelerate the urgency of opening up capacity to the east and west coasts and sharply increase demands for Western financial assistance. Cost estimates for various transportation projects made in 1984—under the aegis of the Southern African Development Coordination Conference—have indicated a need for nearly \$4 billion in Western capital for roads, rail, ports, civil aviation, and communica-

tions. Only about \$850 million has been pledged. Even if the funds were available immediately, it would probably take five to 10 years and large doses of Western managerial and technical know-how and perhaps even labor to bring these projects to fruition. In the interim, the risks of economic and political instability would probably reach serious proportions.

From: NSHJC --CPUA
To: NSPSS --CPUA

Date and time 03/18/87 09:00:00

NOTE FROM: Herman J. Cohen

SUBJECT: Federalism Debate at Justice on Thursday, Mar. 19
My Contacts at State tell me they are not invited to the debate in Justice tomorrow on the federalism question stimulated by State and local government sanctions against companies doing business with South Africa. They hear it will be an internal affair between the Office of Legal Counsel and the Civil Division. They suggest the following contacts if you would like to pursue the possibility of your attendance as the NSC rep: Bob Sincar, Deputy Director of the Civil Division; David Anderson, Office of Federal Programs in the Civil Division; and in the State Department, Michael Matheson, Deputy Director of the African Legal Advisor's office. He can be reached at 647-8460.

I gather that South Africa is not the only issue with which local authorities are running their own foreign policy. Northern Ireland and Arab-Israeli relations also stimulate similar activities. The bottom line is that we want American companies to remain South Africa, and the Congress, in its wisdom, has said the same thing, despite sanctions. If the Federal Government takes no action against the local authorities, the companies will have to leave South Africa.

*So. Africa
Sanctions*

South Africa Sanctions (1)

Box 12017

Stevens, Rev / Schott: Files

From: NSHJC --CPUA

Date and time 03/18/87 09:00:00

*See Hoffman
Standard 1263 / Jike*

HRC -> Paul STEVE

Los Angeles Times

Monday, March 16, 1987/Part II

5

Apartheid Act Casts Doubt on Local Laws

By GARE A. SMITH

Amid the furor of debate surrounding the enactment of federal sanctions against South Africa, at least one critical issue has escaped resolution: whether the Anti-Apartheid Act precludes the enforcement of state and local anti-apartheid laws.

This issue affects the responsibilities of numerous local government officials, the business of hundreds of U.S. companies and the lives of thousands of South Africans. Although the courts have not yet addressed this question, it is probable that the federal act preempts state and local laws.

The act presents two possible grounds for preemption of state and local anti-apartheid measures. First, it appears to occupy the field of anti-apartheid law. More than 100 cities and states adopted anti-apartheid measures before the enactment of the federal statute. Many of these

state laws and local ordinances impose stronger sanctions against South Africa, and U.S. companies with business ties to South Africa, than does the federal law. Massachusetts, for example, requires the divestiture of all public pension funds from companies operating in South Africa. Los Angeles has adopted a similar ordinance, and also prohibits contracts for goods or services involving city funds with companies that own property in South Africa or that have done business recently with the South African government. The all-encompassing nature of the federal act indicates congressional intent to invalidate such state and local regulations.

The act says that its purpose is to "act forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to

apartheid." This declaration implies that the act is intended to preempt local regulations in order to offer a national response to apartheid. The Senate record supports such an interpretation. Sen. Richard G. Lugar (R-Ind.), one of the act's sponsors, said that it was intended to "occup(y) the field with regard to U.S. law on apartheid." An amendment offered by Sen. Alfonse M. D'Amato (R-N.Y.) would have reversed this and permitted state and local anti-apartheid laws and ordinances to remain in force. That amendment was defeated. The House passed a resolution saying that the bill would not preempt state and local regulations. The resolution, however, is not part of the act, and is not law.

A second basis for preemption of state and local regulations is that such measures interfere with the federal government's power to conduct foreign relations. The U.S. Supreme Court has found actions by

states and municipalities that intrude on the federal foreign-relations power to be unconstitutional regardless of whether such actions actually conflict with federal statutes. Accordingly, local anti-apartheid laws governing international relations with South Africa might be unconstitutional even if they do not conflict with the Anti-Apartheid Act.

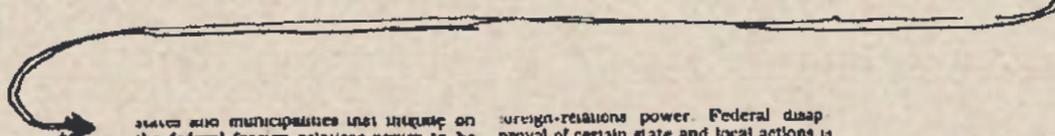
The act applauds the commitment of U.S. firms in South Africa that adhere to the Sullivan Principles. It also requires U.S. firms in South Africa to implement fair labor standards to improve the status and future of their employees in that country.

State and local sanctions, by prohibiting procurement from U.S. firms doing business in South Africa and by prohibiting the investment of public pension funds in such firms, penalize U.S. businesses for remaining in South Africa and in effect coerce them into leaving. Such coercion arguably stands as an obstacle to the accomplishment of objectives expressed in the act as to the presence of U.S. firms in South Africa and, in so doing, interferes with the federal

foreign-relations power. Federal disapproval of certain state and local actions is indicated by a provision in the act enabling the federal government to withhold funds from states and localities that tie projects using federal money to compliance with non-federal anti-apartheid regulations.

The continuing validity of state and local anti-apartheid regulations thus is called into serious question by the federal act. Whether the act is actually preemptive is a question now left to the courts. Individuals and groups displeased with the uncertainty surrounding this issue have only one option outside the courtroom: to contact their members of Congress and lobby for the enactment of an amendment to the federal act specifically addressing the issue of whether it precludes the enforcement of local regulations.

Gare A. Smith is an attorney in the international trade and policy section of the Washington office of Akin, Gump, Strauss, Hauer & Feld.



From Hank G. Pen 13

NATIONAL SECURITY COUNCIL

FLUOR CORPORATION

627 K STREET N.W.
 WASHINGTON, D.C. 20006
 TELEPHONE 202 955-9300
 TELESCOPE 202 933-9300

March 23, 1987

The Honorable Robert P. Bedell
 Administrator
 Office of Federal Procurement Policy
 Office of Management and Budget
 New Executive Office Building
 Room 9001
 Washington, D.C. 20503

Re: South Africa -- Local Anti-Apartheid
 Statutes

Dear Bob:

Relative to the effect of local government anti-apartheid statutes on Federal grantees procurements, enclosed is the Wall Street Journal (March 20, 1987) article on Xerox Corporation's announcement to withdraw from South Africa. The article attributes Xerox's decision to the local anti-apartheid statutes, and mentions the loss of a contract with the Pittsburgh public school system -- no doubt a recipient of some Federal grants from the Department of Education.

Clearly, when these local statutes work to force U.S. companies to withdraw from South Africa, in spite of the good work done by them in furtherance of the Sullivan human rights principles, the Administration's foreign policies and interests in having U.S. companies stay in South Africa are being frustrated. Section 606 of the 1986 South Africa sanctions legislation gave local governments a grace period in which to ensure that these statutes did not conflict with Federal procurement statutes and regulations -- both generally and by agency grant program -- but it may well be that this "statutory warning" is going unheeded.

- 1961 -

↓ FLUOR

I hope you find this useful in your consideration of this emerging problem.

All the best.

Sincerely,



Robert E. Carleton, Jr.
Director
Congressional Relations

Enclosure

cc: Ambassador Douglas Holladay
South African Working Group
Department of State

Stephen Cooney, NAM

March 20, 1987

NATIONAL SECURITY COUNCIL
SECRETARIAT STAFFING DOCUMENT

Xerox, Finally Succumbing to Pressure, Says It Will Sell South African Unit

By DENNIS KEARNS

Staff Reporter of THE WALL STREET JOURNAL

NEW YORK—Xerox Corp., one of the last die-hard supporters of an American corporate presence in South Africa, finally succumbed to pressures here and abroad and said it will sell its South African unit.

Xerox said its 51%-owned Rank Xerox unit, whose 49% partner is Rank Organisation PLC, a Britain-based leisure and hotel company, will sell the local business to Aitron Group, a big South African electronics firm. Terms weren't disclosed for the sale, which is to be completed by May 1.

The pullout culminates more than a year of agonizing at Xerox, which in December held off a final decision as executives searched for a new approach that might let them stay in the racially troubled land. And the move is unlikely to ease the pressure from activists, who criticized Xerox's plans yesterday to let the unit continue selling photocopiers in South Africa after its sale.

"It's a perfect example of a decision that basically pleases no one," David T. Kearns, Xerox chairman, said in an interview.

Nor does it please him. Mr. Kearns was one of industry's most vocal proponents of the notion that only by staying can companies help end apartheid and repression in South Africa. His voice grew lonelier late last year when two other outspoken chairmen—Roger B. Smith of General Motors Corp. and International Business Machines Corp.'s John F. Akers—reversed course and pulled out.

Mr. Kearns said he still feels staying put is best for South Africa's 23 million blacks. But he now says leaving is what is best for Xerox. "It was clear things were continuing to deteriorate on all fronts," he said. The nation's economy and social climate were worsening, pro-disinvestment groups' criticism was rising, and Xerox was beginning to lose sales in the U.S. to local governments that were banning contracts with companies doing business here.

The departure by Xerox, the 14th-largest U.S. employer in South Africa, comes at a critical time for U.S. firms. The pace of pullouts is accelerating, as pressure groups that once praised any departure now say simply leaving isn't enough. The Reagan administration's patient approach toward the South African government has been all but dismissed, even by a Reagan-appointed advisory panel. And a May 31 deadline looms for U.S. companies that follow the Sullivan Principles, fairness tenets that for 10 years provided a moral ground for profiting from sales in South Africa.

The Rev. Leon H. Sullivan, founder of the principles, has said he will urge U.S. companies to leave South Africa if apartheid hasn't ended by May 31—a seemingly impossible prospect. That might lead to waves of new withdrawals.

Xerox, based in Stamford, Conn., became the 24th company to announce or complete a withdrawal in the first three months of this year. That compares with 49 corporations in all of 1985. The Washington-based Investor Responsibility Research Center says 182 U.S. companies retain South African units and haven't announced shutdown plans, the total was 267 companies less than a year ago.

The financial impact on Xerox will be puny—the unit provided less than 1% of Xerox's \$9.78 billion of annual sales. Indeed, Xerox may have been more alarmed by the financial effects of staying. Last fall Xerox lost out on a photocopier contract with the Pittsburgh school board, which wouldn't buy from South Africa-linked companies.

The lost sales were "certainly a lot more than a few thousand dollars," Mr. Kearns said, "and it is something we saw increasing unless Xerox pulled out. But

he conceded he still may lose sales to such cities as Los Angeles, which has even tougher rules excluding companies that let their products be sold in South Africa even though they have shed direct investments there.

Most U.S. companies retain distribution agreements with the units they leave behind. Eastman Kodak Co. is one of the few that left and ended all product sales in South Africa.

The criticism of Xerox comes despite the unusual efforts it made in pulling out. It negotiated a promise from the buyer that the unit's 500-plus employees won't lose their jobs. It also is forming a foundation run by black leaders that will spend \$500,000 a year on social programs after Xerox leaves.

~~LIMITED OFFICIAL USE~~

2

from state/local practices to the supervening requirements
Office of Management and

~~LIMITED OFFICIAL USE~~

1713

NATIONAL SECURITY COUNCIL
WASHINGTON D.C. 20506

ACTION

March 23, 1987

MEMORANDUM FOR FRANK C. CARLUCCI

FROM: HERMAN J. COHEN

SUBJECT: South African Sanctions: State and Local
Government Actions Against American Firms

Issue

Whether or not to inform OMB Director Miller of our high level interest in preventing state and local governments from imposing through their own procurement processes, sanctions beyond those approved by Congress against American firms doing business in South Africa.

Background

One aspect of the anti-apartheid campaign in the U.S. has been individual actions by state and local governments to pressure U.S. firms to quit doing business in or with South Africa. The preferred method of applying pressure is to announce that such firms are ineligible to bid on state/local procurement contracts. Such action by state/local government is objectionable on Constitutional grounds, because of the pre-emptive federal authority in matters involving foreign relations and interstate commerce. It also may be incompatible with the state/local jurisdiction's continued receipt of certain federal funding. The Justice Department has concluded that the Transportation Department must withhold federal highway construction funds from New York City to the extent that the City's application of its local anti-apartheid law is inconsistent with competitive bidding requirements of federal statute. This principle may have much broader application to other federally-funded programs. Section 606 of the Comprehensive Anti-Apartheid Act of 1986 accordingly provided state and local governments a 90-day grace period within which to conform their procurement policies to the requirements of federal law. That grace period expired December 31, 1986, but most state/local governments apparently have not yet conformed their practices. From a policy point of view, we have an interest in making sure that the law is enforced. While we enforce sanctions, it is our belief that American business firms should continue to remain in South Africa and continue to trade with South Africa. The maintenance of American business presence in South Africa is important to the maintenance of U.S. influence during this period of transition.

Justice
Dept
& NYC

~~LIMITED OFFICIAL USE~~

-sent 1/19/87

~~LIMITED OFFICIAL USE~~

To conform state/local practices to the supervening requirements of federal law, the next step is for the Office of Management and Budget to send a circular to recipients of federal funding and state/local procurement authorities to notify them that application of local anti-apartheid measures may disqualify them for continued federal funding.

The State Department is now discussing this with OMB at the level of Mr. Robert P. Bedell, Administrator, Office of Federal Procurement Policy. At meetings I have attended on this subject, I note OMB agreement in principle, but a certain bureaucratic reluctance to demonstrate any zeal. I feel the matter is becoming urgent because a growing number of companies are beginning to doubt the wisdom of remaining in South Africa. This is just one more headache on top of all the others, including stockholder and consumer protests. I believe, therefore, that you should communicate with OMB Director Miller to let him know that the issue has a high foreign policy priority in addition to its legal aspects.

^{DC/AS}
Paul Stevens concurs.

RECOMMENDATION

That you sign the memorandum at Tab I to Mr. Miller.

Approve _____ Disapprove _____

Attachment
Tab I Your memorandum to Mr. Miller

200711 11-15-00 001-7100

Box 12017

Stevens, Paul / Schott, Jiles

~~LIMITED OFFICIAL USE~~

1712

Cohen

THE WHITE HOUSE
WASHINGTON

March 25, 1987

MEMORANDUM FOR JAMES C. MILLER, III
FROM: FRANK C. CARLUCCI
SUBJECT: South African Sanctions: State and Local
Government Actions Against American Firms

You are probably aware of interagency discussions about state and local anti-apartheid schemes, and the effect that they are having on U.S. firms that are doing business in or trading with South Africa well within the terms of the Comprehensive Anti-Apartheid Act of 1986. As applied through state/local procurement processes, these local sanctions provisions appear to be incompatible with continued state/local government receipt of federal highway construction and other funding. Although section 606 of the CA-AA allowed state/local governments a 90-day grace period within which to conform their practices, that period expired 31 December 1986 and many local jurisdictions continue to apply more discriminatory standards. I understand that the Administrator of the Office of Federal Procurement Policy is currently considering a proposal to inform recipients of federal funds and state/local procurement authorities that continued application of such local anti-apartheid laws may disqualify them from further federal funding. This step merits prompt and serious consideration.

It is the President's policy to encourage American firms to continue to do business in South Africa whenever such activities are permitted by the CA-AA of 1986. Discriminatory actions by state/local procurement authorities substantially undermine that policy. I would appreciate your support on this very important issue.

Frank C. Carlucci
Frank C. Carlucci

Dept. Affairs Sanctions (1)

Box 7a017

Stevens, Ann / Schott: Files

From: NSHJC --CPUA
To: NSPSS --CPUA

Date and time 03/30/87 08:36:06
NSAPR --CPUA

410
↙

NOTE FROM: Herman J. Cohen
SUBJECT: Justice Decision on South African Sanctions by State and Local Governments

I understand that Justice decided to delay on this issue. They will be replying to the Shultz-Meese letter saying that the Deputy Attorney General (Burns?) will be in touch with State to work on it. It looks to me like Cooper, who wants to do nothing, has been victorious. Last week, IBM, Mobil and 3M came in to say that San Francisco's action is now killing them. You might want to liaise with Sofaer on this to determine the next step. I feel that a PRG is really necessary to make sure this issue is brought to closure quickly.

4.1.87

Hank -
As we discussed, I think a PRG on this issue is a good idea. Do we have anything scheduled yet? The more we can document industry reaction, the better off we'll be. I think it's an odd case for Federalism principles to win out on.

- Paul S.

01 Paul

South Africa Sanctions (1)

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20508

File

April 1, 1987

Paul Stevens:

re: Possible PRG on South African
Sanctions by State and Local
Governments

Abe Sofaer has asked State's African Bureau to hold off requesting a PRG until he makes one more try at getting Justice off the dime. If he fails, the PRG will be requested by Armacost. If that happens, I will make sure you are invited. I have not seen Meese's reply to Shultz on this issue, but I am told that it was very cursory.

HJC

Hank Cohen

Box 72017

Stevens, Rev / Schott: Files

① Park +
E. H. HJC

South Africa Sanctions (1)

655 Fifteenth Street, N.W.
Suite 200
Washington, D.C. 20005-5701
202 638-4600

Public Relations & Public Affairs

April 14, 1987

The
Hannaford
Company,
Inc.

The Honorable
Herman J. Cohen
Special Assistant to the President
for National Security Affairs
room 373, Old Executive Office Building
Washington, D.C. 20500

Dear Ambassador Cohen,

Pursuant to our discussion earlier this year concerning the effect of local government anti-apartheid statutes on Federal grantees procurements, I am enclosing a copy of a recent letter to Robert F. Bedell, administrator, Office of Federal Procurement Policy, Office of Management and Budget, from Robert E. Carlstrom, Jr., director, congressional relations, Fluor Corporation.

The letter refers to an article in the WALL STREET JOURNAL (March 20, 1987) on Xerox Corporation's announcement to withdraw from South Africa. Carlstrom advises Bedell that the "article attributes Xerox's decision to withdraw from South Africa to the local anti-apartheid statutes, and mentions the loss of a contract with the Pittsburgh public school system -- no doubt a recipient of some Federal grants from the Department of Education."

As we discussed, Section 606 of the 1986 South Africa sanctions legislation gave local governments a grace period in which to ensure that these statutes did not conflict with Federal procurement statutes and regulations. Apparently, the "statutory warning" is being ignored. You advised me that you would take this subject up with Administrator Bedell, and perhaps suggest that OMB issue a letter to local governments. Has a letter been sent? If not, would you bring this article to Administrator Bedell's attention? I want to thank you again for your interest in seeking a resolution of this situation. Please let me know if I can provide you with any additional information.

Sincerely,

Steven E. Some
Steven E. Some
Vice President

SES:fl

enclosure

TWX/Telex 710/822-1152
Washington, D.C. • New York • San Francisco • Madrid • Taipei

Box 72017

Stevens, Apr 1 Schott: Files

City trustees hold back on S. Africa divestment

By Ann LoLordo

The trustees of Baltimore's municipal pension systems are delaying selling off South Africa-related investments and may seek to postpone divestment indefinitely because of their court challenge to the city's new law.

Though the ordinance took effect Jan. 1, the trustees have invoked a provision of the law that allows them to suspend divestment for 90 days if the rate of return drops below a certain level.

The trustees sued the city Jan. 1 in what is believed to be the first court challenge of a divestment law in the country.

They maintain that selling the usually high performing, South African-related stocks would seriously affect the performance of the city's \$1.1 billion pension fund.

Depending on the portfolio's recent performance, the trustees for the two systems — police and fire and public employees — may ask for an injunction to delay implementation of the ordinance until the lawsuit is resolved, according to a lawyer for the trustees.

In delaying divestment, the trustees on Jan. 22 cited an exemption in the law that allows them to suspend the sale of South African-related investments if the rate of return dips below the average annual rate of the past five years. That rate, as of last June 30, was slightly more than 19 percent.

The trustees based their decision on the Sept. 30 quarterly earnings of minus 1.6 percent for the fire and police system and minus 1.8 for the municipal employees system, said Ernest J. Glinka, retirement system's administrator.

As part of their decision, the trustees said that any new investments would be made in companies not doing business in South Africa.

They will meet again April 30 to decide whether to continue the suspension.

The delay has been questioned by one of the law's key sponsors, Councilman Nathaniel J. McFadden, D-2nd. Mr. McFadden argued that the current investment performance should have no bearing on implementing the divestment law.

He maintained that the intent of the suspension provision was to ensure that the system did not suffer under divestment.



NATHANIEL J. MCFADDEN
City councilman, D-2nd

The councilman said retirees had a "golden opportunity" to prove the contention of their suit — that the divestment process violates the trustees' fiduciary responsibility to earn the most they can for pensioners.

According to Mr. Glinka, of the pension system, the trustees have two choices if investment earnings improve sufficiently to raise the average yearly earnings. They could draw up a divestment plan or decide whether to seek an injunction, Mr. Glinka said.

He said that investment earnings for the pension systems have increased since last fall. Earnings for the quarter ending Dec. 31, 1986, were 4.1 percent, and there were stronger returns in the first quarter of this year, he said.

If investment performance does not enable the trustees to continue the suspension, the retirees lawyer in the suit, George A. Nilson, said yesterday that he believed his clients would be in a "good position" to win approval to stay implementation of the law.

Circuit Judge Martin B. Greenfeld, who is hearing the divestment suit, is expected to rule on the retirees' motion to decide the case by late April.

He has already decided that one issue in the case — whether the contract rights of retirees were impaired — needs to be resolved in a trial. But he could determine the outcome of the lawsuit on other grounds.

NATIONAL SECURITY COUNCIL

4.22.87

Hank —

Understand Macrost has
requested PRG on this issue.
I think the time is right,
and would be happy for this
office to do paperwork for
ALP (since issue is
predominately a legal one),
subject to your concurrence.
Does that sound OK? If
so, will turn to it right
away.

— Paul S.

NATIONAL SECURITY COUNCIL

April 23, 87

Paul Stevens,

The request for a PRG
is on Frank Carlucci's
desk with a favorable
endorsement from me, you,
and Alison Foster.

So, please do something
for CLP. I see you
as the point man on
this. ZAP COOPER!

Hank

4 South Africa Sanctions (1)

Box 72017

Stevens

NATIONAL SECURITY COUNCIL
WASHINGTON, D. C. 20505

SYSTEM 11
90450

May 4, 1987

MEMORANDUM FOR COLIN L. POWELL *DP*
FROM: PAUL SCOTT STEVENS
SUBJECT: PRG on Local Anti-Apartheid Statutes

Attached at Tab I are talking points prepared for tomorrow's PRG on South Africa. At Tab II is a copy of Mr. Carlucci's memorandum to Justice Miller recommending prompt and serious consideration of action by the Office of Federal Procurement Policy to force localities to conform their anti-apartheid laws to Federal law. At Tab III is a brief memorandum on the constitutional conflict between these laws and Federal supremacy in matters of foreign policy and foreign commerce. At Tab IV are copies of correspondence received from companies disadvantaged by such local laws.

I recommend that you review these materials prior to tomorrow's meeting.

Herman J. Cohen concurs.

Attachments

- Tab I - Talking points
- Tab II - Memorandum from Mr. Carlucci to Mr. Miller : - add 301
- Tab III - Memorandum on constitutional issues
- Tab IV - Correspondence received

TALKING POINTS

PRG ON STATE ANTI-APARTHEID LAWSI. Issue Presented

- The issue presented is what should the federal government do about state and local laws that impose tighter sanctions on companies doing business in South Africa than provided by the Comprehensive Anti-Apartheid Act of 1986 (the "Act"). The course chosen also will affect local laws purporting to affect relations with, for example, the Soviet Union and Northern Ireland.
- ~~Regarding South Africa, some state and local laws are more stringent than the Act, and require total divestment. Others, for example, bar bidding for contracts by companies with subsidiaries in South Africa. Such laws exist in New York, California, and Maryland. One such law is in litigation in Baltimore.~~
- ~~Such local laws not only deny businesses legitimate economic opportunities, they create confusion as to the applicable rules regarding commerce with South Africa.~~

II. Agency Divisions

- The agencies are divided about what the federal government should do.
 - o ~~The State Department advocates intervention in existing lawsuits, or initiation of litigation, to assert that the statutes are unconstitutional attempts by the states to conduct foreign policy or to affect foreign trade. State also advocates using the authority of the ACT to penalize states and localities that have failed to make their laws consistent with federal law.~~
 - o ~~[FYI: There is an internal split at Justice on this issue.] The Justice Department now takes the view that intervening in this way would be inconsistent with the principles of federalism espoused by this Administration. In 1986, Justice opined that the Department of Transportation must withhold Federal-Aid Highway Act funds from localities that do not award contracts through competitive bidding processes, and that the local anti-apartheid ordinances at issue here violated the competitive bidding requirement.~~

- 2 -

-- The impact of this division is illustrated by the litigation in Baltimore. There, the local ordinance requires the Baltimore pension fund to sell its shares in all U.S. companies doing business in South Africa, whether or not they adhere to the Sullivan principles and whether or not they are permitted to do business in South Africa under the Act. The plaintiff asked the State Department to submit an affidavit from Assistant Secretary Crocker setting forth U.S. policy towards South Africa. The Justice Department insisted that it approve the affidavit, and it did not do so.

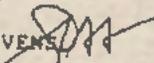
III. Consequences of Action

- Acting against localities may stimulate Congress to enact stronger anti-apartheid legislation.
- Such action may be inevitable anyway.
- It is politically difficult to oppose strong sanctions.
- We can anticipate international criticism of action against localities as evidence of the Administration's support of South Africa's current regime.
- Refusing to act lends legitimacy to local statutes of a type that traditionally have been viewed as unconstitutional.

NATIONAL SECURITY COUNCIL
WASHINGTON DC 20505

MAY 4, 1987

MEMORANDUM FOR COLIN L. POWELL

FROM: PAUL SCHOTT STEVENS 

SUBJECT: Constitutional Issues Raised by Local
Anti-Apartheid Statutes

The issues raised by state and local laws imposing tighter sanctions on companies doing business in South Africa than provided by the Comprehensive Anti-Apartheid Act of 1986 (the "Act") have a constitutional and political dimension. This memorandum briefly sketches the constitutional dimension.

The local ordinances most obviously at issue would bar businesses from competing for contracts that do business with South Africa. Recognizing that such laws existed, the Act gives the states 90 days from October 2, 1986, to conform their laws to the Act, after which time the federal government may reduce funds for which states are eligible under federal law or impose other penalties. Thus, the Act asserts federal supremacy in the matter of U.S.-South Africa relations.

The constitutional status of such laws appears clear. As the Supreme court has consistently held, the Federal Government alone has authority to make foreign policy for the United States. The principle of federal supremacy has its origins in the early history of the Republic. One of the reasons for replacing the Articles of Confederation by the Constitution was the recognized need for the country to speak with one voice in foreign affairs. Under the Articles, the states conducted thirteen foreign policies on behalf of the United States.

The Constitution established Federal supremacy in the areas of foreign affairs and foreign commerce by its articulation of the President's power to be what the Supreme Court has called the "sole organ of the federal government in international relations". By Article II, the Constitution vests the Executive Power of the United States in the President, including authority to make treaties, appoint and receive ambassadors and ministers. Under Article I, section 8, Congress has the power to regulate commerce with foreign nations; Article I, section 10, bars the states from entering treaties with foreign governments, and imposing taxes on imports or exports without the consent of Congress.

- 2 -

The Supreme Court consistently construes the authority of the President and Congress in foreign affairs and foreign commerce to be broad and exclusive. Thus, the states have no authority in these areas, even under the 10th Amendment, which reserves to the states and people those powers not given to the Federal Government by the Constitution. Federal supremacy exists even where the Federal government fails to act. Such inaction does not convey constitutional authority to the states to regulate foreign trade or to establish the country's foreign policy.

Here, not only would the local laws impose a foreign policy on the Administration, but also, as a constitutional matter -- without regard to the merits of particular state statutes -- they have no standing. This conclusion also applies to state statutes purporting to regulate relations with the Soviet Union or Northern Ireland. Any other conclusion would make it extremely difficult, if not impossible, for the President and Congress to discharge their respective constitutional responsibilities.

DIST:

OUTGOING DATAFAX

~~UNCL~~
CLASSIFICATION

DATE: 5/8/87

FROM: State / LIAF: Lynda Clarizio

TO: NSC: Hank Cohen

SUBJECT: PRG on State/Local South Africa Laws: Update of
Baltimore Case

HANDLE AS: ROUTINE PRIORITY URGENT

NUMBER OF PAGES: 1

DRST:
5

Update: Baltimore Divestment Case

We have recently learned from the plaintiffs in the ongoing court challenge to Baltimore's divestment ordinance that the case will move to trial on June 22. The purpose of the trial will be to present evidence on the extent to which the ordinance impairs the financial soundness of the pension fund. This issue is important in order for the court to be able to determine whether the ordinance violates Maryland contract law and unconstitutionally impairs the right to contract.

The trial will not deal with the main constitutional issues before the court: whether the ordinance intrudes upon federal authority to conduct foreign relations, infringes federal authority to regulate foreign commerce, and is preempted by federal law. Judge Greenfeld of the Baltimore Circuit Court heard arguments on these issues from both sides on March 26. The Judge has decided that he will not rule on these issues until the conclusion of the trial.

The plaintiffs have indicated to the Judge, however, that they would like the opportunity to present evidence at the trial on the foreign policy issue, i.e., on the impact of the Baltimore ordinance on the conduct of U.S. foreign policy. The Judge has concurred in their request. The plaintiffs continue to express interest in receiving an affidavit or, if necessary, a deposition from the Assistant Secretary of African Affairs or an equivalent official to address this issue.

It is not unusual that Judge Greenfeld has decided to proceed with a limited trial in the Baltimore case. It is common for a trial court judge to move to trial on any outstanding questions of fact in a case in order to prepare as complete a record as possible for the reviewing court in the event that his or her decision is appealed. Otherwise, there is a chance that the case would be returned to the lower court before the reviewing court will even consider an appeal.

The plaintiffs expect the trial to last about a week. If the U.S. Government were to intervene in the case at this stage of the state court proceedings, intervention would have to occur before June 22.

5/8/87
0848A

4
African
institutions

Don't know

Shapiro, Hov, Schwartz, Hild

NSC 11.1

DIST:
S
D
P
S/S
S/S-S
TMA
TMB
AF
EUR
H
L
RF:rw

THE SECRETARY OF STATE
WASHINGTON

8714979
XL8712824

'87 MAY 29 12:59

May 28, 1987

Dear Ed:

I believe you are aware that on May 5 the NSC convened a Policy Review Group on the question of federal intervention in lawsuits challenging state and local South Africa measures. I understand that all of the participants in the PRG agreed that such intervention is legally justifiable and would be supportive of Administration policy.

As you know, we feel that U.S. interests argue strongly in favor of challenging state and local measures which seek to affect the conduct of our foreign policy, whatever the foreign country involved. If these measures remain unchallenged, state and local authorities will be able to erode the federal government's constitutional authority and ability to conduct a coherent foreign policy.

This is particularly true with regard to the many state and local measures on South Africa, which penalize even those U.S. businesses that comply fully with existing federal sanctions against South Africa. These measures run directly contrary to our policy of encouraging U.S. firms to remain in South Africa and to work to promote social and economic change in that country.

I do not believe that federal intervention in lawsuits challenging these South Africa measures would be politically harmful. The Congress specifically considered and rejected language in the Comprehensive Anti-Apartheid Act of 1986 and other legislation that would have approved the enforcement of such state and local measures. Further, attitudes may be changing, even among the strongest opponents of apartheid in this country, on the wisdom of forcing U.S. firms to disinvest from South Africa.

The Honorable
Edwin Meese III,
Attorney General

S/S-MICROFILM
MAY 29 1987

278125 / 1001 SECRETARIES

7101

- 2 -

In any event, we should be able to stress that any federal involvement in legal challenges to state and local South Africa measures is part of a general policy of opposition to unconstitutional actions by states and localities to direct the conduct of U.S. foreign relations. In this respect, our focus need not only be on South Africa measures: we could, for example, intervene in a coordinated manner against similar state and local actions directed against Northern Ireland.

Federal participation in challenges to these South Africa measures need not always be accomplished through direct federal initiation of lawsuits. Our involvement could be limited, for example, to encouraging the initiation of lawsuits by private plaintiffs and to indicating the willingness of the federal government to support these challenges through the filing of amicus briefs.

The only private legal challenge currently taking place is being heard in Baltimore, where a private plaintiff is seeking to have that city's divestment ordinance declared unconstitutional. I understand that if we are to intervene in the Baltimore suit or provide other assistance to the Baltimore plaintiffs, it must be done quickly. I therefore believe that the issue should be presented to the President for his consideration as soon as possible.

I look forward to hearing from you soon.

Sincerely yours,



George P. Shultz

Drafted: L/AP: LClarizio
5/18/87 ext. 647-4110
0858A

Cleared: L:MNatheson
AP:CWFreeman
L/AP:ECummings
EOR/NE:SPerloo (Info)
H:LBunt (Info)

OFFICIAL COPY REPRINT

*File
So. Africa/
State + Local
Indig. Affairs*

Johnson-Johnson

June 24, 1987

Dear Jim

The Honorable Howard M. Baker, Jr.
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D. C. 20500

He is in

Dear Howard:

Today I sent the enclosed letter to President Reagan expressing our concern at Johnson & Johnson for the future of United States companies in South Africa. As my letter indicates, Johnson & Johnson has been in South Africa since 1930 and intends to remain in business there as long as humanly possible. However, unless some of the pressure from state and local governments on those United States companies remaining in South Africa is removed, our continued presence there may be short-lived. Any assistance that the federal government can offer under appropriate provisions of federal law to alleviate some of these conditions would be appreciated.

Kind regards.

Sincerely,

[Handwritten signature]
James E. Burke

mjb
Enclosure

Jim

John

Stevens, Paul Schott, etc

OFFICIAL COPY REPRINT
1988

*in Johnson
Says - 1/1/88
And quote b
1/2/88*

COUNCIL

Johnson & Johnson

June 24, 1988

President Ronald Reagan,
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D. C. 20503

Dear Mr. President:

The recent announcement by Reverend Leon Sullivan calling for the withdrawal of United States companies from South Africa, while disappointing, was not unexpected. It does, however, make our continued presence in South Africa more difficult. The continued withdrawal of United States companies increases the pressure on those of us who have chosen to remain.

Johnson & Johnson has been in South Africa since 1936. We employ more than 1,400 people which puts us in the top ten of the American companies still operating there. Our decision, while constantly under review, is based on our moral commitment to our employees and their families and to the people of South Africa who have been loyal customers and who we believe should be afforded the full benefit of our health care products developments. Of course we believe that the advocates of divestment and disinvestment, while well intentioned, are totally wrong in their philosophy. We know, however, that they will continue their efforts to force the rest of the United States companies out of South Africa without any regard for the quality of our social and business performances there.

We believe that the United States companies in South Africa have been the best advocates of our American way of life. However, unless we receive some advocacy in our behalf, our positions and our contributions in South Africa will disappear. For that reason, I encourage your Administration to take advantage of the provisions of Section 606 of the Comprehensive Anti-apartheid Act of 1986 and interface with state and local governments whose anti-apartheid laws disfavor or disqualify bidders under federally aided contracts. We think it is critically important that the federal government engage in this dialogue to remove the unnecessary pressure on the business community from the state and local governments. If not removed, the future of the remaining United States businesses in South Africa may be in doubt.

Very respectfully,

J. E. Burke
James E. Burke

mjb



CHEMICAL WORKERS INDUSTRIAL UNION

TRANSCVAAL BRANCH

26 World Centre
48 Railway Street
1401 GERMISTON
Tel: 011-8254963

15/07/87.

Rev. Leon Sullivan
1413 N. Broad Street
PHILADELPHIA,
PA 19122.

Dear Sir,

I hereby on behalf of the Colgate-Palmolive South Africa, in Boksburg plant workers, wish to write to you concerning the dispute that exists in Colgate. We are aware that you have pulled our of the program but we feel we should make you aware of practises which^A followed by one of your sigantories.

The dispute exists out of the Wages and Working Conditions Negotiations which was held between the month of June and July between the representatives of the Union of which four are plant based representatives and one is a Union Official, and the representatives of the Company.

For the purpose of the correspondence I will only delve more in the Policy issues and that the other issues we can be able to resolve amongst ourselves.

There are four areas of dispute namely:-

1. Wages
2. Hours of work
3. Transport Subsidy
4. Holidays

I will then take them in their order one point after the other.

1. Wages

The Company and the Union have deadlocked on the Union demand of an increase of 35%. The Company is offering 14%. Union members are faced with massive food price increases together with escalating transport costs. Tax which is deducted from the members Wages is also heartbreaking. At the end of the day the take home pay becomes below the Living Wage Standard.

page /2...

The White foremen in the factory has been given salary increases ranging between 30% - 35%. Black workers are offered 14 %.

This we maintain is discriminatory and a violation of principle III of the Sullivan Principles.

2. Hours of Work

Union members supported by non Union members are demanding and end to the present 43 hrs working week to a 40 hour work week with no loss of pay.

The Company is refusing to accede to this demand. Workers in the plant have noted with interest that the main office staff which got a majority of white workers and few black workers, are working a total of 38.45 hrs per week and they still get their lunch break. To the production workers which are mainly africans, the Company insists that it should have 40 hours work of production and lunch break to be unpaid.

Again this we see as discriminating because we are not seeing ourselves different from the other employees of the same company.

Again this is another violation of Principle II of the Sullivan Principles.

3. Transport Subsidy

Due to the escalating costs in the Transport both in buses and trains that ferries thousands of workers to their work areas including the Colgate-Palmolive Boksburg Plant workers, workers have demanded that the Company should give a R10,00 per week transport subsidy per production employee. The Company has refused and stated that they have not transport policy.

To demand this kind of an assistance workers have noted that the Company does give educational assistance to workers and that as the issue of transport is also one of the policy issues as adopted by the Company from the Sullivan Principles, that if the Company is refusing to meet the workers demand, that it has not been properly and truly complying in full with Principle VI of the Sullivan Principle.

4. Holidays

Union members have demanded that the Company must in practise challenge the Law governing the holidays in South Africa, as the Law is divisive in the Colgate-Palmolive Boksburg Plant work-force in its entirety.

page /3...

This has been made by demanding that the Company must grant all Public Holidays to factory workers as well. The Company has responded by saying that the factory falls under the factories act, and that the office staff falls under the shops and offices act.

Workers then demanded that the Company must challenge these acts and grant workers similar holiday conditions.

The Company is refusing. On behalf of our members I wish to make this point.

Workers are aware that the Company is prepared to challenge the Group Areas Act. We support this move. At this point in time this move is not beneficial to the African Workers in the factory because their income is far away from making them to qualify to buy houses in these segregated (White) area.

We have therefore identified an area of an apartheid legislation which denies benefits to African work-force in the plant and granting white workers such rights. We demanded that the Company should challenge this. THE COMPANY IS REFUSING.

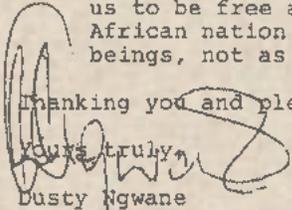
Where does the Company shows its commitment to support the rescension of apartheid laws in South Africa?

How was the Company awarded no.1 rating category in the Sullivan Program and rated as making good progress when it is shown clearly now that Principles II; III and VI of the Sullivan Principle is not strictly adhered to and implemented by the Company.

I am therefore asking you to use your powers in getting clarification or intervene on our behalf as we are aware that this will help. I remember when we met at the Carlton Hotel during our recognition dispute with Colgate South Africa, and that your stand on unionisation gave us room, whereby the Company could no longer refuse talking to us.

As a brother across, on behalf of the African brother in the factory who are denied a voice in Parliament, I call upon you to take this struggle as your own struggle and help us to be free as the oppressed majority so that as the African nation we should also gain recognition as human beings, not as production commodities.

Thanking you and please pass my regards to Dan Purnell.

Yours truly,

 Dusty Ngwane

CHAIRMAN - COLGATE PALMOLIVE



INTERNATIONAL COUNCIL FOR EQUALITY
OF OPPORTUNITY PRINCIPLES, INC.

July 30, 1987

Mr. Dusty Ngwane
Chairman
Colgate Palmolive
26 World Centre
48 Railway Street
1401 Germiston
Republic of South Africa

Dear Dusty:

Reverend Leon H. Sullivan, upon receiving your correspondence, requested that I respond for him. He is indeed concerned about all issues that involve Black trade unionists in South Africa. We read and discussed the content of your letter very carefully, and the issues involved call for resolution so that the relationship between your union and the company will not continue to deteriorate.

As you probably know, Reverend Sullivan is calling for all U.S. companies to leave South Africa, since he is very depressed by the lack of progress in the attainment of conditions he prioritized two years ago. Therefore, he will no longer engage in dialogue with U.S. companies in these areas.

I am concerned about the situation you have described. Having interfaced with you and your council members along with officials from Colgate, it would surprise me if vigorous and open negotiations could not resolve the issues involved.

Essentially, I wish to say that there is a solution to those things outlined, and when I visit --- very soon --- I wish to be helpful.

Please give my best regards to your friends and family for me.

Sincerely,

Daniel W. Purnell

DWP/jb

1415 N. BROAD STREET • PHILADELPHIA, PA. 19122 • (215) 238-6757



Handwritten initials: L, AF, and a signature.

United States Department of State
Washington, D. C. 20520

JUL 21 1987

INFORMATION MEMORANDUM
S/S

TO: The Secretary

FROM: L - Abraham D. Sofaer ^{AD}
AF - Chester A. Crocker ^{CA}

SUBJECT: Decision in the Baltimore Divestment Case

On July 17, the Circuit Court for Baltimore upheld the city's divestment ordinance in the lawsuit brought by the Board of Trustees of the Employee's Retirement System of the City of Baltimore against the Mayor and City Council. The Maryland court ruled against the plaintiffs on all of the federal constitutional and state law grounds. The plaintiffs have informed the Department that it is likely that the decision will be appealed.

The court's decision is unpersuasive on the constitutional issues. In addition, the court relied heavily on factual findings that divestment has only a minimal, if any, effect on South Africa; that divestment alone does not cause companies to leave South Africa; and that such laws do not create political instability in South Africa. The Court suggested that if these measures were more successful, they would come closer to encroaching on an area reserved exclusively for the federal government. Based on the evidence submitted at trial, the judge decided that the Baltimore ordinance has only an incidental or indirect effect in foreign countries, and did not have a "direct impact on foreign affairs."

As you know, neither State nor Commerce was able to provide the court with affidavits on these matters. It is unclear whether the court would have reached a different conclusion if the federal government had spoken. The White House decided two weeks ago that we would not intervene in this case at the trial level but would consider doing so at the appellate stage. We intend to discuss this matter with Justice before providing you with recommendations on how to proceed.

Enclosure:

July 18 Washington Post Article

South Africa Sanctions (2)

Drafted: L/AF:BCummings *CAW*
#0903A x74110 7/19/87

Clearances:

AF - CFreeman } *by whom*
L - HMatheson }

Box 2017

Steven, Paul Schott-Fisher

ric
15

Baltimore Divestiture Law Upheld

City Bars Pension Fund Investment in Traders With South Africa

By Paul W. Valentine
Washington Post Staff Writer

BALTIMORE, July 17—in what may become a national test case, a Baltimore judge today upheld a city ordinance requiring the city's \$1.2 billion employees' pension fund to sell its interests in corporations doing business in racially segregated South Africa.

Bringing to a head arguments that have raged between antiapartheid activists and pension fund administrators in more than 20 states and 70 cities throughout the country—including Washington—Cir-

cuit Judge Martin B. Greenfield found little or no conflict between the objectives of city political leaders to force U.S. corporate giants out of South Africa through divestiture and the obligation of pension trustees to get the best investment yield for retired employees.

The case is believed to be the nation's first test of city laws that force the divestiture of local pension funds in companies doing business with South Africa, and is considered a landmark by many legal scholars and civil rights advocates.

Many pension fund trustees around the country have argued

that companies investing in South Africa provide the greatest yield for them and that the retirees they serve could lose money if they had to pull out of those investments.

But Greenfield ruled that although divestiture and subsequent reinvestment of pension funds in a smaller range of companies may cause some initial extra costs and possible losses, the amounts are so small that they do not violate the Baltimore trustees' legal obligation to seek the best investment yield or impair their contractual relationship with the pensioners.

See DIVESTY, A10, Col 1

Box 72019

Stevens, Paul Schwartz: His

Judge Upholds Baltimore Law On Divestiture

DIVEST, From A1

"Even if the impairment were more significant," Greenfield said, "it would be insubstantial when compared to the salutary moral principle which generated the ordinance" in the first place.

In a 32-page opinion, the judge also swept aside broad constitutional arguments that the divestiture ordinance intrudes on the federal government's prerogative to conduct foreign affairs and violates the foreign and interstate commerce clauses of the Constitution.

Attorneys for the 19-member Baltimore City Council that passed the divestiture ordinance last year expressed elation at Greenfield's ruling.

"He hit all the points that we argued," said attorney H. Russell Frisby Jr. "We are very pleased with the decision."

Frisby, noting concern by municipal pension fund administrators across the country that divestiture could trigger serious financial losses, said "I hope that [Greenfield's] opinion helps put that fear to rest."

Attorneys for Baltimore's pension fund expressed disappointment and said an appeal is likely.

The case has drawn national attention, especially among lawyers representing municipal employee pension funds, and is thought to be one of the first to be tested in court on constitutional grounds. Although the decision is not binding on any other such cases, it can act as a guide to lawyers considering similar litigation.

"It's a national test case, definitely," said Frisby.

Several civil liberties and anti-apartheid groups also have followed the case, and the Reagan administration has taken an interest in it as well. During a recent 10-day trial before Greenfield, observers from the Treasury and State departments were in the courtroom, according to lawyers in the case.

Baltimore's divestiture ordinance, modeled on a similar measure in the District of Columbia, requires the pension fund in the next two years to sell all interests it has in corporations doing business in South Africa and neighboring Namibia.

Attorneys say that the fund, responsible for paying pension checks to about 8,000 retired city workers, will have to sell about 40 percent of its investments to comply with the law.

While the attorneys argued that divestiture would impose additional costs and require the pension fund to enter the less stable investment field of smaller companies that are not as likely to do business in South Africa, Greenfield countered that the divestment costs would be only a fraction of 1 percent of the total pension fund.

Also, he said, "investment in smaller companies with the attendant greater volatility does not necessarily result in a significantly impaired risk," and "if prudently selected, will do at least as well as, if not better than, stocks in the larger companies which must be divested."

On the constitutional question of whether the divestiture ordinance intrudes on the exclusive foreign policy authority of the federal government, Greenfield cited Supreme Court cases holding that such local laws can be allowed as long as they have only an "incidental or indirect effect in foreign countries."

310

stric-
ons

NATIONAL SECURITY COUNCIL

5643

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20508

August 13, 1987

ACTION

MEMORANDUM FOR GRANT S. GREEN, JR.

FROM: HERMAN J. COHEN *HJC*SUBJECT: Letter to Howard Baker from James E. Burke re
U.S. Companies in South Africa

Howard Baker has received a letter from James E. Burke in which he makes note and provides a copy of a letter he sent to the President expressing concern at Johnson & Johnson for the future of the United States companies in South Africa. This concern involves the pressure being exerted at the state and local government levels on those companies remaining in South Africa.

At Tab I is a memorandum for Sally Kelley forwarding a proposed response (Tab A) from the Chief of Staff.

Paul Stevens concurs.

RECOMMENDATION

That you sign your memorandum to Sally Kelley forwarding the proposed draft letter.

Approve *HJC* Disapprove _____

Attachments

Tab I Your Memorandum to Sally Kelley
Tab A Proposed Draft Reply from Howard Baker
Tab B Incoming Correspondence

South Africa - State/Local Anti-Apartheid

File
So. Africa / Local
+ Local
+ Local

Stevens

5643

NATIONAL SECURITY COUNCIL
WASHINGTON DC 20505

August 18, 1987

So. Africa
State/Local
Anti-apartheid

MEMORANDUM FOR SALLY KELLEY

FROM: GRANT S. GREEN, JR. *MG*

SUBJECT: Letter to Howard Baker from James E. Burke re
U.S. Companies in South Africa

Mr. James E. Burke, Chairman of the Board for Johnson & Johnson has written to Chief of Staff Howard Baker regarding concerns they have for the future of United States companies in South Africa.

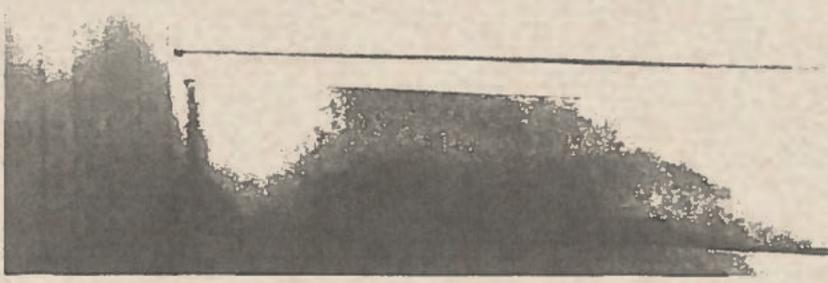
At Tab A is a proposed draft reply to Mr. Burke which explains the delay in responding to his letter and gives a short explanation of our current activities on this subject.

Attachments

- Tab A Proposed Reply to Mr. Burke
- Tab B Incoming Correspondence

Do v 92019

Stevens, Hsu/Short: FHS



[OFFICIAL COPY REPRINT]

File
So. Africa /
State + Local
11/21/61

Dear Jim:

I am sorry it took so long for me to answer your letter of June 24 on the subject of state and local government sanctions against South Africa. I was waiting for the outcome of the Baltimore pension fund case which might have changed the situation. Unfortunately, the decision was not favorable because the judge did not feel that foreign policy considerations were sufficiently relevant.

Our lawyers believe feel that state and local governments do not have the constitutional authority to go beyond Federal Government policies in the area of foreign affairs. We are now studying ways to make an input to the judicial process in order to preempt such activity, which affects several areas of the world in addition to South Africa. I hope to be able to report progress fairly soon.

Thanks for writing. Reports from people and companies on the ground are helpful.

Sincerely,

Howard Baker

[OFFICIAL COPY REPRINT]
SENATE, No. 1986

v.
So. Africa /
State + Local
Antiquities
Laws.

NATIONAL SECURITY COUNCIL

September 17, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.
PAUL SCHOTT STEVENS
HERMAN J. COHEN

FROM: NICHOLAS ROSTOW *NR*

SUBJECT: New Jersey's Northern
Ireland Statute

I recently received the attached New Jersey statute regarding Northern Ireland. I encourage you to review the statute with an eye to a possible court challenge. If the statute appears vulnerable to such a challenge on Constitutional grounds, I think we should encourage the Justice Department to undertake such a challenge.

Attachment

File
So. Office /
State + Local
Antiquarian
Leiss.

[OFFICIAL COPY REPRINT]
SENATE, No. 1986

STATE OF NEW JERSEY

INTRODUCED MARCH 24, 1986

By Senators McNAMARA, FELDMAN, McMANIMON, BASSANO, EWING, O'CONNOR, DUMONT, LIPMAN, GAGLIANO, GORMLEY, CARDINALE, LYNCH, DORSEY, CONNORS, FORAN, BUBBA, HURLEY, GARIBALDI, HIRKALA, JACKMAN, ORECHIO, CODEY, VAN WAGNER, PALLONE, COSTA, RAND, CAUFIELD, COWAN, DIFRANCESCO, STOCKMAN, RUSSO, DALTON and WEISS

Referred to Committee on State Government and Federal and Interstate Relations and Veterans Affairs

AN ACT directing the Director of the Division of Investment in the Department of the Treasury to investigate certain corporate activity in Northern Ireland.

1 *Be it enacted by the Senate and General Assembly of the State*
2 *of New Jersey:*

- 1 1. The Legislature finds and declares that:
- 2 a. The State of New Jersey is cognizant of the unacceptable
- 3 high unemployment levels in Northern Ireland and the attendant
- 4 ills which arise from such a situation; and
- 5 b. The State wishes to support investment in Northern Ireland
- 6 if certain minimal equal opportunity criteria are met.
- 1 2. Notwithstanding any law, rule or regulation to the contrary,
- 2 the Director of the Division of Investment in the Department of
- 3 the Treasury is authorized and directed to investigate "[by means
- 4 of a survey]" the extent to which United States corporations or
- 5 their subsidiaries doing business in Northern Ireland, in which
- 6 the assets of any State pension or annuity fund are invested,
- 7 adhere to principles of nondiscrimination in employment and
- 8 freedom of workplace opportunity. In making this determination,

EXPLANATION—Matter enclosed in bold-faced brackets (above) in the above bill is not enacted and is intended to be omitted in the law.
Matter printed in italics (above) is new matter.
Matter enclosed in asterisks or stars has been adopted as follows:
*—Senate committee action same adopted Nov 2, 1986.

South African note on 217 - Approved

Box 92619

Stevens, H. S. Hart, Fla.

9 the director shall consider, without limitation, the following stand-

10 ards for corporate activity:

11 a. Increasing the representation of individuals from underrep-

12 resented religious groups in the workforce, including managerial,

13 supervisory, administrative, clerical and technical jobs;

14 b. Adequate security for the protection of minority employees

15 both at the workplace and while traveling to and from work;

16 c. The banning of provocative religious or political emblems

17 from the workplace;

18 d. All job openings should be publicly advertised and special

19 recruitment efforts should be made to attract applicants from

20 underrepresented religious groups;

21 e. Layoff, recall and termination procedures should not in

22 practice favor particular religious groupings;

23 f. The abolition of job reservations, apprenticeship restrictions

24 and differential employment criteria, which discriminate on the

25 basis of religion or ethnic origin;

26 g. The development of training programs that will prepare

27 substantial numbers of current minority employees for skilled

28 jobs, including the expansion of existing programs and the crea-

29 tion of new programs to train, upgrade and improve the skills

30 of minority employees;

31 h. The establishment of procedures to assess, identify and ac-

32 tively recruit minority employees with potential for further ad-

33 vancement;

34 i. The appointment of a senior management staff member to

35 oversee the company's affirmative action efforts and the setting

36 up of timetables to carry out affirmative action principles.

37 *The director may use information disseminated by, or surveys

38 or reports of, international, national, independent, state or city

40 agencies if, in the opinion of the State Investment Council, the in-

41 formation, survey or report satisfies the requirements of this sec-

42 tion.*

1 3. The director shall report the results of the investigation to

2 *the Governor and* the Legislature not later than *the first busi-

3 ness day in* January *15* of each year. The report shall include

4 but not be limited to the names and addresses of all United States

5 corporations operating in Northern Ireland in which the assets of

6 any pension or annuity fund are invested, and the findings of the

7 director relative to those corporations' adherence to the standards

8 for corporate activity set forth in section 2 of this act. The director

9 shall also report his recommendations, if any, based upon the find-

10 ings of the investigation. The report shall be available for public

3

11 inspection in the office of the Clerk of the General Assembly and of
12 the Secretary of the Senate and in the office of the director.

1 4. The director shall, where necessary, appropriate, and con-
2 sistent with prudent standards for fiduciary practice, initiate
3 and support shareholder petitions or initiatives requiring ad-
4 herence by the corporation to the standards set forth in section 2
5 of this act.

1 5. This act shall take effect ~~immediately~~ *on the 30th day*
2 *after the date of enactment*.

FEDERAL, INTERSTATE, INTERNATIONAL AFFAIRS

Directs the Director of the Division of Investment to investigate adherence by corporations in which pension funds are invested to the MacBride principles.

Stevens, Paul/Sehott. Files

Rev 92019

Stevens, Paul/Sehott. Files

KW:MJS:MBStorn:dyw
145-0-2421
633-5534

U.S. Department of Justice

ADS
cc. mm
YAF

Washington, D.C. 20530

SEP 22 1987

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Board of Trustees of the Employees' Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore, Pet. Docket No. 387 (Md. Ct. App.).

TIME LIMITS

An amicus brief would be due on October 2, 1987.

RECOMMENDATIONS

I recommend in favor of amicus participation in support of petitioners.¹

QUESTIONS PRESENTED

Whether the Maryland circuit court erred in rejecting constitutional challenges to a Baltimore city ordinance requiring divestiture of city retirement system funds from all companies doing business with South Africa.

STATEMENT

This suit was brought by the boards of trustees of the three retirement systems of the City of Baltimore, challenging the constitutionality of a Baltimore ordinance requiring divestiture of retirement system funds from all companies doing business with South Africa.

¹ The Maryland Court of Appeals granted certiorari in this case on September 9, 1987 and set the cases on an expedited briefing schedule at that time. Because of pressing time considerations, we have not solicited recommendations at this time. We anticipate, however, that the State Department will recommend in favor of amicus participation in support of petitioners.

By copy of this memorandum (together with the attached substantive memorandum analyzing the issues presented), we are advising the Office of Legal Counsel, the Office of Legal Policy, and the Department of State of this recommendation.

The court considered and rejected several constitutional arguments. (1) The court held that the ordinance did not violate the Interstate Commerce Clause because Baltimore was a "market participant" and thus free to invest as it wished without regard to the strictures of the Interstate Commerce Clause. (2) The court held the ordinance did not impinge on the federal power to conduct foreign affairs. The court observed that the ordinance did not involve the exercise of the state's regulatory power and did not affect the rights of foreign citizens. The court further found that the ordinance had minimal if any impact on South Africa, citing expert testimony not contradicted in the record. (3) The court held that the ordinance did not violate the Foreign Commerce Clause because the ordinance affected only domestic companies and had only minimal impact on South Africa. (4) The court held that the federal government had not preempted the ordinance in enacting the Comprehensive Anti-apartheid Act of 1986, holding that the legislative history of that statute did not demonstrate that Congress intended to occupy the field and that, if Congress had intended to invalidate the numerous divestment statutes and ordinances already in existence, it would have specifically addressed the matter.

Plaintiffs sought a writ of certiorari from the Maryland Court of Appeals. The court granted the petition, simultaneously setting the case on an expedited schedule.

DISCUSSION

I believe that amicus participation is appropriate in this case. Because of the press of time, we have attached a memorandum, prepared earlier this year, in which we sought authorization to file suits challenging the constitutionality of state and local laws similar to that involved in this case. That memorandum analyzes in some detail our position on the pertinent constitutional issues. As our discussion in that memorandum makes clear, we believe that the trial court in this case committed serious errors in its analysis of important constitutional questions.

CONCLUSION

For the foregoing reasons, I recommend in favor of amicus participation.

RICHARD K. WILLARD
Assistant Attorney General
Civil Division

Box 9709

Files

E
B
B

C.



8727357
United States Department of State
Washington, D. C. 20520

4/AF

September 24, 1987

ACTION MEMORANDUM **MK**
S/S 9174

TO: The Acting Secretary
FROM: L - Abraham D. Sofaer ^{ADS}
AF - Kenneth L. Brown, Acting ^{KB}
SUBJECT: Baltimore Divestment Case

Issues For Decision

Whether to call Deputy Attorney General Burns to urge Justice to file an amicus brief in the Baltimore divestment case.

Essential Factors

In late June, the NSC staff informed us orally that the White House had decided that the Federal Government would not intervene in the Baltimore case at the trial level, but would reconsider once the case reached the appellate stage.

The Maryland Court of Appeals (the highest court in Maryland) has now agreed to hear the case, and amicus briefs are expected to be filed by October 9. Oral argument is scheduled for early December.

As you know, there are many in the business and legal community who are urging the Federal Government to file an amicus brief in this case. For example, a meeting took place at Justice on Monday with several senior Justice Department officials (including the Deputy Attorney General) to hear requests by members of the Rule of Law Committee for such action. (You met with the same group last Thursday and expressed support for an amicus brief.) The Civil Division of Justice has now recommended to the Solicitor General that an amicus brief be filed. (Tab B)

We can expect that there will be resistance in Justice to filing a brief in light of the past split within that department on whether we should be actively challenging state and local measures. It appears likely that the Secretary may have to raise the matter personally with the President if we are to be allowed to file such a brief.

However, we believe that it would be advisable for you to first call the Deputy Attorney General to urge that he authorize the filing of an amicus brief. If he decides against doing so, we will forward to the Secretary a proposed memorandum to the President and related materials on this matter.

Secretary of State (A)

Box 7007

SECRET

Source: Amicus Submitters (2)

- 2 -

We believe that the most important consideration from our perspective is for the Federal Government to take a clear stand on the constitutionality of state and local measures that conflict with U.S. foreign policy. One important consideration in the Baltimore case at the trial level was to ensure that the court understood U.S. foreign policy. This could have been accomplished through a letter to the court or other statement of interest, but this was objected to by Justice. It is unlikely that anything less than an amicus brief would be acceptable by the Court of Appeals at this stage of the proceedings.

However, we could explore the possibility of sending the Maryland Court of Appeals a letter or other document instead of a brief if necessary. We can raise this possibility with Justice if we are not able to obtain agreement on an amicus brief.

Recommendation

That you call Deputy Attorney General Burns to urge the filing of an amicus brief by October 9.

Approve _____ Disapprove _____

Attachment: TAB A- Suggested Talking Points
TAB B- Civil Division Recommendation
TAB C- Summary of Baltimore Decision

Draft: L/AF: ERCummings
23410; x4110

Clearances: AP/S - MBellamy
P - ESpino
H - LMunt (info)
KUR - HPerlow (info)

Box 92019

Stevens, Paul Schwartz Files

BALTIMORE/SOUTH AFRICA DIVESTMENT CASE

SUGGESTED TALKING POINTS

- I am calling to urge that the Justice Department file an amicus brief in the Baltimore divestment case.
- As you know, a decision was reached at the White House in late June that we should not participate in the case at the trial level. However, it was decided that we would consider intervening at the appellate level.
- The Secretary and I remain seriously concerned regarding the proliferation of unconstitutional state and local actions in the field of foreign policy. We have urged Justice to intervene in appropriate cases, including the Baltimore one.
- We were disappointed by Justice's unwillingness to participate in the case at the trial level or to agree to a State Department affidavit to the court that would have articulated the foreign policy of the U.S. and the damage caused by such measures to the execution of the President's foreign policy. Our failure to provide the affidavit may be partly responsible for the erroneous conclusions reached by the court on the effects of divestment on U.S. firms and U.S. foreign policy.
- We appreciate that the concern was due to the political aspects of intervening rather than the legal merits of the case. However, we believe that our failure to take a stand on this issue has only encouraged state and local governments and now even state courts to become even more bold in legislating or making decisions on foreign affairs. The business community and others are also disappointed by our inaction.
- I believe that this is a good time to act. The President and the Secretary will both be addressing the issue of South Africa in the next two weeks, and will try again to help build a consensus on how best to deal with South Africa. However, we also believe that we should make it clear to all concerned that the focus of our legal action is the constitutional allocation of responsibility for foreign affairs to the Federal Government, and that we will also be active with regard to state measures involving Northern Ireland, nuclear free zones, and similar matters.

- 2 -

We believe that the most important consideration from our perspective is for the Federal Government to take a clear stand on the constitutionality of state and local measures that conflict with U.S. foreign policy. One important consideration in the Baltimore case at the trial level was to ensure that the court understood U.S. foreign policy. This could have been accomplished through a letter to the court or other statement of interest, but this was objected to by Justice. It is unlikely that anything less than an amicus brief would be acceptable by the Court of Appeals at this stage of the proceedings.

However, we could explore the possibility of sending the Maryland Court of Appeals a letter or other document instead of a brief if necessary. We can raise this possibility with Justice if we are not able to obtain agreement on an amicus brief.

Recommendation

That you call Deputy Attorney General Burns to urge the filing of an amicus brief by October 9.

Approve _____ Disapprove _____

Attachment: TAB A- Suggested Talking Points
 TAB B- Civil Division Recommendation
 TAB C- Summary of Baltimore Decision

Draft: L/AF: ERCummings
 23410; x4110

Clearances: AF/S - MBellamy
 P - ESpiro
 H - LHunt (info)
 EUR - HPerlow (info)

South African
Anti-Apartheid
Director's
HM

UNCLASSIFIED
~~W/CONFIDENTIAL ATTACHMENT~~
NATIONAL SECURITY COUNCIL
WASHINGTON DC 20508

7109

September 29, 1987

ACTION

MEMORANDUM FOR FRANK C. CARLUCCI

FROM: HERMAN J. COHEN *HJC*

SUBJECT: South African Sanctions: President's First Annual Report

The Comprehensive Anti-Apartheid Act of 1986 required a number of reports from the Administration. All have been submitted to date except one--the first annual report on the results of economic sanctions due on the anniversary date, October 2, 1987.

Section 501 of the Act requires a presidential report with two sections. First, has there been significant progress toward the end of apartheid in South Africa? Second, if there has not been significant progress, what further measures does the President recommend by way of increased sanctions to step up the pressure on South Africa? Section 501(c) of the Act lists those measures which the Congress wants the President to consider in making his recommendation for more sanctions. These are mostly additional prohibitions on imports from South Africa, including steel, textiles, and strategic minerals. Another suggestion is the cutting off of military assistance to third countries which continue to violate the UN arms embargo on South Africa, a measure that would affect Israel if invoked.

YMC Box 116

A proposed report to Congress and Executive Summary are at Tabs A and B. The report begins with a factual statement that no noticeable progress has been made toward the ending of apartheid. The report then discusses the South African economy and indicates that the impact of sanctions has been marginal. Where sanctions have caused pain, especially in the sugar and coal industries, the brunt of the punishment is being borne by black workers who are suffering increased unemployment.

Human Affairs - Director's
Records

In the political arena, the report credits sanctions with sending a strong signal to the South African Government that the American people are very angry about apartheid. On the other hand, sanctions have reduced our access to the government as well as our ability to influence the whites against human rights abuses.

UNCLASSIFIED
~~W/CONFIDENTIAL ATTACHMENT~~

L

South Africa
Anti Apartheid Act

- The one positive note is the beginning of ferment within the Afrikaaner community which is beginning to talk about "power sharing" and a new constitutional system. This new ferment can be attributed in part to the strong signals coming from the United States against apartheid.
- Since sanctions have had more of a negative than a positive impact, the report concludes that it would not be appropriate to implement additional measures against South Africa. Instead, U.S. policy should be to work diligently to promote negotiations between the South African government and the black leadership in cooperation with our partners among the industrialized nations.

The report does not seek to reopen last year's debate over the value of sanctions. Instead, it demonstrates in a factual way that sanctions have not caused progress in the effort to end apartheid, and in some ways have caused some harm to blacks. There is no "I told you so" in the report, but the reader can determine for himself that sanctions have not been helpful beyond the sending of a psychological message from the people of the United States to the Government of South Africa. The message has been sent loud and clear and has been heard. Therefore there is no need for any further sanctions.

Recommendation

<p><u>OK</u></p> <p>_____</p>	<p><u>NO</u></p> <p>_____</p>	<p>That you sign the two letters to the Speaker of the House (Tab A) and the Chairman of the Senate Foreign Relations Committee (Tab B), transmitting the required report under Section 501 (a) to the Congress.</p> <p>(b)</p>
-------------------------------	-------------------------------	---

Attachments

- Tab A Letter and Report to the Speaker of the House
- Tab B Letter and Report to the Chairman, Senate Foreign Relations Committee

KPI 201 1b

Warren Affairs - Director, NSC

South Africa
Stevens (2)

WITHDRAWN -

NATIONAL SECURITY COUNCIL

For Paul Stevens.

September 30, 1987

Note to Nick Rostow

From: Alison Rosenberg ^{mc}
Subject: South Africa: Baltimore
Divestment Case

Acting on the attached memorandum, DepSec Whitehead called Deputy AG Burns to recommend that Justice file an amicus brief in the Baltimore case. As you know, the case is in the Court of Appeals. The deadline for filing amicus brief is October 9th.

Burns told Whitehead that this is a decision "above our heads--for the White House to make." In other words, they won't budge unless directed to.

State has proposed to Hank Cohen that Carlucci call Burns. However, you and Paul Stevens may feel that firns it has to be sorted out within the White House. Is this the "appropriate moment" to "revisit the issues" with Senator Baker?

Box 99019

CS-

1

7381

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20508

South Africa

October 6, 1987

ACTION

MEMORANDUM FOR FRANK C. CARLUCCI
FROM: PAUL SCHOTT STEVENS *PS*
SUBJECT: South Africa: Baltimore Divestment Case

The time has arrived for the United States to decide whether to file an amicus brief in the Baltimore divestment litigation. The filing deadline is Friday.

As you will recall, a Baltimore ordinance requires the city's pension fund to sell its interests in corporations doing business in South Africa. The fund's Board of Trustees sued to have the ordinance declared invalid, and lost at the trial level. The Board has appealed. The State Department has consistently urged that the United States file a brief to preserve the important constitutional prerogatives of the Federal Government at issue. (See Tab I) The Justice Department will file a brief only on presidential direction, and State has proposed through Hank Cohen that you call Deputy Attorney General Burns.

The issue for decision is whether it is appropriate to revisit with Senator Baker the earlier decision not to intervene because of the perceived political risks. Clearly, the issue is not going to disappear, and the longer we delay stating our constitutional views in court, the greater the Balkanization of foreign policy. I therefore recommend that you raise the question of an amicus brief with Senator Baker in time for Justice to file its brief on Friday.

Herman J. Cohen and Alison B. Fortier concur *on revisiting the issue and recommending against participating Congressional relations with this*

RECOMMENDATION

That you revisit the issue of filing a brief in the Baltimore divestment litigation with Senator Baker.

Approve _____ Disapprove _____

Attachment
Tab I - State memoranda

c

21



United States Department of State
RECEIVED
DEPT OF JUSTICE

The Legal Adviser

Washington, D.C. 20520 OCT 9 3 24 PM '87

October 8, 1987

EXECUTIVE SECRETARIAT
OFFICE OF THE
DEPUTY ATTORNEY GENERAL

UNITED STATES DEPARTMENT OF JUSTICE

Honorable Arnold I. Burns
Deputy Attorney General
Washington, D.C.

Dear Arnie,

As you know, John Whitehead has requested that the U.S. Government file an amicus brief in the Baltimore divestment case. I appreciate your concerns regarding filing a formal brief on a matter of this importance in a state appellate court. It is possible that another approach -- that of sending a letter to the court which preserves our position -- might be satisfactory to all concerned. I have included a proposed letter.

Sincerely,

Abraham D. Sofaer

BOX 72017

Enclosure

STEVENS, PAUL DEWITT

Honorable Robert C. Murphy
Chief Judge
Maryland Court of Appeals
Annapolis, Maryland

Dear Judge Murphy:

On June 17, 1987, the Circuit Court for Baltimore City rendered an opinion regarding a Baltimore divestment law and South Africa. It is our understanding that the Court of Appeals has now granted certiorari in this case (Board of Trustees of the Employees' Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore City, Petition Docket No. 387).

The Department of State and the Department of Justice have reviewed the lower court decision, and strongly disagree with many of the legal and factual conclusions reached by the circuit court.

In particular, we believe that the court improperly construed Zchernig v. Miller (389 U.S. 429 (1968)), the Commerce and Supremacy Clauses of the Constitution, and the Anti-Apartheid Act of 1986. In doing so, the circuit court improperly sanctioned an ". . . incursion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." (Zchernig, 389 U.S. at 432) It

UNITED STATES SUPREME COURT (4)

also improperly sanctioned acts by local authorities which had been pre-empted by federal statutory law, and which were contrary to the purpose of that law.

However, we are also deeply concerned regarding the trial court's factual conclusions on foreign affairs, including the erroneous finding regarding the effects of divestment laws on South Africa. Any judgment on the effects of divestment laws and policies in South Africa is inherently a matter within the expertise of the federal government, particularly the Executive Branch. It requires an appreciation and knowledge of various factors, including the foreign policy of the U.S. toward that country, the importance of U.S. investment in achieving U.S. foreign policy goals, knowledge of the public and private reactions of the South African Government to such such laws, knowledge of the direct harm done to our fair labor programs in that country and a careful analysis of the economics of divestment.

BOX 72017

Only the federal government can speak authoritatively on the effects of such laws in our international affairs. The circuit court did not request the government for its view on this foreign policy matter, as it should have. Instead, it

STEVENS, POW, SCHOTT: 111111

substituted its judgment for that of the federal government, and in the process ignored "the potential for disruption or embarrassment" posed by local laws to the successful conduct of foreign policy of this nation. As stated by Justices Stewart and Brennan in their concurring opinion in Zchernig, "... the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several states." (389 U.S. at 443) (Emphasis added) Likewise, they are not entrusted to the circuit court of Baltimore.

[The accompanying affidavit signed by the Assistant Secretary of State for African Affairs contains a more detailed statement on the foreign policy of the U.S.]

Consequently, the Department of State and Department of Justice wish to make it clear that we believe the circuit court made serious errors of law in its decision. State and local sanctions directed at foreign countries, including those which conflict with the foreign policy of the United States or which punish U.S. firms engaged in foreign commerce, are unconstitutional. In addition, the circuit court made judgments that are reserved to the United States. Because of

- 4 -

the court's error in making judgments on foreign affairs, the factual basis presented on appeal is in our view seriously flawed. We accordingly hope that the Court of Appeals will take this into account in its consideration of this case.

Sincerely,

Enclosure

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

BOARD OF TRUSTEES OF THE EMPLOYEES')
RETIREMENT SYSTEM OF THE CITY OF)
BALTIMORE, ET. AL.)
Plaintiff)
v.)
MAYOR AND CITY COUNCIL OF BALTIMORE)
Defendant)

Case No.
86J65065/CES9853

AFFIDAVIT OF CHESTER A. CROCKER

I, Chester A. Crocker, hereby declare and say as follows:

1. I am the Assistant Secretary of State for African Affairs in the United States Department of State. I have held this position since June 9, 1981. I am forty-five years of age. The facts stated in this affidavit are based on my personal knowledge and on information obtained by me in my official capacity.

2. Under the direction of the Secretary of State, I am responsible for the direction and conduct of United States foreign policy toward all countries in sub-Saharan Africa, including South Africa. I supervise the Bureau of African Affairs of the Department of State and am responsible for ensuring that guidance and instructions are provided to United States diplomatic and consular posts in Africa.

Ex 2019

Stevens, For 2019 - 11:05

3. It is the established and stated policy of the United States to promote peaceful change in South Africa and to seek the earliest possible end to the system of apartheid. The United States supports the establishment of a nonracial, democratic system of government in South Africa based on the consent of the governed.

4. In order to achieve these goals, the United States for many years has encouraged U.S. nationals in South Africa to maintain an active presence in that country and to use their influence to promote change in South Africa. In particular, the United States has encouraged U.S. firms in South Africa to implement certain fair labor standards. (Since September 9, 1985, all U.S. departments and agencies have been precluded by Executive Order from interceding with any foreign government regarding the export marketing activities of U.S. firms that do not adhere to those standards.) It is the view of the United States that, through their commitment to desegregation, equal employment opportunity, and freedom of mobility for all South African workers, firms complying with these fair labor standards have posed a direct challenge to the apartheid system.

5. It is the view of the Department of State that the implementation of these fair labor standards and other initiatives by U.S. firms have benefitted those in South Africa who are the victims of apartheid. The United States considers these firms to be in the forefront of American efforts to

- 3 -

challenge the apartheid system and to remain positively involved in the search for a better future in South Africa.

6. Insofar as U.S. firms succumb to divestment and other state and local initiatives by withdrawing from South Africa, the U.S. loses an important lever to press for change in South Africa. By punishing U.S. firms in South Africa that use their influence to promote fair labor and equal employment practices, such state and local measures conflict directly with the foreign policy of the United States.

7. Though the people of the United States are clearly united in their opposition to South Africa's racial policies, there has been a vigorous debate in which sharply different views have been aired about the most efficacious means to influence change in that country. The Congress and the president have addressed these important issues, and the debate over legislative sanctions at the federal level is now over. The adoption of comprehensive sanctions by the federal government, however, has not altered the fundamental United States policy of supporting U.S. firms that remain in South Africa and that work actively to promote change in that country. Indeed, the Act imposing these sanctions applauded U.S. firms in South Africa that adhere to the aforementioned fair labor standards for their commitment to assisting victims of apartheid in gaining their rightful place in the South African economy.

8. It is essential to the conduct of a coherent foreign policy that the United States speak with one voice with respect to South Africa. In foreign affairs, that voice is properly that of the federal government. In addition to being contrary to the foreign policy of the United States, state and local measures that punish U.S. firms that have remained in South Africa create other difficulties for the successful execution of U.S. policy. They give the impression that the foreign policy of the United States is fragmented and contradictory. They thus frustrate attempts by the United States to impress upon South Africa the need for change. Such mixed signals interfere with the ability of the United States to achieve its stated policy goals.

Under penalty of perjury, I solemnly affirm that the foregoing is true to the best of my personal knowledge and that I am competent to testify to the matters stated in this affidavit.

Executed on _____

Chester A. Crocker
Assistant Secretary of State



U.S. Department of Justice 7724
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 15, 1987

The Honorable Abraham D. Sofaer
Legal Adviser
United States Department of State
Washington, D.C. 20520

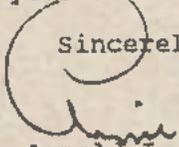
Dear Abe:

Thank you for your letter of October 8 concerning the Baltimore divestment case, The Board of Trustees of the Employees' Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore City, now before the Maryland Court of Appeals on a writ of certiorari. As you remember, when we visited this subject earlier, the Justice Department took the view that before the United States makes a filing in this case, the White House should be consulted and have the opportunity to consider the matter of our participation. Further, the Department stated that if the decision were made to participate, the United States would do so through the filing of a full brief in this litigation, as opposed to the submission of an affidavit or letter.

The Justice Department is of the same opinion concerning whether to participate in this case on appeal. In addition to our previously expressed reservations about litigating these important issues in this context, we have additional concerns about litigating these issues in this court. In the event the United States Supreme Court accepts this case or another case raising similar issues, if past is indeed prologue, there is every prospect that the United States will be asked for its views, and at that time we will enter the case.

There is never a dull moment. I want you to know how much we enjoy working with you and your excellent staff.

Sincerely,


Arnold I. Burns
Deputy Attorney General

7724

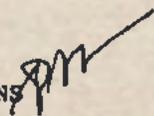
NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20508

October 26, 1987

INFORMATION

MEMORANDUM FOR FRANK C. CARLUCCI

FROM:

PAUL SCHOTT STEVENS 

SUBJECT:

Local Anti-Apartheid Statutes

Attached at Tab I, to keep you up-to-date, are copies of correspondence between Abe Sofaer and Deputy Attorney General Arnold Burns regarding the Baltimore divestment case and whether the United States should file an amicus brief or letter with the Court regarding the important Constitutional issues raised by that proceeding. As you will recall, the case concerns the Baltimore ordinance requiring that the Baltimore Employees Retirement System divest itself of its interests in U.S. companies doing business in South Africa. Mr. Burns wrote Judge Sofaer that the Department of Justice would not act without White House instruction.

In view of the State Department's continuing concern about local anti-apartheid statutes and the proliferation of such statutes, I think another PRG on the subject ought to be considered.

Herman J. Cohen concurs.


Attachment
Tab I - Sofaer/Burns Correspondence

In The
COURT OF APPEALS OF MARYLAND

September Term, 1987

No. 95

BOARD OF TRUSTEES
OF THE EMPLOYEES' RETIREMENT SYSTEM
OF THE CITY OF BALTIMORE, et al.

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

Appeal from the Circuit Court
of Baltimore City
(Martin B. Greenfeld, Judge)

On Writ of Certiorari to the Court of Special Appeals

BRIEF OF Amici Curiae: Baltimore Chapter of National Lawyers Guild, American Civil Liberties Union of Maryland, Maryland Chapter of the National Conference of Black Lawyers, Maryland Citizen Action Coalition, Pax Christi/Baltimore, the Archdiocese of Baltimore South Africa Coalition, the Baltimore Anti-Apartheid Coalition, the Johns Hopkins University Coalition for a Free South Africa, the Lutheran Community Center at Messiah, the Baltimore Emergency Response Network, the Homewood Friends Meeting, Neighborhoods Institute/Community Leadership Center, Baltimore Jobs with Peace, Nuclear Free America, Central America Solidarity Committee, the Baltimore Local of the Democratic Socialists of America, the UMBC Anti-Apartheid Coalition, and Mankekolo Mahlangu Ngcobo.

David Norken
Eleanor Montgomery
C. William Michaels
Deborah Weimer

Louise Hertz*
*student, University of
Baltimore School of Law

National Lawyers Guild
Baltimore Chapter
P.O. Box 1245
Baltimore, Maryland 21203
(301) 727-3520

TABLE OF CONTENTS

<u>LOCAL INTERESTS</u>	1
<u>STATEMENT OF THE CASE</u>	7
<u>QUESTIONS PRESENTED</u>	9
<u>PERTINENT CONSTITUTIONAL</u>	
<u>AND STATUTORY PROVISIONS</u>	9
<u>STATEMENT OF FACTS/SUMMARY OF ARGUMENT</u>	10
<u>ARGUMENT</u>	13
THE COMMERCE CLAUSE DOES NOT COMPEL THE CITY TO SUPPORT APARTHEID OR TO INVEST FUNDS IN A WAY THE CITY FINDS REPUGNANT	13
A. THE SUPREME COURT HAS RECOGNIZED THAT WHEN RACE RELATIONS ARE INVOLVED, STATES MAY TAKE ACTION THAT IMPACTS ON FOREIGN COMMERCE.	13
B. AS A MARKET PARTICIPANT, THE CITY IS FREE TO INVEST ITS FUNDS UNCONSTRAINED BY THE COMMERCE CLAUSE	15
C. CONSTITUTIONAL DELEGATION OF FOREIGN COMMERCE POWER TO THE FEDERAL GOVERNMENT DOES NOT GIVE THE FEDERAL GOVERNMENT THE POWER TO REQUIRE THAT BALTIMORE CITY INVEST IN SOUTH AFRICA.	18
D. <u>JAPAN LINE</u> DOES NOT PROHIBIT A CITY FROM TAKING THE FOREIGN SITUATION INTO ACCOUNT IN MAKING INVESTMENT DECISIONS	21
THE ORDINANCES DO NOT INTRUDE INTO THE FOREIGN AFFAIRS POWER OF THE FEDERAL GOVERNMENT AND ARE NOT PREEMPTED BY CONGRESSIONAL ACTION CONCERNING SOUTH AFRICA	23
A. IMPERMISSIBLE INTRUSION DOES NOT OCCUR BY LOCAL ACTION IN AREAS OF FOREIGN AFFAIRS WHEN IMPORTANT LOCAL INTERESTS ARE INVOLVED	24
B. PREEMPTION IS NOT PRESUMED IN FOREIGN AFFAIRS AREAS, PARTICULARLY IN VIEW OF STRONG LOCAL INTERESTS	30

C. CONGRESSIONAL INTENT IN FAVOR OF PREEMPTION
DOES NOT APPEAR IN CONGRESSIONAL ACTION
CONCERNING SOUTH AFRICA 35

JUDICIAL RESTRAINT SHOULD BE EXERCISED
WHEN REVIEWING STATE OR LOCAL ACTION
RELATING TO FOREIGN AFFAIRS 41

CONCLUSION 44

Court of Appeals
of the
State of Maryland

FILED NOV 17 1987

September Term, 1987

No. 95
 (Consolidated with No. 104)

THE BOARD OF TRUSTEES OF THE EMPLOYEES'
 RETIREMENT SYSTEM OF THE CITY OF BALTIMORE, *et al.*,

Appellants,

— against —

MAYOR AND CITY COUNCIL OF BALTIMORE CITY,

Appellees.

Appeal From The Decision Of The Circuit Court For
 Baltimore City (Martin B. Greenfeld, Judge)

On Writ Of Certiorari To The Court Of Special Appeals

**BRIEF OF AMICUS CURIAE LAWYER'S COMMITTEE
 FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES**

CONRAD HARPER
 STUART J. LAND, Co-Chairman
 NORMAN REDLICH, Trustee
 William L. Robinson
 Judith A. Winston
 Gay J. McDougall

LAWYERS' COMMITTEE FOR
 CIVIL RIGHTS UNDER LAW
 Suite 400
 1400 Eye Street, N.W.
 Washington, D.C. 20005
 (202) 371-1212

Martin R. Gold
 Robert P. Mulvey
 Vicki F. Van Fleet

Gold, Farrell & Marks
 41 Madison Avenue
 New York, New York 10010
 (212) 481-1700

*Attorneys for Lawyers'
 Committee for Civil
 Rights Under Law*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE AMICUS.....	1
STATEMENT OF THE CASE.....	3
POINT I THE DIVESTITURE ORDINANCES DO NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE FUNCTION OR POWER.....	7
POINT II THE ORDINANCES DO NOT VIOLATE THE PRUDENT MAN RULE OR THE DUTY OF LOYALTY.....	11
POINT III THE ORDINANCES DO NOT VIOLATE THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION.....	19
A. The Ordinances Do Not Impair Any Contractual Rights.....	19
B. Any Contractual Impairment Caused By The Ordinances Is Insignificant And Does Not Violate Federal Or State Constitutions.....	25
POINT IV THE ORDINANCES DO NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.....	27
A. Baltimore's Investments Of City Pension Funds Do Not Implicate The Commerce Clause.....	27
B. Even If The Ordinances Constitute Regulation, They Do Not Violate The Commerce Clause Of The United States Constitution.....	39

	<u>Page</u>
POINT V THE CIRCUIT COURT CORRECTLY HELD THAT THE ORDINANCES DO NOT VIOLATE THE SUPREMACY CLAUSE OR THE FOREIGN AFFAIRS POWER.....	43
POINT VI CONGRESS HAS NOT PREEMPTED STATE AND MUNICIPAL DIVESTMENT EFFORTS.....	50
CONCLUSION.....	59

stated that the "Federal Government, to the degree it has spoken, seems to prefer the taxing method adopted by the international community to the taxing method adopted by California." Id. 463 U.S. at 187. Nevertheless, the Court upheld the California tax as not "preemptive by federal law or fatally inconsistent with federal policy." Id. at 197. The Circuit Court applied the principles of Container Corp. to the differences in approach in the federal legislation and the Baltimore ordinances: "Similarly, Congress 'seems to prefer' retention of an American presence in South Africa, while the Ordinance proponents do not. This federal 'preference,' as in Container Corp., is not tantamount to preemption."

In determining whether local laws have been preempted by federal statute, the sole inquiry is the intent of Congress. California Federal Savings & Loan Association v. Guerra, supra; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). The legislative history of the Anti-Apartheid Act indicates that preemption was not intended. During the debate on the Anti-Apartheid Act of 1985, Senator Roth circulated an amendment that would have added specific preemptive language. The proponents of preemption determined not to submit the Roth

Amendment "in the face of certain defeat." See Remarks of Senator Kennedy, Cong. Rec. S. 12,533 (September 15, 1986).

In the 1986 debate, Senator Moynihan stressed the importance of continuing state and local efforts against apartheid, stating that "States and localities should have the right to make their own decisions regarding their own individual involvement with the South African regime." Cong. Rec. S. 9306. (July 17, 1986). The only suggestion of preemption was on the final day of the debate in the Senate, when Senator Lugar introduced the issue (Cong. Rec. S. 11,817 (Aug. 15, 1986)) during the debate on an amendment by Senator D'Amato designed to ensure that New York was able to continue to receive Federal highway assistance after the Department of Transportation had stated that a New York City anti-apartheid ordinance conflicted with Federal competitive bidding rights.

As explained by Senator Moynihan, the purpose of the D'Amato amendment was to strengthen, not preempt, local laws combating apartheid. Specifically, Senator Moynihan stated:

this amendment will allow localities to enforce anti-apartheid bidding standards that differ from those set forth in the Federal statutes and regulations, without the loss of Federal funds, if they agree

to pay for any additional costs that result. Cong. Rec. S. 11,816.*

The passage of the D'Amato Amendment supports the interpretation that local laws are not preempted. There would be no need to penalize states and municipalities by withholding federal funds for state and local contracts if the local laws permitting such contracts were preempted by the Act, and the contracts themselves thus abrogated. Cong. Rec. S. 12533, remarks of Senator Kennedy.

In response to the isolated remark of Senator Lugar, Senator Kennedy discussed and dismissed the phantom preemption issue at length, reviewing the intent of the D'Amato Amendment and the earlier legislative history of the 1985 debate. Cong. Rec. S. 12533-12534 (September 15, 1986). Moreover,

* The original D'Amato Amendment was defeated, but a revised amendment became Section 606 of the Anti-Apartheid Act. It provides as follows:

(1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and (2) no other penalty may be imposed by the Federal Government, by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of enactment of this Act.

Senator Kennedy introduced an interpretative Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 upon State and Local Measures, authored by constitutional scholar Laurence H. Tribe of the Harvard Law School. (Cong. Rec. S. 12534-12536). Professor Tribe reviewed the Act, its legislative history and the Supreme Court precedents on preemption and concluded that "nothing in the recently enacted federal legislation evinces a decision by Congress to oust states and localities altogether from this area." Cong. Rec. S. 12535.

Finally, when the House of Representatives passed the Senate Anti-Apartheid bill on September 12, 1986, it simultaneously adopted House Resolution 549 expressing the intent of the House against preemption. H. Res. 549 provides in Section 2:

Resolved: That in passing the bill, H.R. 4868, as amended by the Senate, it is not the intent of the House of Representatives that the bill, limit, preempt, or affect, in any fashion, the authority of any State or local government or the District of Columbia, or of any commonwealth, territory, or possession of the United States or political subdivisions thereof to restrict or otherwise regulate any

financial or commercial activity respecting South Africa.*

Similar statements were made by Representatives Gray, Solarz, Weiss, Dellims, Morrison, Rangel and Biaggi in support of the Resolution. Cong. Rec. H6758-6767 (September 12, 1986).

As the Circuit Court ruled, this statement of legislative intent clearly demonstrates the intent of one branch of Congress that the Comprehensive Act and Apartheid Act should in no way impede local efforts to divest or otherwise oppose apartheid. Surely, no basis exists for inferring a Congressional intent to preempt the field when one house has specifically expressed an opposite intent and the legislative history

* Rep. Wheat introduced the already-passed Senate bill together with the House Resolution. He stated the anti-preemptive purpose of the Anti-Apartheid Act:

"...[I]t is not the intent of this body to pass any legislation which grants any new constitutional authority. It is merely our intent to make it clear that this legislation does not impact upon the authority that States and local governments already have. If the State of California has the right to pass legislation affecting their own funds in regard to the situation in South Africa, then they continue to have that authority." 132 Cong. Rec. H6767 (statement of Rep. Wheat).

of both chambers of Congress demonstrate an intent not to preempt state and local divestment laws.

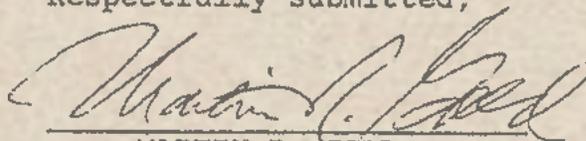
CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment of the Circuit Court.

Dated: New York, New York

November 16, 1987

Respectfully submitted,



MARTIN R. GOLD

Conrad Harper
Stuart J. Land
Co-Chairmen
Norman Redlich
Trustee
William L. Robinson
Judith A. Winston
Gay J. McDougall

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005

Robert P. Mulvey
Vicki F. Van Fleet

GOLD, FARRELL & MARKS
41 Madison Avenue
New York, New York 10010

Attorneys for Lawyers'
Committee for Civil
Rights Under Law

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1987

NO. 95

THE BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM
OF THE CITY OF BALTIMORE, et al.

Appellants

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY

Appellee

Appeal from the Circuit Court
for Baltimore City
(Martin B. Greenfeld, Judge)

Pursuant to a Writ of Certiorari
To the Court of Special Appeals

BRIEF OF APPELLANTS

George A. Nilson
Lee Baylin

Piper & Marbury
1100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201

Attorneys for The Board
of Trustees of the Employees'
Retirement System of the
City of Baltimore, et al.,
Appellants

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE.....	1
QUESTIONS PRESENTED.....	3
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	4
STATEMENT OF FACTS.....	4
1. The Fund to be Divested, and Its Historical Management.....	4
2. STIF Fund Impact.....	7
3. Transaction Costs.....	7
4. Increased Volatility - Lost Opportunity Costs.....	9
5. Impact on Active Money Managers....	9
6. Rate of Return Performance of South Africa Free Funds.....	11
7. Variable Benefits.....	12
ARGUMENT.....	13
I. The Divestiture Ordinances Impair and Conflict with the Contractual Rights of the Members and Benefi- ciaries of the Retirement Systems in Violation of Maryland Law and the Contract Clause of the United States Constitution.....	13
A. There is a Contract Between the City and the Members and Beneficiaries of the Retire- ment Systems that Provides Assur- ances for the Payment of Future Fixed and Variable Pension Benefits.....	13

	<u>Page</u>
B. The Trustees Are Subject to the Prudent Man Rule and Duty of Exclusive Loyalty to Their Beneficiaries.....	15
C. The Ordinances Have Substantially and Impermissibly Restricted the Eligible Universe of Investments and Thus Altered the Prudent Man Rule Long Applicable to the Trustees' Investment of the Funds.....	17
D. It is Not Necessary to be Able to Prove the Extent and Magnitude of the Adverse Impact in Order to Establish an Impairment of Constitutional Dimension.....	19
E. The Ordinances are not Permissible or Justifiable Impairments of Contract.....	21
F. The Ordinances Impermissibly Modify a Governmental Pension Plan in Violation of the Common Law of Maryland.....	23
II. The Divestiture Ordinances Represent an Unconstitutional Delegation of the Legislative Power of the City of Baltimore to a Private Body.....	26
III. The Divestiture Ordinances Impermissibly Intrude on the Sovereign Power of the United States Government in the Area of Foreign Affairs and Commerce.....	31
A. The Divestiture Ordinances Intrude on the Exclusive Power of the National Government to Determine and Carry Out the Foreign Policy of the United States.....	32
B. The Divestiture Ordinances Conflict Directly with and are Preempted by the Comprehensive Anti-Apartheid Act of 1986 and are Therefore Preempted.....	44

	<u>Page</u>
C. The Divestiture Ordinances Violate the Interstate and Foreign Commerce Clauses.....	47
CONCLUSION.....	60

APPENDIX

United States Constitution.....	1
Baltimore City Code, Art. 22, §§7, 17, 42....	2
Comprehensive Anti-Apartheid Act of 1986.....	18
Address, Secretary of State George P. Schultz (September 29, 1987).....	49

APPENDIX

THE DEMOCRATIC FUTURE OF SOUTH AFRICA

Speech by Secretary Shultz

September 29, 1987

Business Council for International Understanding
New York

I want to talk to you tonight about South Africa, about present realities and future possibilities. Our policy toward South Africa must be grounded in reality, but it must also contain a vision of the future. Without a sense of reality, will be ineffectual. Without vision, we will be directionless. The reality is generally grim, but it contains some hopeful elements. The vision seeks to build on those elements of hope to assist South Africans to create a nation that realizes the full potential of all its people.

The Current Realities

It is not easy to find elements of hope in present-day South Africa. It is much easier to see the evidence of the crisis South Africa is in:

- the increased repression of blacks;
- the escalation of violence from all sides;
- the economic despair of millions of blacks who cannot get a decent education and decent jobs;
- increased press censorship;
- the fear of innocent people, white and black, that they will become victims of indiscriminate terrorist attacks such as car bombings; and
- the lack of negotiations between the South African Government and its opponents.

I share the anger that all Americans feel when children are thrown into detention without charge and physically abused. And, because of my job, I particularly feel the frustration of having only limited influence, of not being able to make things right down there. That, too, is a reality.

It is not within the power of the United States or any other country to impose a solution to South Africa's problems.

The solution must come from South Africans themselves. Ultimately it will only come when they sit down together and work it out in the give and take of negotiations. We want help and, in fact, we will help. But the burden and, finally, the glory or the tragedy of the outcome are theirs.

The United States will not walk away as South Africans struggle to decide their destiny. We care deeply about what happens to them. And we are united in our opposition to apartheid. It must be eliminated, and it will be eliminated. On that, all Americans -- Republican or Democrat, liberal or conservative -- agree. Our own history of racial injustice gives us special reason to hate apartheid. We know that it produces a national tragedy and that every day it produces countless personal tragedies.

Apartheid and Regional Instability

But the issue is not only one of moral repugnance, though that would be enough to confirm our unalterable opposition to apartheid. The fact is that apartheid is a primary cause of instability throughout southern Africa. It is a bleeding wound within South Africa itself. It is a dead weight on an economic machine that might otherwise be stimulating development throughout the region. Attacks on apartheid, and defense of

it, account for almost all of the cross-border violence in the region. While apartheid exists, cross-border violence will continue, economies will be dislocated, and outside intervention will be encouraged. That is another reality.

The current climate of instability and violence does not serve our interests, and it does not benefit the countries in the region. An end to apartheid and a strengthened regional focus on economic development would bring greater opportunities for us to play a creative and constructive role. It is in our interest to be involved there. Southern Africa is rich in natural resources and strategically located. Our objectives are:

- to assist the countries in the region to improve the lives of their people;
- to end intervention by outside military forces; and
- to reduce the opportunity and temptation for such intervention to recur.

So, in opposing apartheid, there is no conflict between our ideals and our interests. They converge around the same point -- a rapid end to apartheid, achieved by negotiations among all

South Africans. We intend to play an active role in pursuit of that goal -- but active in support of those South Africans who are working to bring about through peaceful means a just and democratic society. I sense, unfortunately, that the grim realities of South Africa today have produced a debilitating pessimism, both within South Africa and in the international community, about the possibility of a peaceful and just solution to the country's problems. Some despair of avoiding armageddon; others seem almost to welcome it.

Elements of Hope

We Americans are an optimistic people, a people who believe that with hard work, dedication, and energy no problems are insurmountable. When, as an American, I look at the trauma of South Africa, I emphatically reject the fatalistic notion that the country's future has already been written, that it is too late for accommodation. I know that there is hope for the future. For the past several years, I have given South Africa the highest priority. I have talked in depth with many who have visited South Africa and have met with many South African leaders, both white and black. I have spent considerable time listening to South Africans from every part of that country's political spectrum, as have others in our government. In the past year, I met with leading South Africans such as Chief

Buthelezi, Oliver Tambo, Allan Boesak, Colin Eglin, and Enos
Mabuza. I also asked Frank Cary and Bill Coleman to chair a
Special Advisory Committee on South Africa. I studied their
report seriously and benefitted from their counsel. And we
stay in constant touch with the South African Government in a
variety of ways, including through Ambassador Perkins in
Pretoria and the South African ambassador in Washington.

Good Will, But a Lack of Communication

From everything I have learned about South Africa two
themes have come to the forefront of my attention. First,
despite everything, there is a sense of common identity and a
reservoir of good will among South Africans -- black, white,
colored, and Asian -- good will for their fellow countrymen.
Second, there is a tremendous need for communication across
racial lines in South Africa.

Apartheid has succeeded all too well in its design of
keeping the races apart. South Africans of different races may
talk about one another all the time, but they all too rarely
talk to one another. The result is exactly what one would
predict -- mutual misunderstanding and fear. Fear by whites
that their way of life will be destroyed. And fear by blacks
that their just aspirations will never be realized through
peaceful means. These fears are paralyzing. They become
self-fulfilling because all parties convince themselves that it
is impossible to engage in a true give-and-take with the others.

Yes, there is growing anger and bitterness. There is a burning desire to right past and present injustices. And there is a debilitating fear of unleashing pent-up grievances and violent retribution. But that reservoir of good will of which I spoke provides something on which to build.

Of the many tragedies that afflict South Africa today, surely one of the greatest is that the good will that exists has so little opportunity to be expressed across racial lines. For, when South Africans do sit down and talk to one another they find that the barriers that separate them are not as high as they had feared. They find that the ties that bind them are stronger than they had realized. The more they are able to reach across the racial barriers and talk, the more they see how much they have in common, how much they have to gain by working together, and how much they have to lose if they do not. There is great potential here, reason to hope that South Africa's problems are not insurmountable, that differences can be overcome. The headlines often go to the negative realities of South Africa, not to the hopeful elements. But there are efforts to expand communications between the races, and there is evidence that those efforts can bear fruit.

The Natal Indaba

In Natal, leaders from all the racial groups sat down last year and negotiated a set of new constitutional proposals for their province -- the Indaba proposals. These proposals, if implemented, would essentially end apartheid for the one-fifth of South Africans who live in that one province. Some in the South African Government and its opposition have been less than enthusiastic about the idea, which came from the people of Natal themselves, rather than from Pretoria or outside the country. But the voices for change coming from Natal are too strong for anyone to ignore. Currently the Indaba leaders are planning a referendum among all the citizens of Natal, of all races. This would be the first time blacks have ever voted on a major substantive political issue in South Africa. The jury is still out on this dramatic development, but the fact remains that there are powerful forces working to resolve South Africa's political problems through negotiations. Those forces may encounter setbacks and roadblocks but they will not simply roll over in defeat. If not successful this time, they will rise again for another struggle.

The ANC/Afrikaner Meeting in Dakar

In Dakar, Senegal, this summer, leading members of the Afrikaner community met with leaders of the African National Congress -- an encounter that would have been unthinkable a couple of years ago. For several days they discussed the fundamental issues of South Africa's future. This was not a negotiation aimed at producing agreements; I'd call it talks about the future. By all accounts, many participants found that they had clear differences. But they also found that they had more in common than they had ever dared imagine. Such communication, in multiple channels and including all relevant viewpoints, is precisely what should be encouraged and expanded upon. It breaks down stereotypes -- racial as well as ideological -- and it has the potential to identify the shape of a road forward. We applaud the vision and courage of all who participated in those talks, as well as those far-sighted Africans who helped to put it together, especially President Diouf of Senegal.

Black Empowerment

These efforts at cross-racial talks and negotiations are not the only elements of hope in South Africa. Black leadership, black economic strength, and black organizational

skill, aided by powerful political and economic forces, are growing daily. Movements such as the United Democratic Front, Inkatha, and AZAPO are evidence of these changes. Despite the repression of the state of emergency, blacks continue to express their grievances and flex their political and economic muscles. Labor unions, which were not legal for blacks until 1979, are gaining daily in strength and sophistication. The architects of apartheid had to concede long ago that they could not build a modern economic powerhouse -- or even sustain significant growth -- without the participation of ever-increasing numbers of skilled and educated blacks.

In the field of labor-management relations, blacks and whites are learning the politics of negotiation, going beyond the politics of white minority domination and black protest. Blacks are learning that they can sit down as equals with whites and negotiate a fairer share of wealth and power. Whites are learning that it is possible to sit down with blacks and hammer out an agreement that is mutually satisfactory. Each side is gaining respect for the process of negotiation. Each side is learning how much damage can happen if negotiations fail.

These are not easy lessons. I've been involved in many labor-management disputes myself. It can be a humbling

experience, until both sides learn that either they both win or they both lose. Before that lesson is learned, they often throw themselves into open confrontation, substituting threats and non-negotiable demands for real dialogue. Negotiating lessons are being learned on a daily basis in South African labor-management relations. Their effects are carrying over into South Africa's politics as well as its economics.

The Role of Business

A strong and growing South African economy is a powerful force for change. South Africa's white businessmen have been in the forefront in the white community in arguing that apartheid is an unworkable ideology incompatible with a modern economy. Blacks are moving into managerial positions in many industries. American corporations, often maligned for ever being in South Africa, can be proud of being in the forefront of the forces for change. Blacks are seeking to start their own businesses in record numbers, a sign of confidence in the country's future even as their own activities contribute to transformation. The future of South Africa's economy depends on the success of black labor and management. Without them the growth that is needed to overcome the country's social and economic injustices will not be possible. But with the full and free participation of skilled and educated black workers

and businessmen, the future of South Africa's economy can be bright indeed.

Religion and Change

Finally, let us not forget the message of hope carried by the powerful force of religion in South Africa. South Africans are devoutly religious people, whether they be whites, blacks, coloreds, or Asians -- Christians, Jews, Muslims, or Hindus. In the integrated churches, blacks are moving into ever-greater numbers of leadership positions. These churches represent institutional channels for dialogue and reconciliation across racial barriers. Religious leaders are playing important roles in resolving community disputes, and they are fostering self-help projects among those disadvantaged by apartheid.

One of the pillars of apartheid had always been the moral support of the Dutch Reformed Church, the largest church among Afrikaners. It claimed, until last year, that apartheid was not only allowed but actually required by the teachings of the Bible. After many months of internal debate, it announced last year that its previous teachings were wrong; it said that apartheid is not justified by the Bible and is not in accordance with Christian principles. This simple but powerful truth hit like a thunderbolt among the Afrikaners. Suddenly

the spurious moral basis for apartheid had been stripped, revealing it for the unjust and unsanctified system that it is.

So, there are elements of hope amid the grim realities of present-day South Africa. Some negotiations are going on; a willingness to compromise still exists. There are institutions with which to work. There are individuals with whom to work. Change in South Africa is not on some distant agenda for the future. It is taking place right now. And we intend to be involved, working with those institutions, with those individuals, with those forces for change -- part of the solution, not part of the problem.

What We Are Doing

What are we doing to help in South Africa? First, we are meeting with South Africans from across the political spectrum both in South Africa and abroad. We are talking and listening and we are forcefully stating our point of view about the steps that need to be taken to bring a peaceful end to apartheid. We are suggesting practical steps that should be taken, such as the release of all political prisoners, including Nelson Mandela, and the unbanning of all political parties. Serious negotiations can only be conducted by credible leaders. It is not up to white South Africans to decide which black South

Africans should sit at the negotiating table. That is for black South Africans to decide.

We count heavily on our mission in South Africa to keep open our lines of communication to all elements in South Africa and to encourage them to engage in dialogue. Ambassador Perkins has been in South Africa for the better part of a year now. He has made a concerted personal effort to meet with as many South Africans as possible, inside and outside the government, to listen and to convey our message. He has ensured that the entire U.S. mission in South Africa is also reaching out to as many South Africans as possible to do the same thing. We also continue to meet with exiled South Africans, such as leaders of the ANC and the PAC.

Our activities are not limited to words and meetings, however. We are promoting positive change through our program of aid to black South Africans. Our aid is not funneled through the South African Government but rather to private groups that are working to attain racial equality. Among the many programs, we are assisting a college in a black township outside Pretoria to help underqualified black teachers upgrade their skills. The lack of equal opportunities for quality education is one of the crucial tools the architects of apartheid used to keep blacks disadvantaged. Recognizing this,

we have targeted improved education opportunities for blacks one of the keystones of our aid program. We provide scholarships for hundreds of blacks to study both in the U.S. and in South Africa. And we support curriculum development programs to help black students gain entrance to universities.

Other areas of South African society are also targets of our aid. The development of democracy requires local communities to organize to help themselves. We are funding several such projects that have been developed in cooperation with local communities. We are also helping to train blacks start small businesses and strengthen skills in labor unions. And, in another crucial area, we are assisting legal resource centers that are helping blacks to fight back legally against the injustices of apartheid. All of these programs are designed to help blacks develop the leadership skills in all fields -- labor, business, education, community organization, and so on -- so that they will be able to take their rightful place as leaders in a democratic post-apartheid South Africa.

Private American individuals and organizations are also playing an important and positive role in promoting change in South Africa. Ideas and role models from the Western democracies are powerful forces for change in South Africa. South Africans are being stimulated and challenged to question

their assumptions and search for creative solutions through constant interaction with American churches, foundations, universities, and corporations. Americans want South Africans to understand that we support the aspirations of blacks for equality but also understand the fears and concerns of white South Africans. We are working to help all South Africans, black and white, secure a bright future for themselves and their children. We must as a people continue to use our most powerful leverage, our ideas, to promote peaceful change in South Africa. It would be counter to the objective of ending apartheid if we were to isolate South Africans and withdraw our influence from that society.

That is why we strongly support the continued presence of American business in South Africa. American companies have been in the forefront in the business community in promoting equal opportunity for their employees and in developing the managerial skills of blacks. Their examples have helped to stimulate South African companies to do likewise. These positive changes are helping to change attitudes as well as improve the lot of South African blacks.

So, there are several elements in our policy toward South Africa to encourage peaceful change:

-- meeting with all parties to the dispute to challenge them to break through the stereotypes and non-negotiable demands and engage in a real dialogue leading to a peaceful resolution based on the consent of the majority;

-- fostering change on the ground in South Africa by working with the victims of apartheid to help them develop leadership skills and self-empowerment, both economic and political;

-- supporting an active private American presence in Africa to promote democratic values, including encouraging American businesses to stay and to build on their already commendable efforts to promote racial equality; and

-- working with our allies to assert our vision of the future, with the intention of stimulating debate and reasoned dialogue among South Africans about the parameters of a democratic future for their country.

Our Vision of the Future

It is obviously not up to us to prescribe a detailed blueprint for political change in South Africa. That must be worked out in negotiations open to participation by all South

Africans. But we have listened carefully to what South Africans have to say about the future of their country. And we do have experience to draw on -- the Western experience of building democracies, an achievement in which we take pride and which we believe offers something of value to other countries as well.

I therefore want to close my remarks by spelling out the democratic values on which our policy is based. We want South Africans to know clearly what we are for, as well as what we are against. These are ideas that we believe would help South Africans chart their own path to a democratic and prosperous future. We Americans do not claim a monopoly on democratic concepts for another country, but we have every reason to make clear our hopes and vision. I challenge South Africans to rise to the test of building a future which takes into account these ideas.

Here, then, are the basic ideas that we believe must be addressed by all South Africans as they negotiate a replacement for the current system in South Africa:

-- A new constitutional order for a united South Africa establishing equal political, economic, and social rights for all South Africans without regard to race, language, national origin, or religion.

-- A democratic electoral system with multiparty participation and universal franchise for all adult South Africans.

-- Effective constitutional guarantees of basic human rights for all South Africans as provided for in the Universal Declaration of Human Rights and the canons of democracies everywhere, including: the right to liberty and security of persons; the right to freedom of speech and the press, peace assembly and association, and practice of religion; the right of labor to organize and pursue peacefully its economic objectives; the right not to be deprived of property except due process of law and upon payment of just compensation; the right of movement within the country, emigration, and repatriation; and the right of individuals and communities to use their own languages and develop their cultures and customs.

-- The rule of law, safeguarded by an independent judiciary with the power to enforce the rights guaranteed by the constitution to all South Africans.

-- A constitutional allocation of powers between the national government and its constituent regional and local jurisdictions in keeping with South Africa's deeply-rooted regional and cultural traditions. and,

-- An economic system that: guarantees economic freedom for every South African; allocates government social and economic services fairly; and enables all South Africans to realize the fruits of their labor, acquire and own property, and attain a decent standard of living for themselves and their families.

A Policy That Supports Our Vision

This, then, is our vision for a democratic future for South Africa. As such a South Africa struggles to be born, there is an urgent need for all concerned in southern Africa to work for an end to violence in all directions -- whether it be the violence of cross-border raids or the violence between security forces and demonstrators in the black townships. There is a need for strict respect by all the countries of southern Africa for the sovereignty and territorial integrity of their neighbors. A South Africa at peace with itself on the basis of the ideas I have just set forth would also be at peace with its neighbors and entitled to their recognition and respect. And a regional order in which all states lived in peace would encourage South Africans to get about the task of negotiations.

Apartheid has condemned the majority of South Africans to an unjust state of economic underdevelopment. Certainly we strive to do more. As South Africans move toward meaningful negotiations, the United States would be willing to encourage this process. One of the ways we could encourage it would be to expand our efforts to help the victims of apartheid lift themselves out of poverty.

If the contending parties in South Africa are ready to take risks for peace, they may be assured of the active political, diplomatic and economic support of the United States and its allies. We will support those who are working toward these democratic goals. We are ready to take whatever steps we can -- providing channels of communications or a site or lending our political support for meetings between South Africans interested in serious dialogue.

The problems in South Africa are vast. At times they appear overwhelming. A long-entrenched system of racial oppression must and will be replaced. This can be done without in the process destroying a society and economy that can offer better lives to all South Africans. This process will not be easy. All parties will have to be prepared to discard their non-negotiable demands and make difficult compromises.

The hard work is up to the South African people themselves. They are South Africa's greatest resource and its greatest hope. They have it within their power to create a bright future for their children and to unlock the tremendous potential of their land. The time has come for South Africans to act on their hopes, not on their fears. They will find a friend in the United States when they do so, a friend that is realistic in its understanding, hopeful in its expectations, and optimistic in its vision of what they can achieve.



FOREIGN AFFAIRS

South Africa: Why Constructive Engagement Failed

Author(s): Sanford J. Ungar and Peter Vale

Source: *Foreign Affairs*, Vol. 64, No. 2 (Winter, 1985), pp. 234-250

Published by: Council on Foreign Relations

Stable URL: <http://www.jstor.org/stable/20042571>

Accessed: 15-12-2016 22:04 UTC

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the [Terms & Conditions of Use](http://about.jstor.org/terms), available at <http://about.jstor.org/terms>



Council on Foreign Relations is collaborating with JSTOR to digitize, preserve and extend access to *Foreign Affairs*

Sanford J. Ungar
Peter Vale

**SOUTH AFRICA:
WHY CONSTRUCTIVE ENGAGEMENT
FAILED**

Ronald Reagan's imposition of limited economic sanctions against the South African regime in September was a tacit admission that his policy of "constructive engagement"—encouraging change in the apartheid system through a quiet dialogue with that country's white minority leaders—had failed. Having been offered many carrots by the United States over a period of four-and-a-half years as incentives to institute meaningful reforms, the South African authorities had simply made a carrot stew and eaten it. Under the combined pressures of the seemingly cataclysmic events in South Africa since September 1984 and the dramatic surge of anti-apartheid protest and political activism in the United States, the Reagan Administration was finally embarrassed into brandishing some small sticks as an element of American policy.

The Reagan sanctions, however limited, are an important symbol: a demonstration to the ruling white South African nationalists that even an American president whom they had come to regard as their virtual savior could turn against them. Only a few weeks after inexplicably hailing South Africa for an American-style solution to racial segregation,¹ Mr. Reagan, beating Congress to the punch, signed an executive order

¹ In a telephone interview from his California ranch with WSB Radio in Atlanta on August 24, 1985, the President said that South Africa had "eliminated the segregation that we once had in our own country—the type of thing where hotels and restaurants and places of entertainment and so forth were segregated—that has all been eliminated. They recognize now interracial marriages and all." *Weekly Compilation of Presidential Documents*, Vol. 21, No. 35, Sept. 2, 1985, Washington: G.P.O., p. 1004.

Sanford J. Ungar, former Managing Editor of *Foreign Policy*, was until recently a Senior Associate of the Carnegie Endowment for International Peace. He is the author of *Africa: The People and Politics of an Emerging Continent*. Peter Vale is Research Professor and Director of the Institute of Social and Economic Research at Rhodes University in Grahamstown, South Africa. Copyright © 1985 by Sanford J. Ungar and Peter Vale.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 235

banning the export of computers to all official South African agencies that enforce apartheid; prohibiting most transfers of nuclear technology; preventing loans to the South African government unless they would improve social conditions for all races; ending the importation of South African Krugerrand gold coins into the United States; and limiting export assistance to American companies operating in South Africa that do not adhere to fair employment guidelines. By any measure, this was a significant development, and Pretoria's reaction of shock, anger and defiance underlined its impact.

But the sanctions, applied at once with fanfare and apologies, do not represent a fundamental change in American policy toward South Africa. Nor do they portend or promote a meaningful evolution in the South African political and social system. On the contrary, they continue the recent American practice of attempting to reform the South African system by working entirely within it and honoring its rules. "Active constructive engagement" (the new, impromptu name the President seems to have given his policy during a press conference) is still a policy that engages the attention and the interests of only a small, privileged stratum of South Africans. It relies almost entirely on white-led change, as designed and defined by a regime that is becoming more embattled by the day. And it ignores the needs, the politics and the passions of the black majority in South Africa.² The policy will continue to fail.

II

Constructive engagement has not merely caused the United States to lose five valuable years when it might have influenced South Africa to begin negotiating a settlement of its unique and extraordinary racial problems. Many would argue that constructive engagement was a necessary step in the evolution of American attitudes toward South Africa, but the cost has been great. American policy has actually exacerbated the situation inside South Africa by encouraging and indulging the white regime's divide-and-rule tactics—leading that regime, its internal and external victims and much of the international community to believe that, whatever the rhetoric emanating from Washington, American prestige is on the side of the Pretoria government.

² The term "blacks" is used here in the South African sense, to include black Africans, so-called Coloureds of mixed race and Asians.

236 FOREIGN AFFAIRS

Indeed, from the time constructive engagement took effect, American trade with and investment in South Africa increased, and the Reagan Administration expanded the scope of U.S. cooperation with the South African government. It lifted previous restrictions on the export of military equipment and equipment with potential military uses; permitted (until President Reagan's recent change of heart) the sale of American computers to the police, military and other agencies of the South African government that administer apartheid; and approved the sale of shock batons to the police. The Administration also allowed the return of South African military attachés to the United States and otherwise expanded diplomatic, military and intelligence relationships between the two countries—including the establishment of several new South African honorary consulates around the United States, the provision of American training for the South African coast guard, and the resumption of official nuclear advisory contacts.³

In addition, the Reagan Administration frequently stood alone on South Africa's side in the U.N. Security Council—vetoing resolutions critical of South Africa on occasions when Britain and France abstained, and, in some cases, registering the only abstention when Western allies voted to condemn South African actions.

No specific conditions were imposed on South Africa in exchange for these American favors. On the contrary, they were granted at a time when many of the restrictions on black South Africans were being tightened and tensions inside South Africa were growing. One important consequence was that, while America's official gaze was averted, a whole stratum of black South African leaders who had appeared willing to negotiate over the country's future seem to have been pushed aside by groups that advocate violent solutions. The arguments in favor of American-style, if not American-sponsored, conciliation and negotiation in South Africa may now have lost their force, as the South African drama has taken new and significant turns toward a tragic resolution.

Viewed in the context of the events of the past 15 months, South Africa's problem today is a manifestly new one. Unless steps are taken to prevent further deterioration, that country is liable to drift into uncontrollable violence fueled from the

³ See Congressman John Conyers (D-Mich.), "Getting Tough with Pretoria," *The New York Times*, Jan. 23, 1985, p. A23.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 237

extreme right and extreme left. What is needed from the United States is not a withering debate over disinvestment or a domestic public relations campaign on behalf of constructive engagement, but an entirely new and more imaginative approach to South Africa. A policy must be crafted that not only recognizes and works with the current grim realities there, but also tries to ease the transition to an altogether different, albeit unknown, future in which blacks will take part in the government of their country. There is no longer any question that this change will occur in South Africa; the question is how, according to whose timetable and with what sort of outside involvement.

Only by establishing much more direct communication with the South African majority and by granting it far greater and more practical assistance can the United States hope to influence the course of events there. In effect, a new, parallel set of diplomatic relationships is necessary. And only by taking further steps that risk hurting the pride of South Africa's current rulers can American leaders hope to win enough credibility among South African blacks to be listened to in the debate over the country's future—a debate that will have profound consequences in all of Africa, the United States and much of the rest of the world.

III

From the start, constructive engagement meant quite different things to the four constituencies that would be most affected by it: the Reagan Administration itself, and by extension the American public; the South African government and the white population it represents; the South African black majority; and other countries in southern Africa.

The policy of constructive engagement was spelled out in 1980 by Chester A. Crocker, shortly before he became assistant secretary of state for African affairs. One of its first principles was that the previous U.S. policy of putting overt, public pressure for change on the South African regime had seemed to promise much more to black South Africans than it could deliver. "Americans need to do their homework," wrote Mr. Crocker in a landmark article:

A tone of empathy is required not only for the suffering and injustice caused to blacks in a racist system, but also for the awesome political dilemma in which Afrikaners and other whites find themselves. . . . Amer-

238 FOREIGN AFFAIRS

ican powder should be kept dry for genuine opportunities to exert influence. As in other foreign policy agendas for the 1980s, the motto should be: underpromise and overdeliver—for a change.⁴

Ironically, the Crocker approach made its own very ambitious promises, this time to the American public and the international community. Among other things, it offered the prospect of increased American prestige in southern Africa (with the implication that Soviet influence there would correspondingly be neutralized); a solution to the diplomatic and military conflict over Namibia (or South-West Africa), the former German colony that South Africa has continued to rule in defiance of the United Nations; and a withdrawal of Cuban troops and advisers from Angola. The latter—the prospect of an apparent setback for the Cubans—carried particular domestic political appeal in the United States, and it alone seemed to justify the sudden focus of high-level attention on Africa.

Finally, and most fundamentally, constructive engagement promised that if the United States could, as Crocker put it, “steer between the twin dangers of abetting violence in the Republic and aligning ourselves with the cause of white rule,” then it could contribute to the achievement of change in South Africa. The Reagan Administration seemed to believe that P. W. Botha, who had become prime minister in 1978 and elevated himself to state president in 1984 under a new constitutional scheme, was significantly different from other, more orthodox postwar South African leaders. Botha’s program of limited reforms, Crocker felt, should be encouraged and applauded by the United States, if only to safeguard American interests in South Africa and the region.

In the early days of constructive engagement, Botha appeared to be impervious to, or at least capable of outsmarting, the increasingly assertive South African right wing, composed mostly of disaffected members of the ruling National Party. What is more, the domestic situation in South Africa seemed to be secure. The nationwide upheavals associated with the Soweto riots of 1976 had subsided. Despite localized incidents of black unrest and sporadic attacks inside the country by members of the exiled African National Congress, there was no obvious political force that might be able to dislodge, or even unnerve, the Botha government. When ANC attacks got

⁴ Chester A. Crocker, “South Africa: Strategy for Change,” *Foreign Affairs*, Winter 1980/81, pp. 329–351.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 239

out of hand, the South African government seemed capable of neutralizing the organization with commando raids into neighboring black-ruled countries.

Reinforcing all this was the widespread impression that the South African business community—led primarily by relatively liberal English-speaking men with extensive ties to the outside world—was not only poised to play a more active role in setting the pace of reform and determining the country's future, but was also being encouraged to do so by the Afrikaner-dominated political establishment. After the uprisings of 1976, business leaders had established new foundations that would attempt to improve the lives of black people in ways that the government itself was not yet prepared to attempt. At a widely publicized meeting in Johannesburg in 1979, Botha had explicitly asked the captains of South African business and industry to help him lead the country along a new political path, and they had, for the most part, responded enthusiastically.

The Reagan Administration seemed to believe that with its domestic situation under control and improving all the time, South Africa, with American backing, could also play the role of a regional power promoting peace. Once Namibia had achieved independence under U.N. supervision (in direct exchange for the withdrawal of the Cubans from Angola, a linkage that Washington introduced into the negotiations), other regional tensions would be reduced and, the State Department hoped, recalcitrant South African whites would see the advantages of peaceful coexistence with neighboring black-ruled states.

IV

The Botha government had different expectations of constructive engagement. Indeed, for Pretoria, Ronald Reagan's victory in 1980 stirred ambitious hopes. It seemed to signal a return to the days when the South African white regime could get away with portraying itself as a protector of the Western way of life, a bastion of freedom, decency and economic development at the tip of a continent afflicted by tyranny, chaos and abject poverty—above all, a bulwark against communism.

For the four previous years, that pose had been weakened, if not entirely rejected, by Washington. Jimmy Carter, with his emphasis on human rights and his public criticisms of apartheid (made, for example, during a visit to Nigeria) had come to be regarded as public enemy number one by many South African

240 FOREIGN AFFAIRS

whites, who believed that he was trying to humiliate, or perhaps even destroy them. During a press conference at the end of a dramatic confrontation with then Prime Minister John Vorster in Vienna in 1977, Vice President Walter Mondale had appeared to advocate a one-man/one-vote system for South Africa. Two of Carter's other lieutenants who applied pressure on the country, U.N. Ambassadors Andrew Young and Donald McHenry, were black. Some white South Africans held Young and McHenry personally responsible for forcing a supposedly unwitting and, at the time, somewhat disorganized National Party government into a fateful concession—an agreement that Namibia should move toward independence under the terms of U.N. Security Council Resolution 435.

Anti-Americanism became a powerful force in South African white politics during the Carter Administration. In an election held some months after his showdown with Mondale, Vorster was able to add 15 seats to his majority in the white parliament simply by focusing the electorate's attention on alleged U.S. meddling in the country's affairs. Indeed, Carter's promotion of a climate of distrust between Washington and Pretoria, his refusal to acknowledge and endorse South Africa's dominant role in the region, may have contributed to the growing determination of the South African military to demonstrate the country's hegemony by destabilizing the governments and economies of neighboring states.

For the National Party government, Reagan's election raised hopes for more than just a return to a "normal" relationship between the United States and South Africa. There was the prospect of a valuable endorsement of the legitimacy of the white regime and the promotion of South African leadership in the region, perhaps through the "constellation of states" concept that Vorster had introduced and Botha had promoted. When President Reagan himself, in a television interview early in his term, extolled South Africa as "a country that has stood beside us in every war we've ever fought, a country that strategically is essential to the free world in its production of minerals,"⁵ some South African politicians began to fantasize that their wildest dreams might come true.

Pretoria was encouraged that the Reagan Administration

⁵ "U.S. Attitude Toward South Africa," Document 32, *The United States and South Africa: U.S. Public Statements and Related Documents, 1977-85*, Department of State, Washington: G.P.O., 1985, p. 58.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 241

viewed the problems of southern Africa in the context of East-West relations, a perspective that South Africa felt had been naively missing from Carter's policy. South Africa's suspicion of the Soviet Union bordered on paranoia, and the new American government's tough line toward Moscow was greeted in South Africa as "political realism." Indeed, white South Africans hoped they would finally be regarded as an integral part of Western defense requirements.

In a "scope paper" to brief then Secretary of State Alexander Haig for a meeting with South African Foreign Minister Roelof F. "Pik" Botha in 1981 (and later made public by TransAfrica, the black American foreign policy lobbying organization), Crocker gave every indication that the Reagan Administration might be prepared to trust South Africa with just such responsibilities. He wrote:

The political relationship between the United States and South Africa has now arrived at a crossroads of perhaps historic significance; the possibility may exist for a more positive and reciprocal relationship between the two countries based upon shared strategic concerns in southern Africa, our recognition that the government of P. W. Botha represents a unique opportunity for domestic change, and willingness of the Reagan administration to deal realistically with South Africa.⁶

If the South Africans cooperated on the Namibian issue, the Crocker memo went on to argue, the United States could "work to end South Africa's polecat status in the world and seek to restore its place as a legitimate and important regional actor with whom we can cooperate pragmatically." The United States was prepared to begin this process of new, "realistic" dealings with South Africa by taking "concrete steps such as the normalization of our military attaché relationship." In other words, the State Department leadership was so enthusiastic and hopeful about this course that it was willing to make symbolic gestures to Pretoria without any advance indication that reciprocal measures would be forthcoming.

Aware of this attitude, the Botha government expected still more concessions out of constructive engagement—perhaps even some form of American recognition of the South African-designed "independent homelands" of Transkei, Bophuthatswana, Venda and Ciskei, which had been scorned and

⁶ *TransAfrica News Report*, Washington, D.C., Vol. 1, No. 10 (Special Edition), August 1981.

242 FOREIGN AFFAIRS

shunned by the international community but remained an important part of the grand fabric of apartheid. At one meeting with Crocker in Pretoria, Foreign Minister Pik Botha attempted to promote direct communication between the United States and the homelands by passing along messages from the leaders of two of these pseudostates. The thought was that if America conferred some legitimacy on the homelands, then other Western nations might follow suit and, before long, the established, genuinely independent states of the region, such as Botswana, Lesotho and Swaziland, would be forced out of weakness to deal with the homelands directly and perhaps even to join them in Botha's "constellation."

As far as Namibia was concerned, given the rich enticements that were being offered, South Africa seemed willing to play along with Crocker's patient, if overly optimistic, efforts to secure a settlement. Pretoria was, of course, deeply suspicious of the United Nations and skeptical of any transition to independence in Namibia that would operate in favor of the South-West Africa People's Organization, which had been designated by the United Nations as the sole legitimate representative of the territory's inhabitants. SWAPO, although it included among its membership many old-line nationalists whose views were consistent with those of European social democrats, had long been aided by the Soviet Union and other communist countries and, as an organization, officially followed a Marxist political line. Once the connection of a Namibian settlement with the departure of the Cubans from Angola had been introduced by Washington, however, it was much easier for South Africa to cooperate—or at least to give the impression of cooperating—with the Reagan Administration's efforts, which most South African political analysts thought were doomed to fail anyway.

Whether the Botha government ever could have delivered on a Namibia deal without provoking a severe crisis in the ranks of white South Africans is another question; the South African Defense Force, whose influence over the country's regional policies is profound, was, and apparently remains, hostile to any negotiations to "give away" the territory.

When it came to the issue of internal reform, P. W. Botha found it relatively easy to satisfy the Reagan Administration with his own limited agenda. Botha, as a lifelong party organizer and long-standing member of the white parliament from southern Cape province, where the population is evenly divided between whites and so-called Coloureds, had very little direct

WHY CONSTRUCTIVE ENGAGEMENT FAILED 243

experience with other blacks. Thus, when he promoted a new constitutional scheme in 1983 establishing separate chambers of parliament for the so-called Coloureds and Asians, he was still groping to construct an alliance of minority groups that would exclude, and defend itself against, the black South African majority. When the United States appeared willing to accept the new constitution as a step in the right direction, Botha and his reformist allies were encouraged to think that they had American support on this important front.⁷ It was the impression that the United States was identifying itself with the South African government's latest scheme for preserving and prolonging apartheid that was critical to the view of constructive engagement held by most black South Africans.

V

A major complicating factor for any outsiders who attempt to deal with the South African issue is that black South Africans have a view of the world quite different from their white countrymen. But they have no formal diplomatic representation—the few overseas offices of the ANC and the Pan-Africanist Congress (PAC) have no meaningful status, except at the United Nations—and not even any reliable informal ways of making their views known to the international community. They are as disenfranchised in the outside world as they are at home.

For years, contacts between Americans and black South Africans had grown stronger, in part through greater journalistic attention to South Africa in the United States, and in part through the growing inclination of American civil-rights and other organizations to become concerned about the South African problem. An assumption gained currency in South Africa during the presidency of John F. Kennedy that the United States sympathized with the plight of black South Africans and tended to take their side during incidents of repression and violence. Among other gestures, Kennedy's

⁷ The State Department has repeatedly sought to deny that it gave any encouragement to P. W. Botha's "new dispensation" for Asians and "Coloureds," but statements issued by U.S. Ambassador Herman Nickel in South Africa and by official spokesmen in Washington had that effect. Some of the statements were later withdrawn or amended, but the impression had already taken hold; many of the white liberals who campaigned for a negative vote in the whites-only referendum on the new constitution complained that Nickel seemed to be taking the South African government's side. See, for example, the Johannesburg newspapers *Rand Daily Mail*, Aug. 28, 1983, p. 13; *The Star*, Oct. 3, 1983, p. 7; *The Sunday Express*, Nov. 6, 1983, p. 10; and *Die Vaderland*, Nov. 18, 1983, p. 12.

244 FOREIGN AFFAIRS

State Department for the first time required the American embassy in South Africa to invite blacks to official functions; the President's brother, Robert, was particularly involved with South Africa, and his visit there in 1964 is still remembered as an important gesture of solidarity with those who were fighting apartheid.

The Carter Administration sought to rekindle this spirit in American relations with South Africa, especially during its first two years in office. After the death of "Black Consciousness" leader Steve Biko at the hands of the South African police in 1977, the Carter Administration led the international chorus of outrage, and for a time it seemed as if American protests had helped to end deaths in detention in South Africa. Although Carter's rhetoric on the South African issue subsided as the practitioners of realpolitik gained the upper hand in his Administration, and although he repeatedly disappointed those who were waiting for the United States to vote in the United Nations for international economic sanctions against South Africa, the Carter years are nonetheless regarded by some South African blacks as a time when America was ready to help.

In the heady early days of constructive engagement, however, the Reagan Administration seemed obsessed with a need to demonstrate classic American qualities of evenhandedness. In one speech in August 1981 to the annual convention of the American Legion in Honolulu, Mr. Crocker stressed that "it is not our task to choose between black and white" in South Africa, where the United States sought "to build a more constructive relationship . . . based on shared interests, persuasion, and improved communication." While reiterating that the Reagan Administration disapproved of "apartheid policies that are abhorrent to our own multiracial democracy," Crocker said that "we must avoid action that aggravates the awesome challenges facing South Africans of all races. The Reagan Administration has no intention of destabilizing South Africa in order to curry favor elsewhere."⁸

To some black South African leaders, not to choose sides between the oppressors and the oppressed was tantamount to buttressing the oppressors. Already, in March 1981, Bishop Desmond Tutu, then secretary-general of the South African

⁸ "Regional Security for Southern Africa," Document 50, *The United States and South Africa: U.S. Public Statements and Related Documents, 1977-85*, op. cit., pp. 79-84.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 245

Council of Churches, had warned that "a United States decision to align itself with the South African government would be an unmitigated disaster for both South Africa and the United States." Tutu cautioned that the appearance of a reconciliation between Pretoria and the most influential government in the West would negate years of attempts by black South Africans "to achieve a peaceful realization of their political ambitions."⁹

Four months later, a well-known black South African academic, N. Chabani Manganyi of the University of the Witwatersrand, told a Johannesburg conference that "blacks, both in South Africa and elsewhere in Africa, interpreted the policy of constructive engagement as an act of choice—or moral choice. They see the choice as a very simple matter in that it is a choice between South Africa and its domestic policies and the rest of the world." Manganyi called upon the Reagan Administration to fulfill its moral obligation to the people of South Africa and the international community by applying pressure for change; he said that whereas the Carter Administration had given blacks hope, "it could well be that President Reagan is preparing us for despair."¹⁰

So preoccupied was the Reagan Administration with sending signals to South Africa's white minority, however, that it is not clear its representatives paid heed to such warnings. Crocker exacerbated the situation by failing to include formal, public meetings with black South Africans on the itineraries of his many trips to South Africa, which received prominent coverage in the South African press. One black South African newspaper claimed that between January 1982 and December 1984, Crocker had met formally with only 15 South African blacks, and that all of those meetings took place in the United States.¹¹ As a result, it became all the more difficult for him and other representatives of the American government to encounter blacks and solicit their views informally; increasing numbers of them (and even of white liberals) refused to attend functions given by U.S. diplomats in South Africa.

Especially offensive to some black South Africans was the fact that the United States expressed no opposition to the Pretoria government's latest divide-and-rule tactic, the new

⁹ *Sunday Times* (Johannesburg), Mar. 12, 1981, p. 2.

¹⁰ N. Chabani Manganyi, "The Washington-Pretoria Connection: Is There a Black Perspective?" in *The United States and South Africa: Continuity or Change?* Johannesburg: South African Institute of International Affairs, 1981, pp. 50, 53.

¹¹ *City Press* (Johannesburg), May 19, 1985, p. 2.

246 FOREIGN AFFAIRS

constitution creating separate chambers of parliament for so-called Coloureds and Asians—nor to the conduct of a whites-only referendum in November 1983 for approval of the constitution. In a speech to the National Conference of Editorial Writers in San Francisco in June 1983, U.S. Under Secretary of State Lawrence Eagleburger stated:

I do not see it as our business to enter into this debate or to endorse the constitutional proposals now under consideration. Nor do we offer tactical advice to any of the interested parties. Yet the indisputable fact which we must recognize is that the South African government has taken the first step toward extending political rights beyond the white minority.¹²

In the view of black South Africans, who were almost universally opposed to the new constitution (even the leaders of six of the homelands urged a negative vote in the referendum), the United States could hardly have devised a clearer endorsement of the proposals.

In August 1983 more than 570 organizations, with members from all races, joined in a movement that pledged to work actively against the new constitution. The result was the United Democratic Front (UDF), which eventually orchestrated a massive boycott of the September 1984 elections for "Coloured" and Indian members of parliament. Only 30.9 percent of "Coloureds" and 20.3 percent of Indians who had taken the step of registering actually cast their votes; some of South Africa's new nonwhite parliamentarians went to Cape Town on the basis of the votes of only a few hundred people.¹³ Most blacks saw the new institutions as a farce.

The identification of Washington with some of the most detested devices of the white regime may have helped to discredit black South African leaders who were not entirely ill-disposed to the United States, as well as American liberal politicians who were willing to support only moderate tactics in the struggle against apartheid. Thus, the radical Azanian People's Organization (AZAPO), a "Black Consciousness" group, demonstrated against Senator Edward M. Kennedy (D-Mass.) and succeeded in ruining his visit to South Africa early in 1985.

¹² "Southern Africa: America's Responsibility for Peace and Change," Document 115, *The United States and South Africa: U.S. Public Statements and Related Documents, 1977-85*, op. cit., pp. 189-196.

¹³ Another way of stating the turnout in the elections for the new chambers of parliament is that 18.2 percent of the "Coloureds" eligible to vote did so, and that among Asians the comparable figure was 16.2 percent.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 247

Meanwhile, black spokesmen such as Dr. Nthatho Motlana, who had been an early activist in the ANC and, as chairman of the "Committee of Ten," had the support of his community in confronting the authorities during the Soweto riots of 1976, now appeared increasingly irrelevant to the more militant youths in the townships who called each other "comrade."¹⁴

So far had things moved by the time P. W. Botha declared a state of emergency in certain parts of the country in July 1985 that it was not clear that the country-wide violence could be halted even if the ANC were brought into the dialogue. It seemed obvious that the ANC leaders sitting in other African capitals were as surprised as anyone else by the turn of events inside South Africa, and perhaps equally unable to control what happened. Whereas the ANC banner had often been displayed at political funerals over the years, on at least one occasion, in Cradock, eastern Cape province, it was now accompanied by the Soviet flag.

VI

American officials who spoke on behalf of constructive engagement liked to stress as often as possible that it was intended not merely as a policy toward South Africa, but as an effort to deal with the entire southern African region and its problems—thus Washington's promotion of direct talks between South Africa and Angola and its pleasure over the signing of the Nkomati accord between South Africa and Mozambique.

Most governments in the region, however, saw few benefits from constructive engagement. On the contrary, they saw evidence of a dangerous new South African military ascendancy, as the South African Defense Force seemed newly emboldened to strike across frontiers—into Mozambique, Lesotho, Botswana and, above all, Angola—in pursuit of ANC or SWAPO guerrillas and activists. The South Africans certainly supplied and trained the Mozambique National Resistance (MNR or Renamo), whose destructive war against the hard-pressed government of Samora Machel drove him to sign the Nkomati accord. (The accord called for Mozambique to expel ANC guerrillas in exchange for a suspension of South African

¹⁴ See, for example, Alan Cowell, "Generation Gap Adds Tension Among South African Blacks," *The New York Times*, Sept. 18, 1985, p. 1. "Comrade" is a term used in southern Africa over the years among those committed to the overthrow of white minority regimes. For other comments by black South Africans about American policy see Stephen Weissman, "Dateline South Africa: The Opposition Speaks," *Foreign Policy*, Spring 1985, pp. 151-170.

248 FOREIGN AFFAIRS

aid to the MNR; documents recently discovered in Pretoria revealed that while Mozambique kept its part of the bargain, South Africa did not.) South Africa also kept up the pressure on the Marxist government in Angola by continuing to supply the rebel forces of the National Union for the Total Independence of Angola (UNITA) led by Jonas Savimbi. What is more, there have been few moments during the past ten years when there were not substantial numbers of South African troops inside Angola itself; last spring, South African commandos were captured in the Cabinda enclave (a part of Angola that is separated from the rest by a thin piece of Zaïre) as they were preparing to sabotage an American-owned oil-drilling installation.

At the same time, South Africa also found economic means of destabilizing its neighbors and demonstrating its political hegemony over weaker states. The United States tried to put distance between itself and the South Africans on the issue of destabilization, frequently condemning its cross-border incursions and finally, after the raids in Cabinda and Botswana, withdrawing the American ambassador to Pretoria, Herman Nickel, for several months. Yet it seems clear that South Africa felt comfortable taking these steps against its neighbors without fear of serious recriminations from Washington.

Indeed, the U.S. Congress has been pushing the Administration to resume American aid to UNITA; while intended as a means of demonstrating toughness toward Cuba and the Soviet Union, this action would have the primary effect of advancing South Africa's interests in the region. Savimbi is clearly Pretoria's client, and is regarded as such throughout Africa; in fact, there is no way to aid him without going through South Africa.

For a time it appeared that the Reagan Administration would be willing to complement its new closeness with Pretoria with substantial aid programs for nearby black-ruled states. But those programs rarely materialized, and when they did, as in the case of Mozambique, opposition from conservatives on Capitol Hill made them almost impossible to carry out. In the case of Zimbabwe, where the United States had made an international commitment of aid at the time of independence in 1980, the Reagan Administration decided to punish Prime Minister Robert Mugabe for his foreign policy positions—including his sponsorship of a U.N. resolution condemning the

WHY CONSTRUCTIVE ENGAGEMENT FAILED 249

U.S. invasion of Grenada in 1983—by cutting back substantially.

VII

After nearly five years, then, constructive engagement has failed on every front and with all of its constituencies.

The American public has seen little to indicate new U.S. diplomatic or strategic strength in southern Africa; on the contrary, the region is in as much turmoil as ever, and the Soviets have suffered few notable setbacks. The Cubans are still in Angola, and Namibia is no closer to independence; indeed, the South Africans recently instituted a new internal regime there, in direct defiance of American wishes.

Within South Africa itself, the United States has given a great deal and seen little progress as a result. The only concrete achievements of constructive engagement, apart from the shattered Angolan-South African truce and the now-discredited Nkomati accord, were a brief period of leniency by the Pretoria government toward black trade unions and the granting of passports to black spokesmen invited to the United States, such as Tutu and Motlana.

But the Reagan Administration can hardly claim that constructive engagement has brought about genuine improvements in the lives of South Africans. On the contrary, the piecemeal reforms that have been enacted in the past five years have been the object of resentment. The introduction of the new tricameral parliamentary system has coincided with the most devastating internal violence the country has experienced since the formation of the unified South African state in 1910. Unrest has flared during the past year in every part of the country, and the imposition of the state of emergency has done little to quell it. In addition to the hundreds of known deaths and thousands of detentions that have occurred in recent months, more than one hundred South Africans have mysteriously vanished, many of them suspected victims of clandestine elements within the state security apparatus. The South African economy is in a shambles, and the country has been forced to postpone payment of many of its international debts. In some rural areas, such as the strife-torn eastern Cape, black unemployment is estimated to be as high as 60 percent.

The South African government, having expected so much, is itself disappointed with constructive engagement. It has reverted to old-style denunciations of American pressure as

250 FOREIGN AFFAIRS

counterproductive, and it is furious over even the limited sanctions—worried that other nations may do the same or more and weaken the South African economy further. Far from strengthening its network of homelands, South Africa now finds itself having to think about dismantling them altogether or using them to create a new “federation.” Its economic and military dominance of southern Africa is apparently intact, but it is not clear how long that will last if domestic turmoil continues. South Africa’s formidable military machine is now required almost full time to help suppress internal unrest, despite a recently announced increase of 25 percent in recruitments into the police force.

Black South Africans are, if anything, becoming more disillusioned with the United States. Their impression is that although some sanctions have been instituted by executive order and American officials continue to condemn apartheid and demand further reforms, Washington is still collaborating substantially with the apartheid system rather than calculating further measures against the white government. It was particularly telling that when a clinic run by Winnie Mandela, wife of Nelson Mandela, the imprisoned leader of the ANC, was firebombed during the recent violence, she refused an offer of official American assistance to rebuild it.

According to the limited opinion polls that are available, Nelson Mandela remains the most popular black leader in South Africa; having been ignored by the United States all these years, it is difficult to imagine that he would be sympathetic to American concerns in South Africa’s crisis. Some analysts believe that Mandela himself may soon be overtaken by the quickening pace of radicalization in South Africa; it may be that those who inherit his mantle will be overtly hostile to the United States. With President Reagan appearing at times to justify the excesses committed by the South African government under the terms of the state of emergency and at other times seeming to exaggerate the degree of reform that has already taken place, the United States is viewed increasingly by black South Africans as part of the problem rather than part of the solution.

Similarly, other southern African states are blaming constructive engagement for much of their own distress. In some cases, overestimating the degree of actual American influence on the South African government, they have developed unrealistic expectations of what the United States can do to

WHY CONSTRUCTIVE ENGAGEMENT FAILED 251

improve their situations, and they are bound to be disappointed.

VIII

It is time for a new American policy toward South Africa that will help restore the reputation of the United States as a defender of human rights and racial justice in that country and will serve the broader interests of all South Africans and Americans.

There are, of course, important limitations on the American ability to affect the situation in South Africa. The U.S. military is not about to intervene on any side in any current or future crisis; it is foolish for whites or blacks in South Africa to believe otherwise (as some of them do). Nor can American leaders wave political or economic wands that will transform South Africa overnight. Indeed, American sanctions or moves toward disinvestment from the South African economy are sometimes more important on both sides as symbols than as practical measures; when sanctions are invoked, they should be carefully calibrated and thoughtfully applied. Given the level of suffering that already exists in the country, it is in no one's interest to destroy the South African economy or to induce further chaos in the country. And despite the frequent declarations from many quarters about the willingness of black South Africans to endure sacrifices in exchange for eventual freedom, it is not for the United States to condemn them to more abject poverty and deprivation. Disinvestment efforts within the United States should be directed only against particular firms that are known to have conducted themselves in an antisocial, regressive manner within South Africa. As for the continued presence of American business in South Africa, individual companies, evaluating their risks on the basis of hard-nosed, pragmatic criteria, are making their own rational decisions on whether to stay or not.

But there are some official steps that the United States can take in an effort to move South Africa toward meaningful change and full participation by all of its people in the affairs of the country. If Americans still want to try to assure that the South African transition occurs relatively peacefully and with a minimum of vindictiveness on the part of blacks, then there is little time left to act.

The first step, uncomfortable as it may seem to many Americans, is to restore a forthright atmosphere of public and private

252 FOREIGN AFFAIRS

confrontation to relations between Washington and Pretoria—precisely the sort of independent attitude that Mr. Crocker has eschewed. Internal and external pressure is the only thing that has ever produced meaningful change in South Africa. American officials need to become far more direct and persistent in their condemnations of apartheid. Speeches at the National Press Club in Washington alone cannot do the job. U.S. representatives in South Africa must be willing to denounce and even defy the system whenever possible, making clear their official and personal support for organizations like the UDF and Black Sash, the women's group that represents the victims of arbitrary "pass arrests" and other government actions. Some things may have to be said or done many times before they are believed or credited by disillusioned blacks.

All of this would have the immediate effect of helping develop a healthier, more vigorous multiracial opposition within South Africa, which would be far more difficult for the regime to crush if it clearly enjoyed outside support. If an American decision to confront apartheid more boldly also stiffened the resolve of other Western nations and ultimately led to a growing international vote of no-confidence in the leadership of P. W. Botha, that too would be a desirable turn of events. It is now obvious that as long as he remains in power, the National Party will not be able to form or endorse the alliances with other political factions that are necessary to head off full-scale civil war.

The current South African government, under the short-sighted impression that it has profited from a five-year interlude of conciliation with the United States, would be bitterly resentful of such a reversion to prior strategy by Washington. It would undoubtedly attempt once again to profit politically from American hostility and would proclaim, as it must, that this is the surest way for the United States to lose, rather than gain, influence in South Africa. But the truth is that South Africa has few other places to turn. It is dependent on the United States, in spirit as well as in fact; fellow "pariah states", such as Israel and Taiwan—its other current friends—simply cannot do for South Africa what America can do. And if constructive confrontation hastened the start of negotiations over real power in South Africa, which constructive engagement has failed to do, that would be a step forward.

WHY CONSTRUCTIVE ENGAGEMENT FAILED 253

IX

Once having restored a proper sense of balance and confrontation to U.S.-South African relations, it would be important for the American government and private business interests to devise additional measures that might hurt the pride and prestige of the white South African government without inflicting undue economic damage on black South Africans. Some of the measures should be selectively instituted for predetermined periods, in response to particular events in South Africa, with the American government making it clear that they may be lifted if circumstances improve. Alternatively, if the situation continues to deteriorate, the pressures could be intensified.

The landing rights enjoyed by the state-owned South African Airways in the United States can be reduced or terminated. The availability of almost daily direct service between Johannesburg and New York, with only a stop in the Cape Verde Islands, is a great advantage to South African businessmen and officials, and since Pan American abandoned its service for economic reasons earlier this year, the South African state airline has a monopoly on the route's substantial profits. Far from considering this step, which has frequently been proposed in the past, the Reagan Administration actually expanded South African Airways' landing rights in the United States in 1982, permitting direct service between Johannesburg and Houston (later suspended). The cancellation of direct air service is a sanction the United States has frequently taken to demonstrate disapproval of actions by other governments—including the Soviet Union, Cuba, Poland and Nicaragua. Because of the importance to South Africans of their links to the outside world, this would probably be more likely to have an effect in South Africa than it did in those other countries.

The United States can take steps to reduce South Africa's privileged diplomatic status here. South African military attachés can be expelled, for example, especially in the wake of external raids and other objectionable actions by the South African Defense Force. The visa-application process for South Africans who wish to travel to the United States can be made as complicated and cumbersome as it is already for Americans who seek to visit South Africa. And if Pretoria proceeds with its policy of making it more difficult for American journalists to travel to South Africa, and to have the necessary access when they

254 FOREIGN AFFAIRS

do get there, then the number of official South African information officers permitted in the United States can be reduced.

The United States has recently sought South African permission to open a new consulate in Port Elizabeth to establish an official American presence in the troubled eastern Cape. The Reagan Administration must take care not to grant unnecessary concessions in exchange; South Africa already has four full-fledged and four honorary consulates in the United States.

The flow of new American technology to South Africa can be further restricted, especially as it relates to the repressive domestic tactics of the South African government and its raids against neighboring countries. President Reagan's restriction on the shipment of computers to South Africa had little immediate effect because most of the material to which it applied was already in South African hands or could easily be obtained from other countries. Rigorous steps can be taken, however, including the use of U.S. Customs Service agents and other law enforcement personnel, to be sure that other American technological advances do not reach the South African police or military, directly or through third countries. It would also be possible to improve American compliance with the international arms embargo against South Africa and to take further steps to prevent nuclear material from reaching the country. It is widely known that some American companies operating in South Africa are involved in strategic industries, and therefore in the regime's domestic and international war effort; this could be prevented with new federal rules governing American corporate behavior in South Africa.

The U.S. government can severely restrict, or even suspend entirely, its intelligence cooperation with the South African government. There is reason to believe that these ties have helped the South Africans far more than the United States, and they carry the implication that the United States is complicit in some of the worst abuses committed by South Africa against neighboring countries. One of the most troubling aspects of this problem is that some operatives of U.S. intelligence agencies and some State Department employees who have served in South Africa are outspokenly sympathetic to the apartheid policies of the white regime and have occasionally used their positions to thwart official American actions and directives.

The United States can seek to internationalize discussion of the South African issue by putting it on the agenda of the annual

WHY CONSTRUCTIVE ENGAGEMENT FAILED 255

Western economic summits. This would be a way of coordinating economic pressures on South Africa, and also of trying to persuade recalcitrant nations, such as Japan, which has richly profited from its pragmatic relationship with South Africa (the Japanese have status as "honorary whites"), to go along with the measures.

X

Even more important, perhaps, are positive, lasting steps that the United States can take to demonstrate its sympathy for the black majority in South Africa and to show that it does not believe all change there must be white-led.

The United States must open a dialogue with the African National Congress and other black organizations that have widespread support among black South Africans, just as Secretary of State George Shultz has suggested the white South Africans themselves should do. Not to ~~know what the ANC, the oldest black nationalist organization in South Africa, is thinking and doing is not only bad~~ diplomacy but also foolish politics. If South African businessmen and white opposition politicians have recently held such discussions, certainly American officials will be taking no great risk by doing so. As it is, there is a feeling among some black South Africans that the attitude of the ANC may now be too moderate, in view of the pace of events within South Africa, and thus the United States may have to open relations with much more radical organizations. This contact with black South African leaders should take place at the ambassadorial level, both inside and outside South Africa, as a means of stressing the American rejection of the notion that the white government is the only meaningful political institution in the country.

The United States should send a black ambassador—a man or woman of international stature—to South Africa as soon as possible, to demonstrate important points of principle to South Africans of all racial groups. Above all, this would be an opportunity to emphasize the valuable role that black people play in a multi-racial society and a system which South Africans often compare to their own. Some might complain that such an appointment smacks of tokenism, but if the ambassador behaved in an appropriate manner, his presence would be of more than symbolic value. For example, this new ambassador should attend the funerals of blacks killed by the police, political trials, and church services in black communities, as American diplo-

256 FOREIGN AFFAIRS

mats in South Africa used to do. He should provide facilities for the meetings of groups that are trying to organize peaceful protests against the apartheid system and, in other respects, make it clear that he is the ambassador of all Americans to all South Africans, not just of white America to white South Africa. He should not take it upon himself to play American politics in South Africa—as the current U.S. ambassador did when he denounced Senator Kennedy while introducing him at a meeting of the American Chamber of Commerce of Johannesburg—but rather should take it as one of his jobs to convey to South Africans the depth of American feeling against apartheid and the so far inadequate steps to dismantle it.

Massive aid programs, funded by the American government, foundations and business, should be instituted to help black South Africans attain better educations in a broad range of fields, from engineering to international relations. The money for such programs should be distributed to all South African educational institutions, regardless of their nature, but special attention should be paid to encouraging the further integration of the mostly white elite universities. The committees that decide how this money is to be spent should have a majority of black South Africans. American-sponsored educational programs already available have barely scratched the surface; what is needed now is an effort to help black South Africans learn how to help run their country, an eventuality that seems not to have occurred to the ruling whites.

The United States should offer publicly to send forensic pathologists and other experts from the Federal Bureau of Investigation into South Africa to help find South Africans who have mysteriously disappeared and to help determine the cause of death of those who have been found. This has proved to be an effective technique in Central American countries such as El Salvador, where the police do not always care to solve crimes. The South African police are accused of acting to frustrate, rather than advance, the solution of some crimes against black people, and such outside help might well be appropriate. If the South Africans at first refuse such aid, the United States should offer it again and again, until its refusal becomes an embarrassment and a liability to the white government.

The United States government, in conjunction with professional groups such as the American Bar Association, should also send legal aid to black South Africans. Although the legal systems differ in certain important respects, the American experience

WHY CONSTRUCTIVE ENGAGEMENT FAILED 257

with public defenders and government-funded legal services is an excellent example for the South Africans. American law schools and private foundations, for example, could help train black South Africans as paralegal workers, who in turn could establish elementary legal clinics in remote areas of the country, where the civil and human rights of blacks are the most egregiously and routinely violated; these paralegal workers could in turn report to lawyers, who make sure that the abuses are brought to the attention of the courts and the press. The American legal community could also assist the South Africans in the creation of a lawyers' organization in which blacks play a prominent role. (Such an association of doctors and dentists was recently established in South Africa, but unfortunately it is still not officially recognized by the American Medical Association.)

The United States should not only support the efforts of the black-led labor unions in South Africa, but where possible, should also send expert American union organizers to help them strengthen their institutions. Until and unless other structures are established, South Africa's black unions represent one of the few ways that the disenfranchised majority can become involved in political action, and American labor organizations have relevant experience to offer in this domain.

The American government should carefully monitor the performance of U.S. companies operating in South Africa, with a view toward creating and publicizing a list of those who treat their black workers badly. Indeed, American companies should be pressed by their government into playing a far more progressive role in South Africa—for example, by ignoring the Group Areas Act and establishing mixed housing areas where black and white South Africans can create de facto integrated neighborhoods. U.S. businesses operating in South Africa should also make every effort to visit any of their employees who are detained on political grounds and should establish a fund to be used for their legal defense.

The United States should help black South Africans increase and improve their means of communication with each other and the rest of the South African people. The exchange of South African and American journalists should be promoted, along with technical assistance in establishing black publications at the grass roots and black-oriented radio stations. Americans can help South Africans understand that a free press can often be one of the most important safety valves available to a society where there

258 FOREIGN AFFAIRS

is political discontent. Severe consequences should be invoked, such as restrictions on South African diplomatic personnel in the United States, if black publications are closed and banned in South Africa, as they often have been in the past.

XI

In sum, courageous efforts must be made to convince black South Africans that Americans identify with their plight and are willing to help. There have been times in U.S.-South African relations—before constructive engagement—when officials from the American embassy were the first to be called by black activists in moments of crisis, and there were even U.S. officials in South Africa who occasionally sheltered political fugitives or helped them escape from the country. This was a role more consistent with American principles than the current one of keeping a distance from anyone charged by the government.

Recent developments indicate that P. W. Botha, far from responding creatively to the American confidence in him, is resorting once again to repression rather than reform. Concerned about minor electoral losses on the right, he is ignoring the rumbling volcano of discontent on the other side, from blacks and whites alike. His recent curbs on domestic and foreign press coverage of unrest in South Africa are a sign that the last vestiges of decency—South Africa's last claims to be part of the Western democratic tradition—may soon be destroyed in the defense of apartheid.

The United States must clearly and unequivocally disassociate itself from such measures. And it must resist the ever-present temptation to use southern Africa as a place to score points in the East-West struggle. Only after America rediscovers its voice—and its principles—in South Africa can it hope to play a truly constructive role in the region once again.

APPENDIX II

SUMMARY OF FORTHCOMING LEGAL ANALYSIS OF THE DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL 1986 OPINION

The Reagan administration's efforts to support business interests and crack down on city and state sanctions laws has had a lasting impact on federal procurement and grants policy. In particular, the language of the 1986 Office of Legal Counsel (OLC) memo stating that competitive bidding policy may not constitute a burden on competition has persisted in the legal analysis of procurement policy. The legal interpretation stemming from the 1986 OLC opinion still constitutes the primary interpretation of federal contracting laws today.

The essential feature of the 1986 OLC opinion was a new interpretation of the federal rules of competition and of 23 U.S.C. § 112, the Federal Highways Statute. Under this new definition—essentially created by the 1986 opinion—protecting the bidding pool to achieve the lowest price became the most important factor in determining whether a state or local competitive bidding condition (such as New York's preference for businesses without investments in South Africa) complied with the requirements of the "full and open competition" rule. The opinion stated:

We conclude that application of Local Law 19 to federally funded highway

projects administered by New York City would violate 23 U.S.C. § 112. Section 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency. By imposing disadvantages on a class of responsible bidders, Local Law 19 distorts the process of competitive bidding in order to advance a local objective unrelated to the cost-effective use of federal funds. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to Local Law 19.²⁵²(emphasis added).

After the 1986 OLC memo, the "legal" definition of the "full and open competition" rule changed. Rather than interpreting "open competition" as a procedural mechanism by which to ensure fair competition between bidders, the rule now required that bidding operate exclusively via "free market competition," resulting in the lowest-cost bid being chosen.

The 1986 OLC Opinion Is Based on a Misreading of Legislative History

The 1986 opinion makes a straightforward argument that while the Highways Statute itself does not specify cost as the overriding, most important feature, the legislative history of the 1982 Highways statute reauthorization shows that Congress intended for this to be the case. A careful reading of the relevant documents shows that this is not the case.

Early on, the opinion asserts that:

[23 U.S.C] Section 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency.”²⁵³

The opinion later adds:

The legislative report accompanying the amendment reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway projects funded by the federal government . . . The 1982 amendments therefore make clear that the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested.²⁵⁴

Near the end, the opinion states that:

Only a process which strictly adheres to the competitive bidding requirement comports with Congress’ overriding objective of cost-effectiveness by maximizing the number of contractors who will bid for the contract and increasing the likelihood that the contract will be let for the lowest possible price.²⁵⁵

These assertions then pave the way for the opinion to conclude that “By imposing disadvantages on a certain class of contractors, New York City discourages responsible contractors from bidding and undermines the competitive bidding process... New York City has failed to justify, as required by the statute, its departure from competitive bidding procedures by considerations of cost-effectiveness.”²⁵⁶

The idea that Congress intended cost and the protection of the bidding pool to be the paramount concerns of competition processes, and the litmus test of legality for federal highway grants, is not supported by a careful review of the legislative history of the Federal Highways Act, first adopted in 1916 and subsequently expanded in scope and reauthorized under different names.²⁵⁷ While cost was always a concern for Congress, it was never the most important factor. On the contrary, the legislative history shows that throughout the 20th century, Congress was not only concerned with the price of building highways, but also considered a multitude of related social issues, such as creating jobs,

promoting small businesses, and addressing community concerns around new highway construction. The legislative record shows that Congress' approach more closely resembled stewardship ("the responsible overseeing and protection of something considered worth caring for and preserving"²⁵⁸) than a narrow concern for the lowest price and protecting the free market.

While the federal government has long encouraged competition as a means to obtain high-quality goods and services and to prevent fraud, nepotism, and collusion,²⁵⁹ there is no evidence that congressional intent, as the 1986 OLC memo concludes, was ever to privilege lowest cost above all other factors when evaluating contract bids.

The legislative history of the 1954, 1968, and 1982 Federal Aid Highway bills shows that while Congress certainly wanted good value for its investments, it never considered lowest price to be the overriding or most important factor. Instead, Congress sought to create jobs, protect small business, curb corruption, and create fair competition for contractors—as well as secure good prices on highways.

Moreover, an original version of the 1986 OLC opinion obtained by the authors contained a footnote limiting its intended applicability to New York Local Law 19 and the Federal Highways Act. The footnote stated:

You also requested that we opine on the issue of the legality of Local Law 19 as applied to federal programs

in general. Because the statutory framework under which a particular federal program is administered may be highly relevant to the legality of applying Local Law 19 to that program, we are not able to provide a more general opinion. We would be pleased, however, to respond to requests from the Department of Transportation or other agencies concerning the applicability of Local Law 19 to specific programs.²⁶⁰

This footnote was included in the original version of the opinion sent to the Department of Transportation but deleted from the version formally published by the Justice Department and still available on the website of the OLC.²⁶¹ The now missing footnote, together with other Reagan administration internal memos, creates the impression that the Reagan administration intended to expand the applicability of the DOJ's analysis of the "full and open competition" language of the Highways Statute to all federal grant programs for political reasons.²⁶²

Whatever the motive, the 1986 interpretation of the federal law has had lasting impact on policies regarding grants to state and local governments. The end result has been to severely and erroneously limit the kinds of policies states and cities can attach to bidding procedures.

ENDNOTES

- ¹ Shultz, George P. "Letter to Edwin Meese on State and Local Sanctions." *Folder South Africa Sanction* (3). 28 May 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 44 for the primary source.
- ² See Cohen, Herman J. "South African Sanctions: State and Local Government Actions Against American Firms." *Folder South Africa Sanction* (3). 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 33 for the primary source.
- ³ American Legislative Exchange Council. "The States and South Africa: A Study of the Divestment Issue." *Legislative Update*, 1983, <http://www.pfaw.org/sites/default/files/83ALECsa.pdf>. The document was cited in: Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ⁴ "Cooper, Charles J. "Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation." 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.
- ⁵ Robinson, Randall, *Defending the Spirit: A Black Life in America*, New York: Penguin Group, 1998. Kindle Ed.
- ⁶ "A history of Apartheid in South Africa." *South African History Online*, <http://www.sahistory.org.za/article/history-apartheid-south-africa>.
- ⁷ "A history of Apartheid in South Africa." *South African History Online*, <http://www.sahistory.org.za/article/history-apartheid-south-africa>.
- ⁸ "Bantu education and the racist compartmentalizing of education." *South African History Online*, <http://www.sahistory.org.za/article/bantu-education-and-racist-compartmentalizing-education>.
- ⁹ For one businessperson's perspective on these conditions, see: Hanson, William. "Letter from William P. Hanson, President, United Continental Land Corporation, to Edwin Meese, Counselor to the President." ID 021881, Code CO141. 23 Mar. 1981. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 2 for primary source.
- ¹⁰ "A history of Apartheid in South Africa." *South African History Online*, <http://www.sahistory.org.za/article/history-apartheid-south-africa>.
- ¹¹ "Pass laws in South Africa 1800-1994." *South African History Online*, <http://www.sahistory.org.za/article/history-apartheid-south-africa>.

- ¹² “The Truth and Reconciliation Commission (TRC) was a court-like body assembled in South Africa after the end of Apartheid. Anybody who felt he or she had been a victim of violence could come forward and be heard at the TRC. Perpetrators of violence could also give testimony and request amnesty from prosecution.” <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc>. See also, Truth and Reconciliation Committee of South Africa, Final Reports, available at <http://sabctrc.saha.org.za/reports.htm>.
- ¹³ “Truth and Reconciliation Commission.” *South African History Online*, <http://www.sahistory.org.za/topic/truth-and-reconciliation-commission-trc>.
- ¹⁴ Chairperson, Archbishop Desmond Tutu, et. al. “Truth and Reconciliation Committee of South Africa Final Report.” *Truth Commission Special Report*, Vol. 4, Chapter 2, Subsection 14, 29 Oct. 1998, <http://sabctrc.saha.org.za/reports/volume4/chapter2/subsection14.htm>.
- ¹⁵ Ibid.
- ¹⁶ Ibid.
- ¹⁷ Ibid.
- ¹⁸ “Free South Africa movement.” *African Activist Archive*. Michigan State University, <http://africanactivist.msu.edu/organization.php?name=Free%20South%20Africa%20Movement>.
- ¹⁹ “A history of Apartheid in South Africa.” *South African History Online*, <http://www.sahistory.org.za/article/history-apartheid-south-africa>.
- ²⁰ “International solidarity with the liberation struggle in South Africa.” *United Nations Resolution A/RES/42/23, 77th plenary meeting*, 20 Nov. 1987, <http://www.un.org/documents/ga/res/42/a42r023.htm>.
- ²¹ Bratyanski, Jennifer A. *Mainstreaming Movements: The U.S. Anti-Apartheid Movement and Civil Rights Memory. A Dissertation Submitted to the Faculty of The Graduate School at The University of North Carolina at Greensboro*. Chapter II. 2012. pp. 16 et seq, https://libres.uncg.edu/ir/uncg/f/Bratyanski_uncg_0154D_10923.pdf.
- ²² Elliott, Justin. “Reagan’s embrace of apartheid South Africa.” *Salon*, 5 Feb. 2011, http://www.salon.com/2011/02/05/ronald_reagan_apartheid_south_africa/.
- ²³ Bratyanski, Jennifer A. *Mainstreaming Movements: The U.S. Anti-Apartheid Movement and Civil Rights Memory. A Dissertation Submitted to the Faculty of The Graduate School at The University of North Carolina at Greensboro*. 2012. pp. 50 et seq, https://libres.uncg.edu/ir/uncg/f/Bratyanski_uncg_0154D_10923.pdf.

- ²⁴ Robinson, Randall. *Defending the Spirit: A Black Life in America*. New York: Penguin Group, 1998, Kindle Ed., Part Four: Moving Against Apartheid, November 21, 1984: Washington, D.C., paragraph 29.
- ²⁵ Ibid.
- ²⁶ Joseph, Peniel E. "South Africans and African Americans Bound by Struggle." *The Root*. 8 Dec. 2013, http://www.theroot.com/articles/politics/2013/12/anti-apartheid_s_and_civil_rights_special_relationship/.
- ²⁷ Bronstein, Scott. "American Cities take on Pretoria." *New York Times*, 22 Jun. 1986. See Appendix I item 22.
- ²⁸ Dimitrief, Alex. "Memorandum from Alex Dimitrief to Mitch Daniels, Deborah Steelman RE: Possible South Africa Briefing." 13 Jan. 1986. See Appendix I item 20 for the primary source.
- ²⁹ "Testimony of the American Committee on Africa Before the Austin City Council." *The American Committee on Africa*, 25 May 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-D36-84-a1.sff.document.acoa000717.pdf>.
- ³⁰ Burke, James E. "Letter from Johnson & Johnson to President Ronald Reagan." *Folder South Africa – State/Local Anti-Apartheid, Box 92019*. 24 Jun. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 45 for the primary source. For White House Chief of Staff, Howard Baker's reply see Appendix I item 48 for the primary source.
- ³¹ Some, Steven. "Letter to Herman J. Cohen, Special Assistant to the President." *Folder South Africa – State/Local Anti-Apartheid, Box 92019*. 14 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 37 for the primary source.
- ³² Scott, Bronstein. "American Cities Take on Pretoria." *New York Times*, 22 Jun. 1986. See Appendix I item 22.
- ³³ Lindsey, Robert. "California's Tough Line in Apartheid." *New York Times*, 31 Aug. 1986, <http://www.nytimes.com/1986/08/31/weekinreview/california-s-tough-line-on-apartheid.html>.
- ³⁴ Ibid.
- ³⁵ Paddock, Richard C. "Governor Signs South African Divestiture Bill." *Los Angeles Times*, 27 Sep. 1986, http://articles.latimes.com/1986-09-27/news/mn-10376_1_pension-funds.
- ³⁶ "Testimony of the American Committee on Africa Before the Austin City Council." *The American Committee on Africa*, 25 May 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-D36-84-a1.sff.document.acoa000717.pdf>.
- ³⁷ Dimitrief, Alex. "Memorandum from Alex Dimitrief to Mitch Daniels, Deborah Steelman RE: Possible South Africa Briefing." 13 Jan. 1986. See Appendix I item 18 for the primary source.

- ³⁸ “Contracts Lost Due to State & Local Anti-Apartheid Statutes.” *Folder South Africa Sanction (2)*. Box 92019. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 1 for the primary source.
- ³⁹ Ibid.
- ⁴⁰ Reagan, Ronald. “Executive Order 12532--Prohibiting trade and certain other transactions involving South Africa.” *National Archives*, 9 Sep. 1985, <https://www.archives.gov/federal-register/codification/executive-order/12532.html>.
- ⁴¹ Gwertzman, Bernard. “Reagan, In Reversal, Orders Sanctions on South Africa.” *New York Times*, 10 Sep. 1985, <http://www.nytimes.com/1985/09/10/us/reagan-reversal-orders-sanctions-south-africa-move-causes-split-senate-new.html>.
- ⁴² Kempster, Norman and Bob Sexter. “Reagan’s, Congress’ Plans Symbolic: Sanctions on South Africa: Not Much Impact Likely.” *Los Angeles Times*, 11 Sep. 1985, http://articles.latimes.com/1985-09-11/news/mn-7115_1_south-africa.
- ⁴³ Robinson, Randall. *Defending the Spirit: A Black Life in America*. New York: Penguin Group, 1998, Kindle Ed., Part Four: Moving Against Apartheid, Spring 1981: Washington, D.C., paragraph 1.
- ⁴⁴ Ungar, Sanford J. and Peter Vale. “South Africa: Why Constructive Engagement Failed.” *Foreign Affairs*, Winter 1985/86 Issue. See Appendix I item 62.
- ⁴⁵ Ibid. p. 244. See Appendix I item 62.
- ⁴⁶ Ibid. p. 236. See Appendix I item 62.
- ⁴⁷ Reagan, Ronald. “National Security Directive No. 187, United States Policy Toward South Africa.” 7 Sep. 1985. Ronald Reagan Library. See Appendix I item 15 for the primary source.
- ⁴⁸ “Disinvestment.” U.S. Department of State. *Folder South Africa Minerals 1 of 3. RAC Box 16, Director of African Affairs Records*. Dec. 1984. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 9 for the primary source.
- ⁴⁹ Reagan, Ronald. “National Security Directive No. 187, United States Policy Toward South Africa.” 7 Sep. 1985. See Appendix I item 15 for the primary source.
- ⁵⁰ Reagan, Ronald. *Letters to Prime Minister PW Botha*. 11 Jun. 1981 and 23 Nov. 1983. C0141 South Africa. Ronald Reagan Library. See Appendix I item 6 and item 8 for the primary sources.
- ⁵¹ Elliott, Justin. “Reagan’s embrace of apartheid South Africa.” *Salon*, 5 Feb. 2011, http://www.salon.com/2011/02/05/ronald_reagan_apartheid_south_africa/.
- ⁵² Gregory, Joseph. “P. W. Botha, Defender of Apartheid, Is Dead at 90.” *New York Times*, 1 Nov. 2006, <http://www.nytimes.com/2006/11/01/world/africa/01botha.html>.

- ⁵³ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016, pp. 96.
- ⁵⁴ Ungar, Sanford J. and Peter Vale. "South Africa: Why Constructive Engagement Failed." *Foreign Affairs*. Winter 1985/86 Issue. pp. 245. See Appendix I item 62.
- ⁵⁵ Hitchens, Christopher. *For the sake of Argument: Essays and Minority Reports*, 1993, pp. 99.
- ⁵⁶ Robinson, Randall. *Defending the Spirit: A Black Life in America*. New York: Penguin Group, 1998, Kindle Ed., Part Four: Moving Against Apartheid, September 1984: Washington, D.C., paragraph 2-3.
- ⁵⁷ Hanson, William. "Letter from William P. Hanson, President, United Continental Land Corporation, to Edwin Meese, Counselor to the President." ID 021881, Code CO141. 23 Mar. 1981. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 2 for the primary source.
- ⁵⁸ Burke, James E. "Letter from Johnson & Johnson to President Ronald Reagan." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 24 Jun. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 45 for the primary source. For White House Chief of Staff, Howard Baker's reply see Appendix I item 48 for the primary source.
- ⁵⁹ Some, Steven. "Letter to Herman J. Cohen, Special Assistant to the President." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 14 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 37 for the primary source.
- ⁶⁰ Carlstrom, Robert E. "South Africa—Local Anti-Apartheid Statutes." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 32 for the primary source.
- ⁶¹ The Fluor Corporation is one of the biggest construction companies in the world and had major dealings with the South African mining industry. Lelyveld, Nita. "Big Businesses Sued for Apartheid Reparations." *Los Angeles Times*, 6 Apr. 2003, <http://articles.latimes.com/2003/apr/06/world/fg-safrica6>.
- ⁶² "Workers Sued Companies Over Apartheid." *New York Times*, 6 Apr. 2003, <http://www.nytimes.com/2003/04/06/world/workers-sue-companies-over-apartheid.html>.
- ⁶³ Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ⁶⁴ Elliott, Justin. "Reagan's embrace of apartheid South Africa." *Salon*, 5 Feb. 2011, http://www.salon.com/2011/02/05/ronald_reagan_apartheid_south_africa/.

- ⁶⁵ John Woodford, "Open Letter from Former Employee of Ford Motor Company, 1983." Folder Correspondence 1983, Box 25. 11 Nov. 1983. Perry Bullard Papers, Bentley Historical Library, University of Michigan, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/175>.
- ⁶⁶ Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ⁶⁷ Cohen, Herman J. "Justice Decision on South Africa Sanctions by States and Local Governments." *Folder South Africa Sanction (3)*. 30 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 35 for the primary source.
- ⁶⁸ Hanson, William. "Letter from William P. Hanson, President, United Continental Land Corporation, to Edwin Meese, Counselor to the President." ID 021881, Code CO141. 23 Mar. 1981. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 2 for the primary source.
- ⁶⁹ Robinson, Randall. *Defending the Spirit: A Black Life in America*. New York: Penguin Group, 1998, Kindle Ed., Part Four: Moving Against Apartheid, May 1981: Silver Spring, Maryland, and Washington, D.C., paragraph 15.
- ⁷⁰ General Motors was the largest employer of black people in South Africa at the time. "The Sullivan Principle." Marshall University. <http://www.marshall.edu/revleonsullivan/principles.htm>.
- ⁷¹ "Sullivan Principles, 1978 Version." *Divestment for Humanity: The Anti-Apartheid Movement at the University of Michigan*, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/182>.
- ⁷² "Sullivan Principles, 1978 Version." *Divestment for Humanity: The Anti-Apartheid Movement at the University of Michigan*, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/182>.
- ⁷³ "Corporate Response: The Sullivan Principles." *Divestment for Humanity: The Anti-Apartheid Movement at the University of Michigan*, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/exhibits/show/exhibit/origins/sullivan-principles>.
- ⁷⁴ "Compliance letter from General Motors Corporation," *Divestment for Humanity: The Anti-Apartheid Movement at the University of Michigan*, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/53>.

- ⁷⁵ In an exposé of General Motors, it was discovered that GM had worked with the South African apartheid government to deploy white commandos who would protect GM plants in South Africa during times of civil disobedience. "General Motors in South Africa: Secret Contingency Plans 'in the event of civil unrest,'" Southern Africa Perspectives. No. 4, Folder MI-Divestment-General, Perry Bullard Papers, Bentley Historical Library, University of Michigan. 1978, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/176>.
- ⁷⁶ In a statement on the Sullivan Principles, an employee of Ford's public relations department described the Sullivan Principles as a "prop of Apartheid." John Woodford, *Open Letter from Former Employee of Ford Motor Company, 1983*, Folder Correspondence 1983, Box 25, Perry Bullard Papers, Bentley Historical Library, University of Michigan. 11 Nov. 1983, <http://michiganintheworld.history.lsa.umich.edu/antiapartheid/items/show/175>.
- ⁷⁷ By 1986, members of Congress had rallied support for sanctions legislation against South Africa, passing the Comprehensive Anti-Apartheid Act of 1986 (CAAA), and then overturning President Reagan's veto of the Act.
- ⁷⁸ Burke, James E. "Letter from Johnson & Johnson to President Ronald Reagan." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 24 Jun. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 45b for the primary source.
- ⁷⁹ Ngwane, Dusty. "Letter to Rev. Leon Sullivan." Chemical Workers Industrial Union. 15 Jul. 1987. See Appendix I item 46 for primary source.
- ⁸⁰ Battersby, John D. "Miners' Strike in South Africa Raises the Spirit of Resistance." *New York Times*, 16 Aug. 1987, <http://www.nytimes.com/1987/08/16/weekinreview/miners-strike-in-south-africa-raises-the-spirit-of-resistance.html>.
- ⁸¹ Davidson, Joe. "Few Firms Get High Marks for Meeting Sullivan Goals." *Wall Street Journal*. 10 Dec. 1986. See Appendix I item 28.
- ⁸² Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ⁸³ In a letter to the Reagan administration, the CEO of Johnson & Johnson attempted to convince the administration that even though Sullivan had revoked his principles and was advocating for companies to completely divest from South Africa, the Sullivan Principles still had legitimacy. Burke, James E. "Letter from Johnson & Johnson to President Ronald Reagan." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 24 Jun. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 45 for the primary source.

- ⁸⁴ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016, pp. 17.
- ⁸⁵ "Workers Sued Companies Over Apartheid." *New York Times*, 6 Apr. 2003, <http://www.nytimes.com/2003/04/06/world/workers-sue-companies-over-apartheid.html>.
- ⁸⁶ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016, pp. 17-18.
- ⁸⁷ Richard, Allen. "Letter from Richard V. Allen, Assistant to the President for National Security Affairs, to John Chettle, Director of North and South America for the South Africa Foundation." 20 Apr. 1981. pp 1. U.S. National Archives & Records Administration. See Appendix I item 5 for the primary source.
- ⁸⁸ "Chettle, John. "Letter from John Chettle, Director of North and South America for the South Africa Foundation, to Richard V. Allen, Assistant to the President for National Security Affairs." 10 Apr. 1981. South Africa Foundation, pp. 2. See Appendix I item 3 for the primary source.
- ⁸⁹ Wattering, Fred. "Memorandum for Richard V. Allen." See Appendix I item 4a for the primary source.
- ⁹⁰ Richard, Allen. "Letter from Richard V. Allen, Assistant to the President for National Security Affairs, to John Chettle, Director of North and South America for the South Africa Foundation." 20 Apr. 1981. pp 1. U.S. National Archives & Records Administration. See Appendix I item 5 for the primary source.
- ⁹¹ Battersby, John D. "Miners' Strike in South Africa Raises the Spirit of Resistance." *New York Times*, 16 Aug. 1987, <http://www.nytimes.com/1987/08/16/weekinreview/miners-strike-in-south-africa-raises-the-spirit-of-resistance.html>.
- ⁹² "Last week, (IBM, Mobil, and 3M) came in to say that San Francisco's action is now killing them." Cohen, Herman J. "Justice Decision on South Africa Sanctions by States and Local Governments." *Folder South Africa Sanction (3)*. 30 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 35 for the primary source.
- ⁹³ "Contracts Lost Due to State & Local Anti-Apartheid Statutes." *Folder South Africa Sanction (2)*. Box 92019. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 1 for the primary source.
- ⁹⁴ For more information on the logic behind the espousal of the Sullivan Principles, see Di Muzio, Tim. ed. *RIPE Series in Global Political Economy: The Capitalist Mode of Power: Critical Engagements with the Power Theory of Value*. Florence, GB. Routledge, 2013.

- ⁹⁵ Marzulo, Sal G. "Before the Senate Committee on Banking, Subcommittee on International Finance and Monetary Policy." *Folder South Africa Minerals 1 of 3. RAC Box 16, Director of African Affairs Records*. 24 May 1985. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 12 for the primary source.
- ⁹⁶ Ibid.
- ⁹⁷ For more in depth information on the South African Government's lobbying efforts in Washington, see: Leonard, Richard. "Who's Who among Apartheid's Friends in the U.S. and Their Campaign Against Sanctions and Disinvestment." *ICCR Brief*. Vol. 18 No.3, 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-1360-84-iccr%20No3-89%20opt.pdf>.
- ⁹⁸ "Pretoria's U.S. Lobby Tied to 'New Right'" *Africa News*, The Africa Fund, 16 Dec. 1985, <http://kora.matrix.msu.edu/files/50/304/32-130-F42-84-al.sff.document.af000216.pdf>.
- ⁹⁹ Graves, Lisa. "A CMD Special Report on ALEC's Funding and Spending." *PR Watch/Center for Media and Democracy*. 13 Jul. 2011, <http://www.prwatch.org/news/2011/07/10887/cmd-special-report-alecs-funding-and-spending>.
- ¹⁰⁰ Graves, Lisa and Fischer, Brendan. "Don't Believe the Spin from ALEC," *PR Watch/Center for Media and Democracy*. 3 Dec. 2013, <http://www.prwatch.org/news/2013/12/12327/don%E2%80%99t-believe-spin-alec>
- ¹⁰¹ Editors, "Exxon and ALEC Running Illegal Lobbying Scheme Watchdog Groups Charge in IRS Complaint," *ExposedbyCMD/Center for Media and Democracy* 6 Oct. 2016, <http://www.exposedbycmd.org/2016/10/06/exxon-alec-running-illegal-lobbying-scheme-irs-complaint/>.
- ¹⁰² NPR, "From Fracking Bans to Paid Sick Leave: How States Are Overriding Local Laws," *Fresh Air*, 6 Apr. 2016, <http://www.npr.org/2016/04/06/473244707/from-fracking-bans-to-paid-sick-leave-how-states-are-overruling-local-laws>.
- ¹⁰³ For more in depth information on the South African Government's lobbying efforts in Washington, see: Leonard, Richard. "Who's Who among Apartheid's Friends in the U.S. and Their Campaign Against Sanctions and Disinvestment." *ICCR Brief*. Vol. 18 No.3, 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-1360-84-iccr%20No3-89%20opt.pdf>.
- ¹⁰⁴ "Pretoria's U.S. Lobby Tied to 'New Right'" *Africa News*, The Africa Fund, 16 Dec. 1985, <http://kora.matrix.msu.edu/files/50/304/32-130-F42-84-al.sff.document.af000216.pdf>.

- ¹⁰⁵ Since its role in opposing divestment from South Africa, ALEC has advanced an array of controversial bills that make it harder for Americans to vote, easier to get away with killing someone, harder to hold corporations accountable for deadly products or practices, easier to privatize public assets and institutions, harder for workers to organize effectively, and harder to mitigate the harms of climate change. But, since CMD's launch of ALECexposed in 2011, more than 100 corporations have left ALEC, including Ford, Expedia, Enterprise, Google, and other recent funders of the group. Meanwhile, ALEC has never apologized for the ways its actions aided apartheid and it continues to this day to oppose socially responsible investment measures and shareholder activism. See ALEC, "Keeping the Promise: Getting Politics Out of Pensions," 2016, <https://www.alec.org/app/uploads/2016/12/Getting-Politics-Out-Of-Pensions-Final-WEB.pdf>.
- ¹⁰⁶ Farney, Dennis. "New Right Groups Promotes Reagan Ideology in State Capitols from Boise to Baton Rouge," *Wall Street Journal*, 7 Aug. 1985.
- ¹⁰⁷ Donahue, Jim. "The Foundations of Apartheid and the Nuclear Industry," *Multinational Monitor*, Dec. 1988, http://www.multinationalmonitor.org/hyper/issues/1988/12/mm1288_05.html
- ¹⁰⁸ Paddock, Richard C., "Governor Signs South African Divestiture Bill," *Los Angeles Times*, 27 Sept. 1986, http://articles.latimes.com/1986-09-27/news/mn-10376_1_pension-funds
- ¹⁰⁹ Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹¹⁰ American Legislative Exchange Council. "The States and South Africa: A Study of the Divestment Issue." *Legislative Update*, 1983, <http://www.pfaw.org/sites/default/files/83ALECsa.pdf>. pp. 11-12. This document was cited in: Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹¹¹ The report listed other claims for not passing sanctions such as: the efficacy of the Sullivan principles in creating change, the geopolitical importance of South Africa as a bulwark against Russian Influence and communism, and that black people in South Africa did not want sanctions on their country. American Legislative Exchange Council. "The States and South Africa: A Study of the Divestment Issue." *Legislative Update*, 1983, <http://www.pfaw.org/sites/default/files/83ALECsa.pdf>. pp. 11-12.

- ¹¹² There are conflicting internal White House reports on the strategic significance of minerals mined in South Africa. See Appendix for reports. "South Africa: Unlikely to Use Strategic Minerals Leverage." White House Secret Document ID IEEW 85-039. *Folder South Africa Minerals 1 of 3. RAC Box 16, Director of African Affairs Records.* 27 Sep. 1985. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 16 for the primary source. See also: "Western Vulnerability to a Cutoff of Key South African Minerals." White House Secret Document ID SNIE 73-3-87. *Folder South Africa Minerals 1 of 3. RAC Box 16, Director of African Affairs Records.* 6 Feb. 1987. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 30 for the primary source.
- ¹¹³ Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹¹⁴ Information about ALEC's relationship with another executive agency, the Department of Transportation. "Presidential Cabinet Meeting: Secretary Dole, Transportation." American Legislative Exchange Council, 17 Jan. 1985. See Appendix I item 10 for the primary source.
- ¹¹⁵ ALEC, "Prominent Leaders Against Divestment" *First Reading* Jan. 1984, available from the Tobacco Library <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=ny-cv0045>.
- ¹¹⁶ Dimitrief, Alex. "Memorandum from Alex Dimitrief to Mitch Daniels, Deborah Steelman RE: Possible South Africa Briefing." 13 Jan. 1986. Ronald Reagan Library. See Appendix I item 18 for the primary source.
- ¹¹⁷ American Legislative Exchange Council. Legislative Working Session Agenda. http://files.pfaw.org/pfaw_files/IMG_6527.JPG. This document was cited in: Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹¹⁸ The South Africa Foundation was made up of many South African mining executives. Moreover, the South Africa Foundation was named one of the most effective foreign lobbyists in Washington, DC. See Leonard, Richard. "Who's Who among Apartheid's Friends in the U.S. and Their Campaign Against Sanctions and Disinvestment." *ICCR Brief*. Vol. 18 No.3, 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-1360-84-iccr%20No3-89%20opt.pdf>.

- ¹¹⁹ Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹²⁰ Dimitrief, Alex. "Memorandum from Alex Dimitrief to Mitch Daniels, Deborah Steelman RE: Possible South Africa Briefing." 13 Jan. 1986. Ronald Reagan Library. See Appendix I item 18 for the primary source.
- ¹²¹ ALEC, "South African Divestment Update," *Legislative Update*, May 1985, available from the Tobacco Library: <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=trdj0031>.
- ¹²² ALEC, "Oregon Takes Giant Step to Assisting Democracy in South Africa," *F.Y.I.*, 2 Dec. 1991, available from the Tobacco Library: <http://industrydocuments.library.ucsf.edu/tobacco/docs/nnkf0037>.
- ¹²³ Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹²⁴ American Legislative Exchange Council. "The States and South Africa: A Study of the Divestment Issue." *Legislative Update*, 1983, <http://www.pfaw.org/sites/default/files/83ALECsa.pdf>. This document was cited in: Sloan, Calvin. "Shilling for Profit, a Case Study of ALEC's Campaign Against Disinvestment from Apartheid South Africa." *PR Watch/Center for Media and Democracy*, 9 Dec. 2013, <http://www.prwatch.org/news/2013/12/12338/shilling-profit-case-study-alecs-campaign-against-divestment-apartheid-south>.
- ¹²⁵ The United States Corporate Council, for example, was active on this front. Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016. p. 127.
- ¹²⁶ Hanson, William. "Letter from William P. Hanson, President, United Continental Land Corporation, to Edwin Meese, Counselor to the President." ID 021881, Code CO141. 23 Mar. 1981. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 2 for the primary source.
- ¹²⁷ Some, Steven. "Letter to Herman J. Cohen, Special Assistant to the President." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 14 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 37 for the primary source.
- ¹²⁸ Carlstrom, Robert E. "South Africa—Local Anti-Apartheid Statutes." *Folder South Africa - State/Local Anti-Apartheid, Box 92019*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 32 for the primary source.

- ¹²⁹ The Fluor Corporation is one of the biggest construction companies in the world and had major dealings with the South African mining industry. Lelyveld, Nita. "Big Businesses Sued for Apartheid Reparations." *Los Angeles Times*, 6 Apr. 2003, <http://articles.latimes.com/2003/apr/06/world/fg-safrica6>.
- ¹³⁰ Burke, James E. "Letter from Johnson & Johnson to President Ronald Reagan." *Folder South Africa – State/Local Anti-Apartheid, Box 92019*. 24 Jun. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 45 for the primary source.
- ¹³¹ Shultz, George P. "Letter to Edwin Meese on State and Local Sanctions." *Folder South Africa Sanction (3)*. 28 May. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 44 for the primary source.
- ¹³² Cohen, Herman J. "South African Sanctions: State and Local Government Actions Against American Firms." *Folder South Africa Sanction (3)*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 33 for the primary source.
- ¹³³ Cohen, Herman J. "Federalism Debate at Justice on Thursday, Mar. 19." *Folder South Africa Sanction (3)*. 18 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 31 for the primary source.
- ¹³⁴ For example, a member of the National Security Council, Nicholas Rostow, recommended to a White House advisor that they consider asking the Justice Department to file a case against a New Jersey state law that mandated investigation of corporate employment practices in Northern Ireland. Rostow, Nicholas. "Memorandum for Arthur B. Culvahouse, Jr., Paul Schott Stevens, and Herman J. Cohen." *Folder South Africa – State/Local Anti-Apartheid, Box 92019*. 17 Sep. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 49 for the primary source.
- ¹³⁵ Cohen, Herman J. "Federalism Debate at Justice on Thursday, Mar. 19." *Folder South Africa Sanction (3)*. 18 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 31 for the primary source.
- ¹³⁶ Activists ultimately won over 120 sanctions and/or divestment measures at the state, local, and county government level "Testimony of the American Committee on Africa Before the Austin City Council." *The American Committee on Africa*. 25 May 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-D36-84-al.sff.document.acoa000717.pdf>.
- ¹³⁷ Reagan, Ronald. "National Security Directive No. 187, United States Policy Toward South Africa." 7 Sep. 1985. See Appendix I item 15 for the primary source.
- ¹³⁸ Ibid.
- ¹³⁹ Ibid.
- ¹⁴⁰ Ibid.

- ¹⁴¹ Memorandum from Robert C McFarlane for the Vice President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Director of Central Intelligence, the Chairman, Joint Chiefs of Staff, and the Director, United States Information Agency. Subject: United States Policy Toward South Africa, NASDD-187. 7 Sep. 1985. See Appendix I item 15a for the primary source.
- ¹⁴² Robert McFarlane served as President Reagan's national security adviser from October 1983 until December 1985. "Understanding the Iran Contra Affairs," a project of Brown University. https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/profile-mcfarlane.php
- ¹⁴³ "Those portions of the previous August 5, 1985 draft NSDD dealing with southern Africa and requiring additional inter-agency discussions and consultations have been eliminated from the NSDD. This was done to fill the immediate and urgent need of an approved Decision Directive dealing with our policy toward South Africa." See Appendix I item 15a for the primary source.
- ¹⁴⁴ "Draft, United States Policy Toward Southern Africa," *Folder NSDD 187 – South Africa. RAC Box 15, Director of African Affairs Records*. 7 Aug. 1985. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 13 for the primary source.
- ¹⁴⁵ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016. pp. 122.
- ¹⁴⁶ "The proposal was that [Reagan] accept most but not all of the pending legislation and accompany the action with a firm statement pressing South Africa to end apartheid. If he did that, the advisers told him, there was a good chance that the Republican leadership in the Senate would not push the sanctions bill to a vote, allowing Mr. Reagan to emerge stronger politically and to be seen abroad as being in charge of American foreign policy." Gwertzman, Bernard. "Reagan, In Reversal, Orders Sanctions on South Africa; Move Causes Split in Senate; New Policy on Pretoria." *New York Times*, 10 Sep. 1985.
- ¹⁴⁷ Elliott, Justin. "Reagan's embrace of apartheid South Africa." *Salon*, 5 Feb. 2011, http://www.salon.com/2011/02/05/ronald_reagan_apartheid_south_africa/.
- ¹⁴⁸ Gwertzman, Bernard. "Reagan, In Reversal, Orders Sanctions on South Africa; Move Causes Split in Senate; New Policy on Pretoria." *New York Times*, 10 Sep. 1985.
- ¹⁴⁹ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016. pp. 122.
- ¹⁵⁰ White House Office of the Press Secretary Press Release. "Text of a Letter from the President to the Majority Leader of the Senate and to the Speaker of the House of Representatives." 29 Sep. 1986. See Appendix I item 27b for the primary source.

- ¹⁵¹ Cohen, Herman J. "Federalism Debate at Justice on Thursday, Mar. 19." *Folder South Africa Sanction (3)*. 18 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 31 for the primary source.
- ¹⁵² Dimitrief was presumably referring to Executive Order 12532. Reagan, Ronald. "Executive Order 12532--Prohibiting trade and certain other transactions involving South Africa." *National Archives*, 9 Sep. 1985, <https://www.archives.gov/federal-register/codification/executive-order/12532.html>.
- ¹⁵³ Dimitrief, Alex. "Memorandum from Alex Dimitrief to Mitch Daniels, Deborah Steelman RE: Possible South Africa Briefing." 13 Jan. 1986. See Appendix I item 18 for the primary source.
- ¹⁵⁴ South Africa Briefing for Business Persons Invitees and Agenda, 5 Feb. 1986, folder "Director of African Affairs Records," WHORM: South Africa, Ronald Reagan Library. See Appendix I item 20 for the primary source.
- ¹⁵⁵ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016. pp. 126-128.
- ¹⁵⁶ *Ibid.* pp. 127.
- ¹⁵⁷ *Ibid.* pp. 128-129.
- ¹⁵⁸ Nixon, Ron. *Selling Apartheid: South Africa's Global Propaganda War*. Pluto Press, 2016. pp. 128.
- ¹⁵⁹ "Southern Africa: Constructive Engagement." *gist: A Quick Reference Aid on US foreign relations, Bureau of Public Affairs, Department of State*. Feb. 1985. See Appendix I item 11a for the primary source.
- ¹⁶⁰ "Statement by Hon. Frank G. Wisner Before the House Banking Subcommittee on Financial Institutions." 7 Jun. 1983. See Appendix I item 7e-7q for the primary source.
- ¹⁶¹ *Ibid.*
- ¹⁶² *Ibid.*
- ¹⁶³ *Ibid.*
- ¹⁶⁴ *Ibid.*
- ¹⁶⁵ Cooper, Charles J. "Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation." 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.
- ¹⁶⁶ Scott, Bronstein. "American Cities Take on Pretoria." *New York Times*, 22 Jun. 1986. See Appendix I item 22 for the primary source.
- ¹⁶⁷ Liebschutz, Sarah F. *Bargaining Under Federalism: Contemporary New York*. SUNY Press, 1991, pp. 128-129.

- ¹⁶⁸ For other DOT arguments regarding the unlawfulness of Anti-Apartheid provisions, see Letter from David S. Gendell, Director, Office of Highway Operations to Regional Federal Highway Administrators. 15 Nov. 1985. Subject: Anti-Apartheid Provisions. See Appendix I item 17 for the primary source.
- ¹⁶⁹ Cohen, Herman J. "South African Sanctions: State and Local Government Actions Against American Firms." *Folder South Africa Sanction (3)*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 33 for the primary source.
- ¹⁷⁰ Nix, Crystal. "City in Conflict with U.S. Unit Over Apartheid." *New York Times*, 1 May 1986, <http://www.nytimes.com/1986/05/01/nyregion/city-in-conflict-with-us-unit-over-apartheid.html>.
- ¹⁷¹ Liebschutz, Sarah F. *Bargaining Under Federalism: Contemporary New York*. SUNY Press, 1991, pp. 128-129.
- ¹⁷² Mooney, Mark. "Apartheid rule holds up highway funds." *UPI*, 10 Jun. 1986, <http://www.upi.com/Archives/1986/06/10/Apartheid-rule-holds-up-highway-funds/9376518760000/>.
- ¹⁷³ Ibid.
- ¹⁷⁴ Nix, Crystal. "City in Conflict with U.S. Unit Over Apartheid." *New York Times*, 1 May 1986, <http://www.nytimes.com/1986/05/01/nyregion/city-in-conflict-with-us-unit-over-apartheid.html>.
- ¹⁷⁵ Nix, Crystal. "City in Conflict with U.S. Unit Over Apartheid." *New York Times*, 1 May 1986, <http://www.nytimes.com/1986/05/01/nyregion/city-in-conflict-with-us-unit-over-apartheid.html>.
- ¹⁷⁶ Liebschutz, Sarah F. *Bargaining Under Federalism: Contemporary New York*. SUNY Press, 1991, p. 129.
- ¹⁷⁷ Cooper, Charles J. "Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation." 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.
- ¹⁷⁸ The Federal Aid Road Act of 1916 was the first highway legislation in the U.S. The legislation has changed in content and in name through numerous reauthorizations (for example, The Federal Aid Highway Act of 1956, the Federal Aid Highway Act of 1968, and the 1982 Surface Transportation Act). Lewis, Tom. *Divided Highways: Building the Interstate Highways, Transforming American Life*. Cornell University Press. 2013.
- ¹⁷⁹ A forthcoming piece by the authors documents this new interpretation, its lack of support in law, and the ways in which this interpretation has influenced all federal grant programs through the present time. See summary of forthcoming legal analysis of the 1986 OLC memo in Appendix II.

¹⁸⁰ The 1986 OLC memo stated: “We conclude that application of Local Law 19 to federally funded highway projects administered by New York City would violate 23 U.S.C. § 112. Section 112 clearly reflects a congressional judgment that the efficient use of federal funds afforded by competitive bidding is to be the overriding objective of all procurement rules for federally funded highway projects, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency. By imposing disadvantages on a class of responsible bidders, Local Law 19 distorts the process of competitive bidding in order to advance a local objective unrelated to the cost-effective use of federal funds. Accordingly, the Department of Transportation is obligated to withhold funding for highway construction contracts subject to Local Law 19.5.” (Emphasis added) Cooper, Charles J. “Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation.” 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.

¹⁸¹ A forthcoming piece by the authors documents this new interpretation, its lack of support in law, and the ways in which this interpretation has influenced all federal grant programs through the present time. See summary of forthcoming legal analysis of the 1986 OLC memo in Appendix II.

¹⁸² Liebschutz, Sarah F. *Bargaining Under Federalism: Contemporary New York*. SUNY Press, 1991, p. 129.

¹⁸³ Ibid.

¹⁸⁴ The American Committee on Africa. “Testimony of the American Committee on Africa Before the Austin City Council.” 25 May 1989, <http://kora.matrix.msu.edu/files/50/304/32-130-D36-84-a1.sff.document.acoa000717.pdf>.

¹⁸⁵ A forthcoming memorandum by the authors documents the application of the 1986 OLC opinion to all federal grant programs through the present time through regulations known as the Common Grant Rule. See summary of forthcoming legal analysis of the 1986 OLC memo in Appendix II.

¹⁸⁶ “When state law and federal law conflict, federal law displaces, or preempts, state law, due to the Supremacy Clause of the Constitution. U.S. Const. art. VI., § 2. Preemption applies regardless of whether the conflicting laws come from legislatures, courts, administrative agencies, or constitutions.” <https://www.law.cornell.edu/wex/preemption>.

¹⁸⁷ “Board of Trustees of the Employees’ Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore City.” Brief of Amicus Curiae Lawyer’s Committee for Civil Rights Under Law in Support of Appellees. Court of Appeals of the State of Maryland. September Term 1987. Filed on 16 Nov. 1987. pp. 54-59. See Appendix I item 60 for the primary source.

- ¹⁸⁸ Board of Trustees v. Mayor & City Council of Baltimore City, 317 Md. 72, 120, 562 A.2d 720, 743 (1989), cert. denied, 110 S. Ct. 1167 (1990).
- ¹⁸⁹ Cong. Rec. 15 Sep. 1986. 23291 Lexis Nexis. See Appendix I item 26a for the primary source.
- ¹⁹⁰ *Board of Trustees v. Mayor & City Council of Baltimore City*, 317 Md. 72, 116-117, 562 A.2d 720, 741-742 (1989), cert. denied, 110 S. Ct. 1167 (1990).
- ¹⁹¹ House Resolution 549 stated: “[I]t is not the intent of the House of Representatives that a bill limit, preempt, or affect, in any fashion, the authority of any State or local government...to restrict or otherwise regulate any financial or commercial activity respecting South Africa.” Cong. Rec. 12 Sep. 1986. 23154 Lexis Nexis. See Appendix I item 25 for the primary source.
- ¹⁹² Tribe, Laurence. “Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 Upon State and Local Measures.” Cong. Rec. 15 Sep. 1986. 23292 Lexis Nexis. See Appendix I item 26 for the primary source.
- ¹⁹³ Remarks by Senator Moynihan. Cong. Rec. 15 Aug. 1986. 21803 Lexis Nexis. See Appendix I item 24 for the primary source.
- ¹⁹⁴ Cohen, Herman J. “Federalism Debate at Justice on Thursday, Mar. 19.” *Folder South Africa Sanction (3)*. 18 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 31 for the primary source.
- ¹⁹⁵ Cohen, Herman J. “South African Sanctions: State and Local Government Actions Against American Firms.” *Folder South Africa Sanction (3)*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 33 for the primary source.
- ¹⁹⁶ *Board of Trustees v. Mayor & City Council of Baltimore City*, 317 Md. 72, 562 A.2d 720 (1989), cert. denied, 110 S. Ct. 1167 (1990).
- ¹⁹⁷ Cohen, Herman J. “South African Sanctions: State and Local Government Actions Against American Firms.” *Folder South Africa Sanction (3)*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 33 for the primary source.
- ¹⁹⁸ The OMB is an oversight and coordinating agency within the Executive Office of the President that, among other things, oversees executive agency performance and coordinates and reviews significant federal regulations. See <https://www.whitehouse.gov/omb/>.
- ¹⁹⁹ Carlucci, Frank C. “Memorandum for Director of OMB James C Miller III -- South African Sanctions: State and Local Government Actions Against American Firms.” *Folder South Africa Sanction (3)*. 25 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I 34 for the primary source.

- ²⁰⁰ Cohen, Herman J. "Memorandum for Frank C. Carlucci Re: South African Sanctions: President's First Annual Report." *Folder South Africa Anti-Apartheid, RAC Box 16, Director of African Affairs Records*. 29 Sep. 1987. WHORM: Subject File, Ronald Reagan Library. See Appendix I item 52 for the primary source.
- ²⁰¹ Cohen, Herman J. "Federalism Debate at Justice on Thursday, Mar. 19." *Folder South Africa Sanction (3)*. 18 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 31 for the primary source.
- ²⁰² Ibid.
- ²⁰³ Carlucci, Frank C. "Memorandum for Director of OMB James C Miller III -- South African Sanctions: State and Local Government Actions Against American Firms." *Folder South Africa Sanction (3)*. 25 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 34 for the primary source.
- ²⁰⁴ Carlstrom, Robert E. "South Africa—Local Anti-Apartheid Statutes." *Folder South Africa – State/Local Anti-Apartheid, Box 92019*. 23 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 32 for the primary source.
- ²⁰⁵ Shultz, George P. "Letter to Edwin Meese on State and Local Sanctions." *Folder South Africa Sanction (3)*. 28 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 44 for the primary source.
- ²⁰⁶ For example, a member of the National Security Council, Nicholas Rostow, recommended to a White House advisor that they consider asking the Justice Department to file a case against a New Jersey state law that mandated investigation of corporate employment practices in Northern Ireland. Rostow, Nicholas. "Memorandum for Arthur B. Culvahouse, Jr. Paul Schott Stevens and Herman J. Cohen Re: New Jersey's Northern Ireland Statute." 17 Sep. 1987. National Security Council. See Appendix I item 49 for the primary source.
- ²⁰⁷ Lohr, Steve. "Push on Hiring Bias in Ulster." *New York Times*, 4 Sep. 1986, <http://www.nytimes.com/1986/09/04/business/push-on-hiring-bias-in-ulster.html?pagewanted=all>.
- ²⁰⁸ Stevens, Paul Schott. "PRG on Local Anti-Apartheid Statutes." National Security Council. *Folder South Africa Sanction (3)*. 4 May 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 41 for the primary source.
- ²⁰⁹ Stevens, Paul Schott. "Note from Paul Schott Stevens to Hank Cohen." *Folder South Africa Sanctions (1)*. 22 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 39 for the primary source.
- ²¹⁰ Golomb, Cynthia L. "Maryland Counters Apartheid: Board of Trustees v. City of Baltimore." *Maryland Journal of International Law*. Vol. 14, Issue 2. 1990, <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1327&context=mjil>.

- ²¹¹ Baniksy, Sandy. "Council Votes South African Investment Ban." *Baltimore Sun*, 20 Aug. 1985. See Appendix I item 14.
- ²¹² Baniksy, Sandy. "South Africa issue tied to a mayoral appointment." *Baltimore Sun*, 28 Jan. 1986. See Appendix I item 19.
- ²¹³ *Board of Trustees v. Mayor & City Council of Baltimore City*, 317 Md. 72, 120, 562 A.2d 720, 743 (1989), cert. denied, 110 S. Ct. 1167 (1990).
- ²¹⁴ Lolordo, Ann. "City Council Testimony Divided on South African Divestment." *Baltimore Sun*, 23 May 1986. See Appendix I item 21.
- ²¹⁵ Ibid.
- ²¹⁶ Ibid.
- ²¹⁷ Ibid.
- ²¹⁸ Baniksy, Sandy. "City Pension Trustees Sue Over New Divestment Law." *Baltimore Sun*, 1 Jan. 1986. See Appendix I item 29.
- ²¹⁹ Ibid.
- ²²⁰ Lolordo, Ann. "City Trustees Hold Back on S. Africa Divestment." *Baltimore Sun*, 21 Apr. 1987. See Appendix I item 38.
- ²²¹ Clarizio, Lynda. "PRG on State/Local South Africa Laws: Update of Baltimore Case." *Folder South Africa Sanction (3)*. 8 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 43 for the primary source.
- ²²² Sofaer, Abraham D. and Chester A. Crocker. "Memo to the Secretary Re: Decision in the Baltimore Divestment Case." *Folder South Africa Sanction (2)*. Box 92019. 21 Jul. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 47a for the primary source. Also see: Valentine, Paul W. "Baltimore Divestiture Law Upheld." *The Washington Post*, 18 Jul. 1987. See Appendix I item 47c.
- ²²³ Shultz, George P. "Letter to Edwin Meese on State and Local Sanctions." *Folder South Africa Sanction (3)*. 28 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 44 for the primary source.
- ²²⁴ Ibid.
- ²²⁵ Ibid.
- ²²⁶ Cohen, Herman J. "Federalism Debate at Justice on Thursday, Mar. 19." *Folder South Africa Sanction (3)*. 18 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 31 for the primary source.
- ²²⁷ Alison, Rosenberg. "Note to Nick Rostow Re: South Africa: Baltimore Divestment Case." *Folder South Africa Sanction (2)*. Box 92019. 30 Sep. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 53a.

- ²²⁸ Stevens, Paul Schott. "Memo for Frank Carlucci Re. South Africa: Baltimore Divestment Case." *Folder South Africa Sanction (2)*. Box 92019. 6 Oct. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 54 for the primary source.
- ²²⁹ Sofaer, Abraham D. and Kenneth L. Brown. "Memo from Abraham Sofaer to Acting Secretary Re: Baltimore Divestment Case." *Folder South Africa Sanction (3)*. 24 Sep. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 51a for the primary source.
- ²³⁰ Sofaer, Abraham D. "Letter to Deputy Attorney General Arnold I. Burns." *Folder South Africa Sanction (2)*. Box 92019. 8 Oct. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 55a. For Deputy Attorney Burns' reply, see: Burns, Arnold I. "Letter to Abraham D. Sofaer." *Folder South Africa Sanction (2)*. Box 92019. 15 Oct. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 57 for the primary source.
- ²³¹ Cohen, Herman J. "Justice Decision on South Africa Sanctions by States and Local Governments." *Folder South Africa Sanction (3)*. 30 Mar. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 35 for the primary source.
- ²³² Ibid.
- ²³³ In an April 1, 1987 memo, Cohen wrote: "PRG [Policy Review Group] on this issue is a good idea...The more we can document industry reaction, the better off we'll be. I think it's an odd use for Federalism principles to win out on." Cohen, Herman J. "Possible PRG on South African Sanctions by States and Local Governments." *Folder South Africa Sanction (3)*. 1 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 36 for the primary source.
- ²³⁴ Stevens, Paul Schott. "Note from Paul Schott Stevens to Hank Cohen." *Folder South Africa Sanctions (2)*. Box 92019. 22 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 39 for the primary source.
- ²³⁵ Cohen, Hank. "Note from Hank Cohen to Paul Stevens." *Folder South Africa Sanctions (2)*. Box 92019. 23 Apr. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 40 for the primary source.
- ²³⁶ Stevens, Paul Schott. "Memo to Frank Carlucci." *Folder South Africa Sanctions (2)*. Box 92019. 26 Oct. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 58 for the primary source.
- ²³⁷ Willard, Richard K. "Memorandum for the Solicitor General. Re: Board of Trustees of the Employees' Retirement System of the City of Baltimore v. Mayor and City Council of Baltimore, Pet. Docket No. 387." *Folder South Africa Sanction (3)*. 22 Sep. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 50 for the primary source.

- ²³⁸ Sofaer, Abraham D. and Kenneth L. Brown. "Memo from Abraham Sofaer to Acting Secretary Re: Baltimore Divestment Case." *Folder South Africa Sanction (3)*. 24 Sep. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 51 for the primary source.
- ²³⁹ The online records of the Hagley Museum and Library collection contain National Foreign Trade Council (NFTC) records. Box number 148 contains 1977 Anti-Boycott Guidelines from the Rule of Law Committee. Record at: <http://findingaids.hagley.org/xtf/view?docId=ead/2345.xml>.
- ²⁴⁰ Sofaer, Abraham D. and Kenneth L. Brown. "Memo from Abraham Sofaer to Acting Secretary Re: Baltimore Divestment Case." *Folder South Africa Sanction (3)*. 24 Sep. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 51c for the primary source.
- ²⁴¹ Burns, Arnold I. "Letter to Abraham D. Sofaer." *Folder South Africa Sanction (2)*. Box 92019. 15 Oct. 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 57 for the primary source.
- ²⁴² Ibid.
- ²⁴³ Appellants (the Trustees of the Employees' Retirement System) in the Baltimore case attached to their brief a speech by then-Secretary of State George Schultz claiming that anti-apartheid sanctions were damaging U.S. interests. Shultz, George. "The Democratic Future of South Africa." Business Council for International Understanding. New York. 29 Sep. 1987. Cited in Brief of Appellants at 50-71, *Board of Trustees v. Mayor & City Council of Baltimore City*, 317 Md. 72, 120, 562 A.2d 720, 743 (1989), cert. denied, 110 S. Ct. 1167 (1990). See Appendix I item 61f-61z for the primary source.
- ²⁴⁴ Crocker, Chester A. "Affidavit of Chester A. Crocker Submitted in the Circuit Court for Baltimore City." *The Board of Trustees of the Employees' Retirement System of the City of Baltimore, et al. v. Mayor and City Council of Baltimore City*. See Appendix I item 56 for the primary source.
- ²⁴⁵ Stevens, Paul Schott. "Constitutional Issues Raised by Local Anti-Apartheid Statutes." *Folder South Africa Sanction (2)*. Box 92019. 4 May 1987. Paul Schott Stevens Files, Ronald Reagan Library. See Appendix I item 42 for the primary source.
- ²⁴⁶ Amici Curiae: Baltimore Chapter of National Lawyers Guild. Board of Trustees v. Mayor & City Council of Baltimore City, 317 Md. 72, 120, 562 A.2d 720, 743 (1989), cert. denied, 110 S. Ct. 1167 (1990).
- ²⁴⁷ Brief of Amicus Curiae Lawyer's Committee for Civil Rights Under Law at 54-59, *Board of Trustees v. Mayor & City Council of Baltimore City*, 317 Md. 72, 120, 562 A.2d 720, 743 (1989), cert. denied, 110 S. Ct. 1167 (1990). See Appendix I item 60 for the primary source.
- ²⁴⁸ <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

- ²⁴⁹ <https://www.sfcityattorney.org/wp-content/uploads/2017/01/Complaint.pdf>
- ²⁵⁰ <http://www.cnn.com/2017/04/25/politics/sanctuary-cities-injunction/index.html>
- ²⁵¹ <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-continuing-litigation-sanctuary-city-case>
- ²⁵² Cooper, Charles J. “Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation.” 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.
- ²⁵³ Cooper, Charles J. “Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation.” 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.
- ²⁵⁴ Ibid.
- ²⁵⁵ Ibid.
- ²⁵⁶ Cooper, Charles J. “Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements: Memorandum Opinion for the General Counsel, Department of Transportation.” 30 Jun. 1986. https://www.justice.gov/sites/default/files/olc/opinions/1986/06/31/op-olc-v010-p0101_0.pdf.
- ²⁵⁷ The first Federal-Aid Road Act was signed into law July 16, 1916. Lewis, Tom. *Divided Highways: Building the Interstate Highways, Transforming American Life* by Tom Lewis. 2nd ed. Copyright 2013. pp 11.
- ²⁵⁸ Dictionary.com definition.
- ²⁵⁹ Manuel, Kate. “Competition in Federal Contracting: An Overview of the Legal Requirements.” *Congressional Research Service*, 10 Jan. 2011. pp. 2-3. https://digital.library.unt.edu/ark:/67531/metadc31464/m1/1/high_res_d/R40516_2011Jan10.pdf.
- ²⁶⁰ Cooper, Charles J. “Memorandum for Jim J. Marquez, General Council, Department of Transportation. Re: Applicability of New York City Local Law 19 to Bidding Under Federal-Aid Highway Act Programs.” 30 Jun. 1986. Folder “*Paul Schott Stevens Files*,” WHORM: *South Africa Sanctions (3)*, Ronald Reagan Library. See Appendix I item 22 for the primary source.
- ²⁶¹ Ibid.
- ²⁶² A forthcoming memorandum by the authors documents the application of the 1986 OLC opinion to all federal grant programs through the present time.



**JOBS TO MOVE
AMERICA**

FOR MORE INFORMATION,
GO TO WWW.JOBSTOMOVEAMERICA.ORG