

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

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FLORIDA

State Action: Speaker Pro Tem Steve Pajcic introduced a bill in December 1983 calling for state funds, including pensions, to be divested over a three-year period from banks and corporations operating in South Africa. The bill passed the Retirement Personnel Collective Bargaining Committee and is awaiting action by the House Appropriations Committee.

GEORGIA

State Action: Representatives Tyrone Brooks, Betty J. Clark and J.C. Daugherty introduced House bill 1202 on January 18, 1984. The bill prohibits public retirement systems funds from being invested in banks operating in or dealing with South Africa.

Senators Julian Bond, Horace E. Tate and David Scott introduced Senate bill 543 on February 9, 1984. The bill states that no state funds shall be invested or deposited in any financial institution which has outstanding loans to South Africa. Both bills are awaiting action.

ILLINOIS

State Action: On April 4, 1984, more than 200 representatives of trade unions, churches and community organizations visited Springfield to lobby on behalf of a divestment bill introduced by Representative Carol Moseley Braun and co-sponsored by the House Speaker, Representative Michael Madigan. Bill 569 prohibits the investment of state funds in banks making loans to South Africa. The bill has passed out of committee and is now before the House for final passage, but voting has been postponed. South African government officials and U.S. corporations have lobbied strongly against the bill.

INDIANA

State Action: Representative William Crawford reintroduced a bill to remove corporations investing in South Africa or Namibia from the list of approved investments for state and local funds. The bill was not heard this year. Representative Crawford is organizing a stronger coalition for the 1985 legislative session with church, union and civil rights organizations.

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IOWA

State Action: On April 20th, the Iowa legislature passed an Appropriations Bill with an amendment requiring that the Iowa Public Employee Retirement System Investment Board make no future investment of state pension funds in banks and companies dealing with South Africa. The amendment further requires the Investment Board to vote their stock at shareholders meetings against investing in apartheid. The amendment was introduced by Senator Charles Bruner, Chairman of the State Investment Board. The bill is awaiting the governor's signature. This success follows initiatives taken by Senator Thomas Mann and Representative Michael Connolly which were narrowly defeated in Committee.

KANSAS

State Action: Representative Norman Justice reintroduced House bill 2880 on February 22, 1984. There have been hearings in the House Committee on Pensions, Investments and Benefits but there was no action taken.

MARYLAND

State Action: Senator Clarence M. Mitchell III, president of the National Black Caucus of State Legislators introduced a divestment bill on March 14. As amended, the bill would prohibit future investments in South Africa and it was passed in the Senate. At the same time, Delegates Howard P. Rawlings and Wendell Phillips had introduced a similar bill in the Assembly. On April 9, the last day of the session, the Assembly voted the bill down. It is expected to be reintroduced next year.

MICHIGAN

State Action: House bill 4516, sponsored by Representatives Perry Bullard and Virgil C. Smith, Jr. and modeled on the comprehensive Massachusetts legislation, is held up in the Retirement Fund Committee. Representative Smith is working out an agreement with the treasurer which will get the bill out of committee and bring it before the legislature.

MINNESOTA

State Action: Senator Allan Spear and Representative Randy Staten reintroduced divestment legislation in both the Senate and the House. The bills prohibit future investments of funds by the State Board of Investment

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in corporations and banks that do business in South Africa and Namibia. There were hearings in the House and Senate on March 12, 1984. Corporations bussed in retirees to protest the bill. A vote was postponed until later in the session.

#### NEBRASKA

State Action: On April 9, the Nebraska legislature passed a divestment bill by a vote of 29-19 that will take effect as of January 1, 1987. The bill calls for the divestment of pension funds from corporations that do not meet the "highest rating of the Sullivan Principles." In 1980, Nebraska passed a divestment resolution introduced by Senator Ernest Chambers. Since then, Senator Chambers has been working to make the resolution binding.

#### NEW JERSEY

State Action: Assemblyman Willie B. Brown introduced Assembly bill 1309 on February 23, 1984. The bill requires divestment of state pension funds from companies doing business in South Africa. The bill is pending in the Assembly State Government Committee, and is co-sponsored by the House Speaker Alan J. Karcher.

In other action, Senator Wynona M. Lipman reintroduced Senate Joint Resolution #16 on January 23, 1984. The resolution calls upon the government of South Africa to rescind its apartheid policy. The Resolution is pending in the Senate State Government Committee.

#### NEW YORK

State Action: On January 13 and 17, the Assembly Banking Committee held hearings in New York City and Albany on divestment bills introduced by Assemblyman Herman D. Farrell, Jr., who is chairman of the committee. The bills call for an end to the investment of public funds in banks and corporations dealing with South Africa and are still pending before the New York Assembly. Since the hearings, meetings attended by representatives of trade unions, churches and community organizations were held in Syracuse and New York City to formulate strategies to support these bills. The New York State Council of Churches has voted to support divestment legislation and to work for its passage. The legislature is expected to start considering these bills after the Easter recess.

City Action: New York City: Council Member Ruth Messinger has introduced a

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bill in the City Council which would prohibit the city from accepting bids from companies having operations in South Africa and prevent the city from purchasing any South African product. The bill known as "Intro. 619" is co-sponsored by City Council President Carol Bellamy and 10 other Council members. Hearings will be held.

In a separate action, several trustees of the New York City pension system are discussing a strategy for divesting the pension fund system from corporations and banks operating in South Africa. The fund has over \$8 billion in assets.

#### OHIO

State Action: Senator William Bowen, chairman of the Senate Finance Committee introduced divestment legislation. The bill passed out of committee and is awaiting a hearing on the Senate floor.

City Action: Cleveland: On March 12, the county of Cuyahoga which includes the city of Cleveland passed a unanimous binding resolution sponsored by Commissioner Timothy Hagan calling on the County Investment Advisory Board not to invest its taxpayers' funds in banks dealing with the Government of South Africa.

#### PENNSYLVANIA

State Action: Senator Freeman Hankins and Speaker of the House, Leroy Irvis have introduced bills in their respective houses to divest pension funds from banks and corporations dealing with South Africa. Both bills are still pending.

#### RHODE ISLAND

State Action: Senator David Carlin introduced new divestment legislation which was referred to the Senate Corporation Committee on February 29, 1984. On March 23, 1984, the Senate voted to transfer the bill to the Senate Finance Committee. No action has yet been taken.

#### WISCONSIN

State Action: Bill 834 introduced by Assemblywoman Marcia Coggs, prohibits public funds from being invested by the State Investment Board in corporations doing business in or with South Africa. It was heard on February 21, 1984 by the Committee on Government Operations. The bill is still pending.

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WASHINGTON, D.C.

For the first time, the U.S. Congress had the opportunity to debate divestment legislation when a divestment bill passed unanimously by the D.C. City Council, came before the House District Committee for approval. As expected, Congressman Phillip Crane, a long-time supporter of South Africa, introduced a resolution to block the D.C. bill. Hearings were held on Crane's resolution and witnesses, including a financial "expert" who claimed that D.C. would "lose millions" by divesting, were called to testify. However, the House District Committee voted on February 14 by an overwhelming and bipartisan margin of 10-2 for the D.C. pension funds to be divested.

Prepared by: Nicholas Gouede

# # # #

New Publications Available:

The South Africa Fact Sheet summarizes in four pages of facts and graphs the inequalities of life under the racist apartheid system and key facts about US economic involvement. \$.30 each, \$.15 over twenty.

Southern Africa Film Guide is a compendium of recent films available with brief narratives and listings of distributors and prices. \$1.00

Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment is a thorough review of the arguments in a 34 page article for a prestigious law journal published by Georgetown University, "Law and Policy in International Business." Written by ACOA Executive Director Jennifer Davis, Research Director Gail Hovey and consultant James Cason. \$2.00

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# Legislators want South African ties cut

By **BRUCE SCANDLING**  
The Associated Press

JUNEAU — Alaska should protest racial policy in the Republic of South Africa by selling off stock in any company doing business with that apartheid government, two House lawmakers say.

Such action would illustrate the state's opposition to segregation and discrimination practiced against blacks in South Africa, said Juneau Democrat Jim Duncan and House Majority Leader Don Clocksin, D-Anchorage.

"It's based on the principal that we can make money without assisting a government that imposes racial discrimination," Clocksin said.

The resolution, introduced Friday, would affect investments made through the Alaska Permanent Fund Corp.

Dave Rose, executive director of the permanent fund, said \$560 million — or 8 percent — of the \$6.3 billion balance of the fund is invested in common stock.

Most of the fund is invested in U.S. government stocks and bonds.

The state buys stock through Standard and Poor's index of 500 leading companies. Rose said about one-third of those firms could have some business link with the South African government.

"That's everybody from

IBM to Coca-Cola," Rose said. Every major multinational oil company also does business in South Africa, he said.

Questions about the investment of permanent fund money have arisen before, Rose said.

"But the trustees of the fund have always resisted political and social statements," he said. "That could present an investing problem."

Rose said the trustees are appointed to make the best possible investment decisions for the state and, regardless of political beliefs, are looking to buy high-yield stocks and bonds.

Duncan and Clocksin both said the resolution is careful-

ly worded so the state won't lose money by having to immediately yank some of its investment portfolios.

"There's a lot of flexibility in it," Duncan said. "We're not asking them to go and pull out immediately and lose a lot of money."

A legislative report prepared last year by the House Research Agency suggests the state — at that time — would have lost nearly \$5 million by immediately divesting holdings in companies with business links to South Africa.

But the report also indicates a gradual divestment might be achieved without financial loss to the state, Clocksin said.

## Divest, House members say

Associated Press

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### Murkowski to address Alaska Black Caucus

Times Staff

Sen. Frank Murkowski will be keynote speaker at the ninth annual Alaska Black Caucus Awards and Pioneer Banquet scheduled to begin at 6:30 p.m. today at the Anchorage Westward Hilton Hotel.

The caucus will acknowledge contributions individuals and groups have made to progress in the Alaskan community. Tickets are \$20.

American  
Committee  
On  
Africa

# SOUTH AFRICA:

## Questions and Answers On Divestment

There is a growing debate about whether US investments in South Africa help or hinder efforts to abolish the system of white minority rule known as apartheid. Corporations have claimed that investment provides job opportunities and helps promote positive change. Opponents of investment contend that US involvement provides capital and technology needed by the white minority to maintain its absolute domination over the black majority.

A movement for divestment of funds from corporations that invest in South Africa is growing throughout the United States. It involves leaders of civil rights organizations, labor unions, churches, universities, community groups, and state and municipal legislators. They argue that ending South Africa-related investments will make new funds available for mortgages, home improvements, and community development. The following questions and answers on divestment have been prepared to help deal with the issues that are being raised by this debate.

### 1. Why focus on South Africa?

Attention is focused on South Africa not because it has quantitatively less freedom, less justice or less democratic government than a hundred other countries one could name, according to Sydney Kentridge, a prominent South African lawyer. Those goods do exist in South Africa but they are strictly rationed on the sole basis of color — not of citizenship or birth or merit, but color alone.

While South Africa does not hold the monopoly on racism, this is legalized racism at its most brutal. Color determines every facet of human life and death in South Africa.

► The African population is 22.7 million. The white population is only 4.7 million. Whites vote. Africans are not permitted to vote. Comprising over 72 percent of the population, Africans may live permanently on only 13 percent of the total land area.

► The average monthly wage in 1982 was \$1136 for whites, and \$250 for Africans. For every \$1.00 that a white employee earns, an African earns 22c.

► In 1981-82, the government spent \$1199 on education for every white child, and \$145 for every African child.

► In 1980, of every 1,000 white children born, 13 died in infancy. In some rural areas, 240 out of every 1,000 African children born die in infancy.

### 2. Isn't economic involvement in South Africa a foreign policy issue that should be handled by the federal government?

In an important opinion of May 1984, the Attorney General of Maryland, one of the 29 states to have considered the enactment

of divestment legislation, stated that there is no conflict between divestment legislation and the US Constitution, federal law and federal foreign affairs powers.

A separate opinion prepared for the prestigious Lawyers Committee for Civil Rights Under Law in August 1984 agreed.

State divestiture legislation violates no statute, treaty or executive agreement of the United States, and so transgresses none of

the grounds upon which state action has traditionally been deemed violative of national foreign policy.

Beyond the legal question, many state and city officials have been adamant that divestment not be relegated to the realm of foreign affairs. New York City Mayor Ed Koch endorsed the July 1984 report on City Policy With Respect to South Africa, which stated that "The issue is the relationship between the City's finances and an unjust system. We believe that there is no legal or constitutional requirement that the City support apartheid in any way. It is simply not accurate to say that South Africa's governmentally supported policy of massive and sustained discrimination is none of our concern."

### 3. Why is corporate withdrawal necessary?

The net effect of American investment has been to strengthen the economic and military self-sufficiency of South Africa's apartheid regime. (Report of the Senate Subcommittee on Africa, January, 1978.)

Total US financial involvement in South Africa, including direct investment, bank loans and shareholdings, totals some \$14 billion. There has been a tripling of direct US investment to over \$2.6

billion since 1970. In March 1984 US banks had \$4.6 billion in outstanding loans to South Africa.

General Motors and Ford manufacture cars and trucks used by the police and military. Secret General Motors contingency plans prepared in 1977 indicate that the company would cooperate with the South African government in the event of civil unrest and that its vehicles may be taken over for Civil Defense purposes.

Fluor Corporation of California, on contract with SASOL, the South African Coal, Oil, and Gas Corporation, provided \$4.2 billion worth of coal-to-oil conversion plants to help South Africa achieve energy self-sufficiency and withstand an oil embargo. Major US oil companies like Exxon, Mobil, Texaco, and Standard Oil of California are supplying oil to South Africa in violation of the OPEC embargo.

Control Data Corporation sold equipment to the South African police in violation of US Commerce Department regulations. Other firms such as IBM have supplied computers to the government for streamlining South Africa's racist population controls.

#### **4. What effect does US investment and lending have on South African blacks?**

US corporations and the US government put forward the argument that US investment is a positive force for change in South Africa. Exxon spokesperson, Philip Wetz, said in August 1984: "We feel we can do more good by staying in South Africa." If US investment were an agent for change, then this should have been proved over the past 25 years. In fact, their presence and increasing involvement have not prevented the growth of the highly repressive apparatus of the apartheid state.

► An African is arrested for a pass offense every 2.5 minutes. This is a crime that no white can ever commit. Pass laws govern all movement of Africans in and out of the urban areas.

► A computer system has been installed in one bantustan that classifies black workers as "trouble makers," "good boys," "trade unionists," etc., and monitors the migration of workers into the urban areas.

► According to Amnesty International "torture is extensively inflicted on political detainees, and the Government sanctions its use." Over 65 detainees are known to have died while being held in solitary confinement, without charge, trial, without access to family or lawyers. In 1977 police killed Steve Biko, Black Consciousness leader, while in detention. In 1982, trade union leader Neil Aggett died while in detention.

► Over 4,500 people have been convicted since 1961 under the Suppression of Communism Act (1950), the Unlawful Organization Act (1960), the Public Safety Act (1933), the Terrorism Act (1967), and the General Law Amendment Act (1962). Recently the Internal Security Act (1982) supplanted some of these acts and entrenched repressive measures. It allows for detentions without charge or trial and the outlawing of any organization or publication.

► In the 1984 protests sparked by fraudulent elections under the new constitution, over 160 anti-apartheid demonstrators were killed between September and mid-November. In one African township, unarmed residents found themselves sealed off by 7,000 troops and armed police who proceeded to conduct house to house searches and arrest residents.

The apartheid regime uses funds from corporate taxes and inputs of foreign equipment such as computers, cameras, and police trucks to keep track of pass offenses and political detentions, and to keep the repressive machinery of the South African state running smoothly. US companies help fill the gap between what the South Africans can themselves provide, and what they

#### **5. What do South African blacks say about foreign investment?**

"Those who invest in South Africa," said Bishop Desmond Tutu, winner of the 1984 Nobel Peace Prize and head of the South African Council of Churches, "should not think they are doing us a favor; they are here for what they get out of our cheap and abundant labor and they should know that they are buttressing one of the most vicious systems." (1984)

There is of course a variety of opinion on this subject within the black community of South Africa. Those who advocate increased foreign investment are most often members of the tiny black middle class or are employed by a branch of the government such as the civil service of one of the bantustans. They are people who have become dependent on the system and fear the cost of fundamental change.

According to the Internal Security Act (1982), any person in South Africa or outside who supports divestment commits the crime of "subversion" ("terrorism" under the predecessor law), for which the penalty is up to 20 years in prison. In spite of the danger, leaders of the trade union movement, the South African churches, and black political organizations continue to call for divestment.

FOSATU, the largest federation of black trade unions, declared in its 1984 International Policy Statement: "It is FOSATU's considered view that the pressure for disinvestment has had a positive effect and should therefore not be lessened. FOSATU is definitely opposed to foreign investment that accepts the condition of oppression maintained by this regime." This position was thoroughly debated at all levels before being adopted by the National Executive.

The South African liberation movements have consistently called for divestment. As long ago as 1959, Nobel Peace Laureate Albert Lutuli, then president of the African National Congress (ANC), urged the international community to impose economic sanctions on South Africa. He argued that: "The economic boycott of South Africa will entail undoubted hardship for Africans, we do not doubt that. But if it is a method which shortens the day of bloodshed, the suffering to us will be a price we are willing to pay."

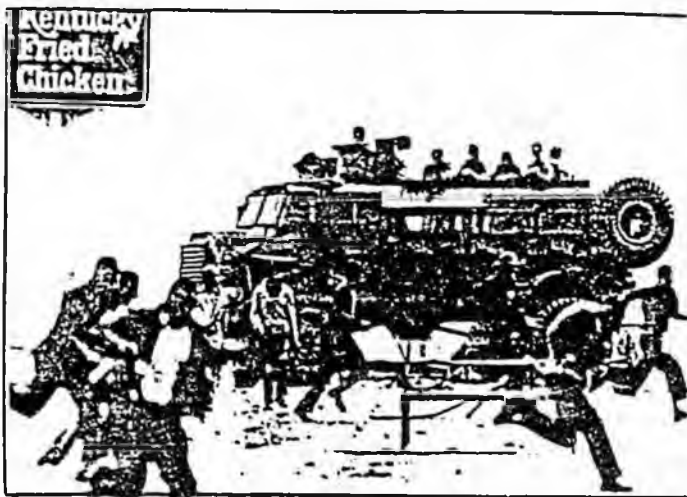
Stating it strongly, Steve Biko, shortly before his death, said, "The argument is often made that the loss of foreign investment would hurt blacks the most. It would undoubtedly hurt blacks in the short run, because many of them would stand to lose their jobs. But it should be understood in Europe and North America that foreign investment supports the present economic system of injustice. We blacks are perfectly willing to suffer the consequences! We are quite accustomed to suffering."

#### **6. What is the most effective way to achieve corporate withdrawal?**

Many hundreds of millions of dollars worth of investments and bank deposits have already been affected by the divestment campaign.

Since the State of Connecticut passed its South African divestment law in September 1982, securities in twenty-five corporations who were found not to be in compliance with the State's South African divestment law, have been sold. Philadelphia's action involved the divestment of over \$65 million, and Massachusetts, \$90 million. Since July 1984 the City of Boston and New York City's largest pension fund have begun a divestment process which will move nearly \$700 million in stocks and bank deposits from companies involved in South Africa.

By late 1984 divestment legislation had been passed by five states and 20 cities. Legislators have been joined in divestment action by trade unionists, investment experts, students and



**Over 160 killed, over 1,000 detained as anti-apartheid protests swept South Africa in 1984.**

church activists to end American complicity with the apartheid regime.

In 1977, this campaign was already having an effect. The Polaroid Company, after 29 years of involvement in South Africa, pulled out. It did so only after it had nominally attempted to improve working conditions. Polaroid took the step in direct response to public disclosure of surreptitious sales of Polaroid products to the South African government and military by the South African distributor. However, this move followed a vigorous campaign mounted against the company by Polaroid workers and anti-apartheid groups, pressuring them to withdraw.

Few corporations are likely to withdraw from South Africa until there are economic reasons to do so. Institutional investors and pension funds hold a key to this withdrawal, because of their economic power. Many state and city governments, trade unions and churches are acting in concert to use this economic power and exert pressure, and it is being felt. The corporations are fighting back. The US Chamber of Commerce in South Africa, along with a group of major South African companies, placed a 10-page supplement in the October 1984 *Fortune* magazine, acknowledging the "gathering momentum" for divestment. It is this pressure that can ultimately lead to corporate disengagement.

## 7. What would be the effect of disengagement by US corporations and banks?

"Each trade agreement, each bank loan, each new investment is another brick in the wall of our continued existence," stated former South African Prime Minister John Vorster.

US investment provides "the bricks" for certain key sectors of the economy. US firms control 75 percent of the computer market, 23 percent of the automotive market, almost 40 percent of the petroleum producers market, and a sizable share of the electronics market.

Disengagement would be more than a major psychological blow to the confidence of the ruling minority government. The effect of the cut-off of advanced US technology would be enormous.

In August 1984, South Africa's leading financial journal, *The Financial Mail*, commented in a long review of the divestment campaign that "the arguments for foreign disinvestment from South Africa are intensifying — particularly in the US. Though there is no cause for real panic, it would be unwise to disregard the psychological impact of the moves and the effect they could have on the economy." A cable sent in October 1978 by the US Embassy in Pretoria to the State Department confirmed that "a grave problem would be the supply of spares for existing high tech-

nology equipment. SAG [the South African government] has built up a reserve of stocks of more than one year which will act as a cushion, but there is no possibility all replacement parts for imported goods which keep the economy going (even office elevators) can be locally produced."

The US Embassy message went on to point out that lack of access to foreign technology could cripple South Africa, and that large corporations are intent on countering any sanctions measures. "Multinationals, including US subsidiaries, are determined to undercut any sanctions action and have already made plans to camouflage their operation through subterfuges arranged with affiliates in other countries."

## 8. Is South Africa the place for prudent investment?

According to the managing director of Goodyear Tire and Rubber Company's South African subsidiary, "Foreign companies are going to be the target. That is where dissident blacks will focus. We are right in the tinder box."

The appeal of high profits and fast growth on investment is offset in South Africa by the failure of the government to institute desperately needed labor reforms. Black unemployment and underemployment are estimated at 25 percent creating what the London *Economist* has called "a time bomb of discontent and revolution-fodder."

These factors have already pegged South Africa as an economic risk. BERI SA, which specializes in risk analysis for international corporations, has warned that "operational and socio-political problems will become more acute throughout the 1980's. Therefore, no long term commitments to South Africa are recommended." It sees a decline in the Operational Risks index to "high risk" within five years, while the Political Risk index will deteriorate to the "prohibitive risk" category in the +5 years forecast.

The conditions in South Africa together with pressure from legislators, anti-apartheid groups, churches, universities and other institutional investors in the US make up what has been labeled "the hassle factor." All these factors are making US corporations wary. As Ian Leach, general manager of Caterpillar Africa warned in 1980, "We are secure here for five years. Up to ten years it is a matter of caution. After that it is anybody's guess."

## 9. Are the Sullivan principles an alternative to withdrawal?

When Ford Motor Company, the largest US employer of black workers in South Africa, asked its workers what they thought of the Sullivan principles, they responded with a hard-hitting four-page document. The Sullivan principles are a "toothless package" and a "piece-meal reform that allows this cruel system of apartheid to survive," the document stated. "The Code does not demand apartheid to be abolished, but merely to modernize and ensure its perpetuation."

The Sullivan principles are a voluntary code of conduct for US firms operating in South Africa. Drafted in 1976, they call for non-segregation in the work place and fair employment practices. Institutions which have been called on to divest began using the principles to judge companies' performance, with signing of the principles taken as an indication of sufficiently good intentions as to eliminate any reason for action.

In 1984, 122 of the 350 US companies operating in South Africa were signatories of the six principles. US corporations employ 66,000 workers, fewer than one percent of all working people in South Africa. Thus, even if the principles were practiced they would affect an insignificant number of workers.

More important, the Sullivan principles make no demand for

change in the fundamental structure of apartheid, no demand for black political rights. Stated Emma Mashinini, Secretary of the Commercial Catering and Allied Workers Union of South Africa:

"This Manifesto is just good cosmetics for the outside world. To us trade unionists, we see no difference between American and South African companies."

Appreciating the fact that the Sullivan principles provide the companies with an opportunity to deflect criticism, many firms were quick to jump on the bandwagon. One subsidiary of a US firm explained that it held off signing for some time — until it realized that "the principles were being used to pacify critics in the States."

## 10. What are the financial implications of divestment?

"We here in Massachusetts are proud to have been the first state in the nation to vote to sell from our public pension fund portfolio all those investments in firms doing business in South Africa . . . It has been our experience that divestiture makes not only a strong moral statement against apartheid but divestiture has proven to have had no significant impact on our pension earnings . . . Timely and careful divestiture can result in net increases in pension earnings." (Letter from Michael S. Dukakis, Governor of Massachusetts, August 1983.)

This experience of the State of Massachusetts has been repeated by other states and cities divesting from companies that are involved in South Africa. For instance, the Director of the Board of Pensions and Retirement for the City of Philadelphia stated in 1984 that: "We . . . consistently achieved or bettered our assumed actuarial investment return rate of 9 percent in our transactions divesting our portfolio of fixed income securities of firms doing business in South Africa."

The University of Wisconsin Trust Fund found that "divestment of South Africa-related stocks has not hampered or limited our ability to find suitable sources of investment." Michigan State University found in June 1980, within months of passing divestment resolutions, their portfolio had earned an additional \$1 million.

Joan Bavaria, President of Franklin Research Company, has pointed out that fears that divestment will prove costly are groundless. "Rather, [studies] have shown that over time South Africa-free companies have outperformed the restricted stocks with a minimal amount of added risk." This has been borne out by studies conducted by Chemical Bank, the US Trust Co. and Trinity Investment Management Corporation.

Hence, Robert J. Schwartz, Vice President of Shearson/American Express and an expert on socially responsible investment, stressed in 1984: "A decision about divestment should not be cluttered by arguments in regard to investment performance, but be based upon the political, moral issues and as to whether the decision makers believe that divestment will have an effect on ending the system of apartheid."

In September 1984, the Connecticut State Treasurer, Henry Parker, reported that "Connecticut has been able to earn money by selling the holding of socially irresponsible companies. Corporate America must take a strong stand against racism wherever it exists and our divestment law is an important incentive for them to do just that. What is more, we have shown that it is profitable to be socially responsible."

## 11. Who is joining the divestment campaign?

The list of states considering some divestment action grows steadily. By mid-1984 the number had reached 29, of which Con-

necticut, Massachusetts, Maryland, Michigan and Nebraska have passed divestiture legislation. The campaign continues to gain ground. In 1984 the Executive Council of the National Conference of Mayors passed a resolution calling for cities to divest their pension funds. New York City is considering selective purchasing legislation to make it illegal to purchase any products that originate in South Africa and to give preferential treatment to purchases from US companies which do not invest in South Africa. Numerous other cities are poised for positive action.

The campaigns in the states and cities are supported by a wide coalition of groups including significant trade unions. Unions that have taken a position against economic involvement in South Africa include the Amalgamated Clothing and Textile Workers Union, United Auto Workers, American Federation of State, County and Municipal Employees, United Steel Workers of America, National Education Association, United Electrical Workers, International Longshoreman and Warehouseman's Union, District 1199 RWDSU, District 65 UAW, and Fur, Leather and Machine Workers Union UFCWU.

Said UAW Vice-president Don Ephlin, "We cannot tolerate public monies being invested in a country which practices institutionalized racism through its laws."

Churches which have voted to end their banking or corporate links to South Africa include the National Council of Churches, the American Lutheran Church, Disciples of Christ, the United Methodist Board of Global Ministries, the Reformed Church in America and the American Friends Service Committee.

At least 40 universities have taken either full or partial divestment action. Those that have passed resolutions to sell all shares in corporations doing business in South Africa include the City University of New York, Antioch and Hampshire Colleges, Ohio University, Michigan State, Indiana Central and the Universities of Massachusetts, Oregon and Wisconsin.

## 12. What kinds of alternative responsible investment exist?

"There is a mounting consensus that pension fund investments cannot protect retirees' benefits unless they protect employees' jobs and economic interests as well . . . Investments . . . that create jobs, build houses, and return a fair yield could be a model for government pension systems." (Edmund G. Brown, Jr., Governor of California.)

Many of the investors concerned not to support apartheid have not chosen to re-direct their funds to achieving particular social goals. But some have seen the need to use reinvestment as such an opportunity.

Examples of such investment include the Kansas Public Employees' Retirement System program called "Kansas Funds for Kansas Jobs." In the program, the retirement system buys the guaranteed portion of SBA loans. By making capital available for small businesses the economy is improved and jobs are created. Other investments available include affordable housing, health care and human services, and alternative energy resource conservation. The interest in public pension fund investment is growing rapidly and new alternatives to investment in South Africa are multiplying.

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Stephanie Urdang, Research Director  
December 1984

Special thanks to Karen Jolkovski for proofreading and Jim Artis for layout.

The American Committee on Africa

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Associated Press

Demonstrators marching outside Reagan campaign's Boston headquarters to protest support of South Africa.

## More Municipalities Cutting Ties to South Africa

By COLIN CAMPBELL

Ten years ago it was college students who most visibly protested South Africa's official system of racial separation by putting pressure on trustees to sell stock in companies that did business in South Africa. Now American cities and states are, more and more, restricting investments in South Africa.

Activists see municipalities, with billions of dollars invested in South Africa through pension funds and other assets, as a wellspring of wider political appeal for the divestment movement, which had already attracted churches, labor unions, entertainers and athletes.

Since it caught hold among cities in the late 1970's, the divestment campaign has prevailed in about a dozen small ones, often college towns such as Cambridge, Mass., and Berkeley, Calif. Then in 1982 Philadelphia passed a divestment ordinance. Last year Washington followed suit. Since July, Boston and New York City have instituted divestment policies that will require sale or transfer of nearly \$700 million in stocks and bank deposits.

So far, five states, Connecticut, Maryland, Massachusetts, Michigan and Nebraska, have also passed laws on divestment of South African hold-

ings.

At the same time, support for Federal legislation on curtailing investment in South Africa, while opposed by the Reagan Administration, is building in Congress. The House passed measures early this year to halt all new corporate investment in South Africa and require American companies to institute fair-labor practices and benefits for blacks in their South African operations.

The House provisions would prohibit bank loans to the South African Government, except to finance social welfare projects, and would prohibit importing South African krugerrands. "It represents the most far-reaching legislation to date," Representative Stephen J. Solarz, Democrat of Brooklyn, said yesterday. Mr. Solarz, a sponsor of the House measure, said it was tied up in conference with the Senate.

"But even if our bill should die, the effort to register our concern over conditions in South Africa will continue," he said.

Direct investment by American companies in South Africa is estimated by the State Department to total \$2.3 billion, which includes expenditures for factories, real estate and other uses but excludes bank loans and gold stocks. Other estimates, which include the loans and gold stocks, have placed the total American investment as high as \$14 billion.

Supporters see divestment as a way of exerting economic pressure to encourage change in South Africa's racial policies, while opponents, including the Reagan Administration, say such methods could hurt South Africa's economy in general and black workers in particular.

#### Boston Recruits Others

Last month Mayor Raymond L. Flynn of Boston wrote 100 mayors urging them to copy his city's sweeping divestment ordinance, which makes no exceptions for American companies that have signed principles calling for fair-labor practices. Those principles were devised seven years ago by the Rev. Leon H. Sullivan of Philadelphia, who is a director of General Motors.

Officials in Chicago, Los Angeles, Detroit, Seattle, Gary, Ind., and a few other big cities have replied to Mr. Flynn that they are considering comparable moves. At a meeting in New York Sept. 7, the executive committee of the United States Conference of Mayors endorsed the concept.

"What we do in Boston isn't going to change world politics," Mayor Flynn said in an interview last month. But he said his city had sent "a message."

"I think to me and to the people of Boston, the South African Government epitomizes oppression and discrimination," he said.

The Reagan Administration, while criticizing apartheid in South Africa,

opposes divestment as a way of pressing for change there. The Administration argues that divestment could eliminate many jobs, health plans, schools, training programs and other opportunities for South African blacks.

Hundreds of American companies take the same view. So does the South African Government, whose representatives in the United States have devoted increasing attention to the issue.

South Africa's growing concern is epitomized in a 10-page advertisement, paid for by a group of major South African corporations, in the October issue of Fortune magazine. The advertisement acknowledges the "gathering momentum" for divestment and asserts that "a victory for U.S. Presidential candidate Walter Mondale in November could certainly see this campaign intensify."

Mr. Mondale has endorsed the House bill, aides said yesterday.

In a campaign appearance yesterday in Houston Mr. Mondale, as he had done earlier in St. Louis, outlined steps he said he would take to bring pressure on South Africa to end apartheid.

He told college students in both cities he would oppose loans from the International Monetary Fund unless South Africa showed progress in human rights, expand the existing ban on arms sales to include the police, prohibit the sale of krugerrands in the United States and terminate South African airline flights to the United States.

Apoll of South African workers published Sunday indicated overwhelming resistance to divestment. Of 551 workers surveyed, 75 percent said they disagreed with the efforts. Of those, 54 percent said divestment would reduce the number of jobs, and 41 percent said divestment would harm blacks. The survey for the South African Institute for Race Relations, which opposes apartheid, was paid for in part by the Reagan Administration.

When Americans sell South African investments or withdraw deposits from banks such as Citicorp and Manufacturers Hanover that are large lenders to South Africa, neither that nation nor the affected corporations necessarily lose. Other investors tend to pick up the slack. But if enough large multinational companies pull out, there is always a chance of significant losses. Perhaps more significantly, there is a chance of erosion diplomatic support.

#### Economic Concern in South Africa

South Africa's economy has been sluggish in recent years, and the Government at Pretoria was constrained in late 1982 to borrow \$1.1 billion from the International Monetary Fund. The vote to lend the money was close.

In a report, the fund later criticized apartheid as bad economics and called it "essential that the impediments and restrictions governing the labor market be eased."

The lesson of such developments, South Africa's critics say, is that it is susceptible to economic pressure.

Arguments against state and city divestment, include the contentions it is an imprudent way for states and municipalities to manage money, that it may damage American companies, that it may make strategic minerals less available and that it will help polarize South African politics into intransigent defenders of rule by the white minority and supporters of black revolution.

Meanwhile, the Reagan Administration has a policy of "constructive engagement" with South Africa that has resulted in less criticism of that nation from Washington, and fewer trade restrictions than prevailed under President Carter.

Campaigning in Texas yesterday, Mr. Mondale called Mr. Reagan's policy in South Africa a code for saying the heat was off.

#### Politics and Pension Funds

While municipal and state governments have in the past avoided introducing political criteria into the management of pension and other large funds, they have been influenced in recent years by consultants specializing in "socially responsible" investments.

Such investments have sometimes prospered. Officials in Connecticut and Michigan say they have suffered no financial losses, and in some cases have profited, as a result of their South African divestment.

"That really helped us, because people were saying that you can't divest without losing money," said Dumisani S. Kumalo, a South African who works for the American Committee on Africa in New York, a well-known proponent of divestment.

Recent divestment laws vary considerably in detail. Boston's is total. Connecticut's limits divestment to companies that sell to the South African military and police, or fail to sign the Sullivan principles, or, having signed, obtain less than a first- or second-place rating for their performance.

New York City's new rule, which affects its huge employees' retirement fund, is similar to Connecticut's. Within three years, though, it will apply to companies that fail to get the Sullivan code's highest rating, and within five years it will affect any company doing business in South Africa that is not "of substantial assistance to efforts to eliminate apartheid."

#### Companies' Performance Judged

Of the 350 American companies doing business in South Africa, 122 have signed the Sullivan principles, according to D. Reid Weedon, vice president of Arthur D. Little, the accounting firm that regularly scores the companies' performance. The most recent accounting gave 82 passing grades.

Mr. Weedon said by telephone from his firm's headquarters in Boston last week that although only 66,000 employees, less than 1 percent of South Africa's labor force, work for American companies that have signed the principles and submitted reports to Mr. Weedon, their working conditions had improved greatly and other companies were imitating their fair-labor practices.

"The influence is a positive one," Mr. Weedon said.

Among other things, the Sullivan principles call for equal pay regardless of race, training, desegregated facilities and benefits for health and education. Since the introduction of those principles, more and more companies have improved conditions, but once the employee leaves the workplace he still lives under the strictures of apartheid.

And proponents of divestment say apartheid is much larger and more important than wages, working conditions and schools in a few private corporations. The argument, moreover, that divestment will hurt blacks, Mr. Kumalo said, is a "racist" one.

"It will hurt blacks and whites," he said. "It will put pressure for change on South Africa."

that of a husband, son, or brother. There is nothing inherent in women's psyches that makes them better than men at providing nurture and care.<sup>100</sup> The provision of emotional and physical sustenance for either children or the elderly should be shared by men and women equally. Stanley Brody reflected on a future marketplace that would allow for such sharing: "allocation of an adult's time between market work and nonmarket activity may thus undergo important changes . . . . In the past this has been seen only as a need for women in meeting family obligations. The near future may see it as a shared need by men as well as women."<sup>101</sup>

I look to this vision of the future. To provide the best quality of life for our elderly women and men, we must offer them the opportunity and the capability to remain in the community, and we must eliminate the current biases towards institutional and acute medical care. For families who are and will be providing home based care, we need to establish structures in which their support complements agency provided services, and in which they remain well below their tolerance threshold. Finally, we need to work through the feminist movement and through specific counseling structures to change underlying attitudes regarding the separate and unequal roles of men and women in the province of caregiving.

## COMMENT

### ACTION SPECIFIC HUMAN RIGHTS LEGISLATION FOR EL SALVADOR

KENNETH H. ANDERSON\*

The United States has long been a party to international instruments calling for the protection of human rights.<sup>1</sup> In the 1970's, Congress became increasingly concerned about human rights abuses in countries that received United States military and economic aid.<sup>2</sup> This concern was first expressed in the Foreign Assistance Act of 1973,<sup>3</sup> but key policymakers in the Executive Branch appeared not to share Congress's enthusiasm for using military aid to encourage respect for human rights.<sup>4</sup> Congress subsequently tightened the requirements of the For-

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<sup>1</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/1810, at 71 (1948); U.N. CHARTER art. 55; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

<sup>2</sup> Congress held hearings on the subject in 1973, *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on Int'l Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1974). The subcommittee released a significant report shortly afterwards, concluding that the United States should use restrictions on military aid as a tool to promote human rights. SUBCOMM. ON INT'L ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 2D SESS. 11, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP (Comm. Print 1974).

<sup>3</sup> Pub. L. No. 93-189, 87 Stat. 714 (1973) (codified as amended in scattered sections of 22 U.S.C.). The Foreign Assistance Act provided in part that "[i]t is the sense of Congress that the president should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." *Id.* § 32, 87 Stat. 733. For a discussion of this Act and its subsequent amendment, see Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 *AM. U.L. REV.* 163, 167-76 (1983); Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 *AM. J. INT'L L.* 246, 249-56 (1982).

<sup>4</sup> See CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., HUMAN RIGHTS AND U.S. FOREIGN ASSISTANCE: PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 84-85 (Comm. Print 1979); Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 *GA. J. INT'L & COMP. L.* 231, 241 (1977).

<sup>100</sup> Not all feminists would agree with this assertion. See, e.g., L. GLENNON, *WOMEN AND DUALISM: A SOCIOLOGY OF KNOWLEDGE ANALYSIS* 119-46 (1979) (describes theory of feminism that women are inherently better at nurturing than men).

eign Assistance Act,<sup>5</sup> and in some cases went so far as to make United States aid to specific countries contingent upon their respect for human rights.<sup>6</sup>

One example of such country specific legislation is the El Salvador certification requirement. In 1981, Congress enacted legislation requiring that the President certify human rights progress in El Salvador as a condition for United States military aid to that country.<sup>7</sup> Beginning in January 1982 and proceeding at six month intervals, the Executive Branch has regularly certified that respect for human rights in El Salvador has improved.<sup>8</sup> On the strength of those certifications, the United States has provided El Salvador with increasing quantities of armaments.<sup>9</sup>

Members of Congress, along with independent human rights organizations, have criticized the accuracy of the certifications, arguing that human rights abuses in El Salvador have persisted and in some respects have become worse.<sup>10</sup> The vague language

<sup>5</sup> Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (current version at 22 U.S.C. § 2304 (1982)); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 116, 89 Stat. 849, 860 (1975) (current version at U.S.C. § 2151n (1982)). For a discussion of these changes, see Comment, *supra* note 3, at 167-73.

<sup>6</sup> Congress reduced military aid to South Korea and denied it to Chile in the Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, 1802 (1974) (codified as amended in scattered sections of 22 U.S.C.).

<sup>7</sup> International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981).

<sup>8</sup> The first certification was made on January 28, 1982, Presidential Determination No. 82-4, 47 Fed. Reg. 6417 (1982), reprinted in *The Presidential Certification on El Salvador (Volume I): Hearings Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 2 (1982)* [hereinafter cited as *House Presidential Certification Hearings I*]. The second certification was made six months later. Report on the Situation in El Salvador With Respect to the Subjects Covered in Section 728(d) of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, reprinted in *The Presidential Certification on El Salvador (Volume II): Hearings and Markup Before the House Comm. on Foreign Affairs and its Subcomm. on Inter-American Affairs, 97th Cong., 2d Sess. 467 (1982)* [hereinafter cited as *House Presidential Certification Hearings II*].

President Reagan pocket vetoed an extension to the certification requirement in November 1983, 19 WEEKLY COMP. PRES. DOC. 1627 (Nov. 30, 1983). The legal validity of that pocket veto has been disputed. Telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 7, 1984). The administration submitted additional certifications, stipulating that they were voluntary, in January 1984 and July 1984. *Id.* The D.C. Circuit refused to declare provision of military aid to El Salvador illegal, see *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, No. 82-2461 (D.C. Cir. Nov. 18, 1983), but the plaintiffs in that case did not base their claim on the certification requirement. See generally Comment, *supra* note 3.

<sup>9</sup> U.S. military aid to El Salvador was \$5.9 million in 1980, \$35.5 million in 1981, \$82.0 million in 1982, \$81.3 million in 1983, and \$196.6 million in 1984. Telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 1, 1984); see also N.Y. Times, Mar. 30, 1984, at A4, col. 1.

<sup>10</sup> Congressional criticism was voiced during the certification proceedings. See, e.g., *House Presidential Certification Hearings II*, *supra* note 8, at 12-13 (statement of Rep.

of the certification requirement, however, has provided the President with considerable leeway in determining whether certification is justified.<sup>11</sup> At the same time, Congress is apparently unwilling to withhold all military aid to El Salvador, even in the face of disturbing abuses, for fear that the government could fall and that even greater violence could follow.<sup>12</sup> Congress has thus continued to accept the certifications, despite the concern among some of its members that the certifications are inconsistent with the goal of conditioning military aid on human rights progress.<sup>13</sup>

This Comment describes an approach to human rights legislation that seeks to overcome the limitations of congressional influence over human rights progress manifest in the presidential certification process. The approach relies on "action specific" conditions on military aid, in contrast with the "country spe-

Barnes (D-Md.); *id.* at 75 (statement of Rep. Studds (D-Mass.)); C. PILL & P. LEAHY, EL SALVADOR: THE UNITED STATES IN THE MIDDLE OF A MAELSTROM. A REPORT TO THE SENATE COM. ON FOREIGN RELATIONS, 97th Cong., 2d Sess. 4 (1982); *House Presidential Certification Hearings I*, *supra* note 8, at 13 (statement of Rep. Bunker (D-Wash.)); *id.* at 61 (statement of Rep. Solarz (D-N.Y.)); *Presidential Certification on Progress in El Salvador: Hearing Before the Senate Committee on Foreign Relations, 98th Cong., 1st Sess. 4 (1983)* (statement of Sen. Cranston (D-Cal.)) [hereinafter cited as *Senate Hearing on Certification on Progress*]. For a representative reaction of human rights groups, see C. ARNSON, A. NEHR & S. BENDA, AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR, JANUARY 31, 1984 FOURTH SUPPLEMENT (1984); A. NEHR & J. MENDEZ, JULY 19, 1983 THIRD SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1983); C. ARNSON & A. NEHR, JANUARY 20, 1983 SECOND SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1983); C. BROWN, JULY 20, 1982 SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1982); AMERICAS WATCH COMMITTEE AND THE CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR (1982) [hereinafter cited as *REPORT ON HUMAN RIGHTS*].

<sup>11</sup> One illustration of the difficulties raised by the statute involves the requirement that the Salvadoran government make a "concerted and significant effort to comply" with human rights principles. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981). While the administration and some legislators interpret that language merely to require some showing of progress, other congresspersons have argued that it requires substantially more. See, e.g., *House Presidential Certification Hearings I*, *supra* note 8, at 17-18 (statement of Rep. Bunker).

<sup>12</sup> See *House Presidential Certification Hearings II*, *supra* note 8, at 219 (statement of Rep. Studds).

We clearly have a problem. At some point we have to be willing to cut off aid. There must be a point which is unacceptable even to this Congress and to this administration. The trouble is that people . . . are postulating that the aid cut off is unthinkable because of some of the consequences which would flow from that. If that is the case, then nothing we do by way of conditions will have any credibility down there because they know we do not think our interests are served by the cutting off of aid. It seems we are in a box of our own making . . .

<sup>13</sup> See *supra* note 10; see also Horton & Sellier, *The Utility of Presidential Certification of Compliance with United States Human Rights Policy: The Case of El Salvador, 1982*, WIS. L. REV. 875.

cific" conditions imposed by the current certification process. Action specific human rights legislation defines the human rights objectives of Congress in narrow, specific terms, and it conditions particular items of military aid on that progress. In this way, the legislation avoids the vagueness of the certification process and provides Congress with a wider range of conditioning options than simply cutting off all military aid. Action specific human rights legislation can be used to supplement, rather than replace, other types of human rights legislation. It would be particularly appropriate where more general efforts have failed to produce the degree of human rights progress sought by Congress, as appears to be the case in El Salvador.<sup>14</sup>

#### I. THE COUNTRY SPECIFIC CERTIFICATION REQUIREMENT FOR EL SALVADOR MILITARY AID

Congress expressed the general foreign policy of the United States regarding human rights in section 502B of the Foreign Assistance Act, stating that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."<sup>15</sup> The provision directed that no government "which engages in a consistent pattern of gross violations of internationally recognized human rights" shall receive military aid.<sup>16</sup> Nonetheless, the Salvadoran government received increasing amounts of military aid<sup>17</sup> despite allegations of serious human rights abuses. Large numbers of civilian noncombatants were killed, driven into foreign exile, or internally displaced from their homes and lands.<sup>18</sup> Major independent human rights organizations report that the majority of human rights abuses were the fault of the Salvadoran government rather than the guerrillas

<sup>14</sup> See *supra* note 10.

<sup>15</sup> Foreign Assistance Act of 1961, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (codified at 22 U.S.C. § 2304 (1982)).

<sup>16</sup> *Id.* § 502B(c)(1) (22 U.S.C. 2304(a)). Exceptions are permitted where "extraordinary circumstances exist which necessitate a continuation [of military aid] in the national interest of the United States." *Id.* The elasticity of the "extraordinary circumstances" exception is described in REPORT ON HUMAN RIGHTS, *supra* note 10, at 305 n.24. For an account of the development and application of § 502B, see Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. OF INT'L L. 246 (1982).

<sup>17</sup> See *supra* note 9.

<sup>18</sup> See, e.g., N.Y. Times, Oct. 16, 1984, at A1, col. 6 (estimating 50,000 civilian deaths); C. ARNOLD, A. FULLER & S. BENDA, *supra* note 10, at 49 (estimating 500,000 refugees abroad and 500,000 internally displaced).

or the uncontrollable right wing, and that the "death squads" were composed mainly of members of the police and military.<sup>19</sup>

The certification legislation, enacted shortly after a series of highly publicized murders of United States citizens,<sup>20</sup> reinforced the "gross violations" restriction by requiring the President to certify every 180 days that the government of El Salvador was attaining the following goals:

- (1) making a concerted and significant effort to comply with internationally recognized human rights;
- (2) achieving control of the armed forces to end the indiscriminate torture and murder of Salvadoran citizens;
- (3) reforming the economic and political system, including land reforms;
- (4) preparing to organize early elections with international observers and to initiate discussions with all major political factions in the country.<sup>21</sup>

The legislation required the President to submit the certifications to the Speaker of the House and the Chairman of the Senate Committee on Foreign Relations.<sup>22</sup> As long as the President continued to submit certifications, his ability to send military aid to El Salvador would not be hampered; he could ad-

<sup>19</sup> Americas Watch and the American Civil Liberties Union jointly concluded that "the government [of El Salvador] is in control of its security forces—that in fact, for all practical purposes, the security forces are the real government—and that torture and murder are instruments of policy." C. BROWN, *supra* note 10, at 132. The two organizations also found "considerable evidence that the unofficial paramilitary groups, or death squads, that are responsible for many anonymous killings include on- and off-duty members of the security forces." *Id.* at 143.

<sup>20</sup> Four American churchwomen were murdered in December 1980 under circumstances that strongly implicated the Salvadoran security forces. See LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, A REPORT ON THE INVESTIGATION INTO THE KILLING OF FOUR AMERICAN CHURCHWOMEN IN EL SALVADOR (1981). Two American land reform advisers were murdered in January 1981 in the lobby of the San Salvador Sheraton Hotel. See REPORT ON HUMAN RIGHTS, *supra* note 10, at 54. The Archbishop of San Salvador, Monsignor Romero, was shot and killed during Mass in March 1981 after delivering a homily urging army soldiers not to fire on unarmed civilians; those circumstances again suggested military complicity. *Id.*

<sup>21</sup> International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1555 (1981). The first two certifications also required a special finding that the government was making progress in investigating the murders of the American churchwomen and land reform advisers. *Id.* Congress amended the Act to require a report on John Sullivan, an American journalist in El Salvador who has been missing since 1960. Act of July 15, 1983, Pub. L. No. 98-53, 97 Stat. 287 (1983).

<sup>22</sup> International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1555 (1981).

minister the aid programs previously authorized by Congress without further impediment. If the President did not submit a certification when required, however, the legislation directed the President to suspend all military assistance to El Salvador immediately.<sup>23</sup> If the President failed both to submit a certification and to suspend military aid as required, Congress could, of course, sue to obtain a judgment declaring the President's actions illegal.<sup>24</sup> Congress defined the assistance covered by the certification requirement to include equipment, services, and credits extended under the Foreign Assistance Act of 1961<sup>25</sup> and the Arms Export Control Act.<sup>26</sup>

The improvement in human rights resulting from the certification process has been, at best, limited. In issuing the required certifications, President Reagan has pointed to the land reform program, the detention of National Guardsmen suspected in the murder of the four churchwomen, the elections of 1982, and claimed reductions in the number of death squad victims in the urban areas of San Salvador.<sup>27</sup> While such developments should be welcomed, they do not address the fundamental problems of human rights abuse in El Salvador, which stem from widespread military violence against peasants in the countryside.<sup>28</sup> This vio-

<sup>23</sup> *Id.* § 728(c).

<sup>24</sup> The equitable discretion doctrine applied in *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, No. 82-2461 (D.C. Cir. Nov. 18, 1983), would probably not prevent such a judgment. In *Crockett*, the court declined to examine the merits of plaintiffs' Foreign Assistance Act claim that El Salvador was engaging in "a consistent pattern of gross violations," 22 U.S.C. § 2304(a), holding that the dispute was one among legislators (those favoring aid and those opposing it) rather than between branches. 558 F. Supp. at 1002. Failure to submit a certification, however, would be more clearly an instance of a President failing to comply with congressional directives; no judicial inquiry into the condition of human rights in El Salvador would be necessary.

<sup>25</sup> Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. §§ 2151-2431 (1982)).

<sup>26</sup> Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751-2796 (1982)).

<sup>27</sup> DEP'T OF STATE, JUSTIFICATION FOR PRESIDENTIAL DETERMINATION TO AUTHORIZE CONTINUED SECURITY ASSISTANCE FOR EL SALVADOR 4 (1982) (land reform); *id.* at 5 (murder suspects); *id.* at 4-5 (elections). Thomas Enders, Ass't. Sec'y of State for Inter-American Affairs, claimed in congressional testimony in 1982 that the level of noncombat violence had been reduced by one-half during 1981. *Presidential Certification Hearings I*, *supra* note 8, at 30. This claim was sharply disputed by Morton H. Halperin on behalf of the American Civil Liberties Union. *Certification Concerning Military Aid to El Salvador: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess., 73 (1982).

<sup>28</sup> "As human rights workers in all of El Salvador's human rights organizations have stressed, the focus of killing in El Salvador, during this period of intensified armed conflict between government forces and armed insurgents of the left, has shifted to the countryside." C. ARNISON & A. NEHER, *supra* note 10, at 19; see also C. ARNISON, A.

lence has included aerial bombardments of peasant hamlets, massacres of civilian noncombatants in massive infantry sweeps through the countryside, and destruction of crops and agricultural infrastructure in an effort to undercut the guerrillas' logistical base.<sup>29</sup> Major human rights organizations, as well as members of Congress, have therefore argued that the certifications were improper.<sup>30</sup>

The certification requirement suffers from several difficulties. First, the statute is vague, giving little guidance to the Executive Branch on what Congress considers to be "progress" or "good faith efforts."<sup>31</sup> Second, it provides no mechanism for Congress to review the determinations of the Executive Branch, short of enacting additional legislation to curtail the aid.<sup>32</sup> Finally, the statute provides no alternative to a complete cutoff of United States military aid. Given the importance of the national security interests that many leaders in both branches perceive to be at stake in the Salvadoran conflict, the certification process is a clumsy tool for reducing human rights abuses.<sup>33</sup> Action specific legislation seeks to cure those defects.

## II. AN EXAMPLE OF ACTION SPECIFIC LEGISLATION FOR EL SALVADOR: THE SPECTER AMENDMENT

By 1983, despite administration certifications that the Salvadoran government was making good faith progress in bringing the murderers of the American churchwomen to justice, little

<sup>29</sup> Infantry atrocities are described in the *Boston Globe*, Sept. 9, 1984, at 1, col. 5. The author's account of aerial bombardments, based on his personal observations and interviews with Salvadoran peasants in August 1984, appears in the *Boston Globe*, Oct. 1, 1984, at 19, col. 1.

<sup>30</sup> See C. BROWN, *supra* note 10, at 9-20; *Presidential Certification Hearings II*, *supra* note 8, at 521; AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1983, at 136 (1983); Horton & Sellier, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 Wis. L. REV. 825.

<sup>31</sup> See *supra* note 11.

<sup>32</sup> The use of a legislative veto to check executive action with regard to military aid would probably be invalid under *INS v. Chadha*, 103 S. Ct. 2764 (1983), which held that Congress cannot reserve one-house veto power when delegating authority to the Executive Branch. See generally Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984); DeConcini & Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984). Therefore, Congress could counter executive action only through the passage of formal legislation, which would be subject to a presidential veto.

<sup>33</sup> Rep. Barnes, for example, laments that the process has created "an all or nothing legislative game." *House Presidential Certification Hearings II*, *supra* note 8, at 238.

progress had in fact been made.<sup>34</sup> Some low level National Guardsmen had been detained, but no officers had been indicted; observers generally agreed that the paralysis of the Salvadoran judicial system and the traditional protection that the armed forces provided for their men prevented any substantial results.<sup>35</sup> Congress therefore adopted an amendment offered by Senator Arlen Specter (R-Pa.) and Representative Clarence D. Long (D-Md.) blocking one third, or \$21 million, of one of President Reagan's supplemental requests for El Salvador military aid until the Salvadoran government obtained convictions in the churchwomen case.<sup>36</sup>

The amendment succeeded for a variety of reasons. First, Congress wanted action on that particular case. The murders were especially disturbing, as the victims were female religious workers who had been raped and brutalized. The murders were also reported extensively in the United States press.<sup>37</sup> Even some members of Congress who generally favored President Reagan's policy in El Salvador were disturbed by this case.<sup>38</sup> Second, the amount of aid at risk gave the Salvadoran government a strong inducement to conduct a trial, without posing an immediate threat to the government's security. The Specter Amendment thus provided a realistic carrot and stick approach. By March 1984, a trial had been held, though with considerable United States involvement;<sup>39</sup> for the first time in Salvadoran history, members of the armed forces were convicted of political violence against civilians.<sup>40</sup>

Although these convictions were an important first step in curbing human rights abuses, the Specter Amendment was only a limited success. First, the circumstances of the case were unique. The case dealt with a privileged class of victim—United States citizens—and involved somewhat sensational facts. Second, responsibility for the violations was assigned no further up

<sup>34</sup> See C. ARNSON, A. NEHR & S. BENDA, *supra* note 10, at 56.

<sup>35</sup> See DeWind & Kass, *Justice in El Salvador: A Report of a Mission of Inquiry of the Association of the Bar of the City of New York*, 38 REC. A.B. CITY N.Y. 112, 129 (1983).

<sup>36</sup> Act of Nov. 14, 1983, Pub. L. No. 98-151, 97 Stat. 970 (1983).

<sup>37</sup> See, e.g., N.Y. Times, Dec. 5, 1980, at A3, col. 3; L.A. Times, Dec. 5, 1980, at 1, col. 3; Chi. Tribune, Dec. 5, 1980, at 3, col. 1.

<sup>38</sup> See, e.g., *House Presidential Certification Hearings II*, *supra* note 8, at 336 (statement of Rep. Gilmer (R-N.Y.)).

<sup>39</sup> See N.Y. Times, May 25, 1984, at A11, col. 2.

<sup>40</sup> "Salvadoran judges said it was the first time a jury had convicted any member of the armed forces for a slaying with political overtones." *Id.* at A4, col. 12.

the military chain of command than enlisted men; no officers were punished.

The first qualification is important because further progress requires extension of protection to less privileged classes of victims. If one envisions a continuum of victims ranging from United States citizens at one end to socially important Salvadorans (for example, priests, urban union officials, important members of Duarte's Christian Democratic Party) to ordinary middle class Salvadorans down to peasants in the countryside, one would find that the last group is the most numerous, the most defenseless, and has suffered the most in the civil war.<sup>41</sup> In short, the group most urgently requiring protection is the one made up of those individuals who are lowest on the continuum.

The second qualification is important because further progress requires accountability at higher levels of the military when those levels are indeed responsible for the violations that occur. Some have argued that the Salvadoran military resists any punishment of its members.<sup>42</sup> A significant barrier to generally improving human rights protection in El Salvador is the difficulty of making individuals, including military officers, who are ultimately responsible for human rights violations, accountable for their actions. Human rights observers contend that in some cases, including the murder of Archbishop Romero, the direct responsibility lies with the high command, while in other cases lower officers are directly responsible with the high command giving tacit approval.<sup>43</sup>

### III. A PROPOSAL FOR ACTION SPECIFIC HUMAN RIGHTS LEGISLATION

Congress can assert more control over its efforts to demand respect for human rights without jeopardizing its concern for stability in the region by adopting action specific human rights legislation. Constructing such legislation requires that Congress choose a particular manifestation of progress and a particular aid package to be conditioned on that progress. In making the first choice, Congress can build on the Specter Amendment by

<sup>41</sup> REPORT ON HUMAN RIGHTS, *supra* note 10, at 51.

<sup>42</sup> See, e.g., *Senate Hearing on Certification on Progress*, *supra* note 10, at 538 (statement of Michael Posner, Exec. Dir. Lawyers Comm. for Int'l Human Rights).

<sup>43</sup> See, e.g., N.Y. Times, May 24, 1984, at A11, col. 1; AMNESTY INTERNATIONAL, *supra* note 30, at 137 (1983).

identifying an objective that will both extend accountability further up the military chain of command and extend protection further down the social continuum described in Part II.

One objective that might meet these requirements would be to require the Salvadoran government to investigate a massacre that occurred in the Cabanas province in July 1984. According to accounts collected by the Archdiocese of San Salvador and by newspaper reporters, infantry troops swept through the area and left forty to sixty civilians dead, including men, women, and children.<sup>44</sup> An investigator for the Archdiocese brought back photographs that showed bodies burned, mutilated, and decapitated.<sup>45</sup> Survivor testimony named the army as the perpetrator, and later reports identified the United States trained Atlacatl Battalion as probably responsible.<sup>46</sup>

Some argue that the investigation of the Cabanas massacre has become a public test of President Duarte's will and ability to control the armed forces in El Salvador.<sup>47</sup> On August 27, 1984, Duarte ordered an investigation into the charges, although the investigator will be a military officer.<sup>48</sup> The investigator stated that he must move with "lead feet" for fear that the investigation will "tear apart the armed forces."<sup>49</sup> Such a beginning does not bode well for finding and punishing those responsible for the massacre.

To reinforce the power of Duarte's civilian government, and to further Congress's concern for human rights progress in the country, the United States should exert direct pressure on the Salvadoran military to complete an investigation, even though such an investigation could well implicate officers. The level of backing the United States provides Duarte in investigating this well-publicized, well-documented incident could have a great effect on Duarte's long-term credibility and on his control over the army. The United States thus has an independent reason to demand a complete investigation of the Cabanas province massacre, quite apart from the goal of reducing human rights abuses in the Salvadoran countryside. The prestige of a United States

<sup>44</sup> See *Boston Globe*, Sept. 9, 1984, at 1, col. 5.

<sup>45</sup> The photographs are on file at Americas Watch, 36 West 44th St., New York, NY 10036. Telephone interview with Aryeh Neier, Vice Chairman, Americas Watch (Nov. 1, 1984).

<sup>46</sup> See *Boston Globe*, Sept. 9, 1984, at 1, col. 5.

<sup>47</sup> See *N.Y. Times*, Sept. 13, 1984, at A3, col. 1.

<sup>48</sup> See *Boston Globe*, Sept. 9, 1984, at 1, col. 5.

supported civilian president is at stake, both inside and outside El Salvador. The identification and punishment of those responsible for the Cabanas massacre also provides an opportunity to discipline members of the military, perhaps including officers, for the murder of the most defenseless category of Salvadorans—the peasants in the countryside.

In choosing an appropriate military aid package to withhold pending punishment of the responsible individuals—the second prong of an action specific legislative approach—Congress must tread a fine line, withholding aid of sufficient importance to induce the armed forces to limit the internal loyalty code protecting brother officers, but not so important that its loss would jeopardize the government itself. One package that might meet these requirements is the administration's plan to build a second helicopter base in the eastern region of El Salvador, to continue delivery of UH-1H helicopters, and to deliver two C-47 airplanes.<sup>50</sup> Withholding this package pending the punishment of those responsible for the Cabanas massacre is especially appropriate because these weapons would leave civilian lives even more threatened than before.<sup>51</sup> If the Salvadoran government were to hold culpable officers responsible for a massacre like the one in Cabanas, it would provide some evidence that the Salvadoran army is ready to assume responsibility for the safety of civilians.<sup>52</sup>

#### IV. OBJECTIONS TO ACTION SPECIFIC HUMAN RIGHTS LEGISLATION

There are several possible objections to a proposal for action specific legislation. One general objection is that action specific conditions on military aid, whether tied to human rights or not, excessively limit the discretion of the President in conducting foreign policy. While a significant body of scholarship indicates

<sup>50</sup> This plan was confirmed in a telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 1, 1984).

<sup>51</sup> See Uhlig, *Torpedoing Salvador's Talks*, *N.Y. Times*, Oct. 24, 1984, at A27, col. 2.

<sup>52</sup> The evidence would actually be quite tenuous. Since the Cabanas massacre was better documented than most, the lesson that Salvadoran officers will take from any

that legislation of this sort is constitutional,<sup>53</sup> this objection does implicate the wisdom of the policy. Some have argued that the Executive Branch makes better foreign policy decisions because it has more information and flexibility;<sup>54</sup> the Reagan Administration has argued that action specific legislation would unduly interfere with that decisionmaking.<sup>55</sup> If used appropriately, however, action specific legislation will have only a limited effect on presidential discretion. As noted earlier, Congress can limit its use of action specific conditions on military aid, attaching such conditions only where other measures have failed. Congress can continue to use general measures such as the "gross violations" rule or the certification process. By using action specific legislation only as a supplement to more general measures, Congress can leave the President's discretion in foreign policy matters largely intact.

A second potential objection is that this proposal would give the Salvadoran government an incentive to satisfy the aid conditions by punishing scapegoats rather than the actual offenders. If the Salvadoran army wants the helicopters, and it must have a conviction by a certain date to get them, then it might conduct a kangaroo court. The aid conditions should therefore require not only convictions, but also respect for due process standards. The convictions of the National Guardsmen for the murders of the American churchwomen is an apt example. There, the United States not only set standards, but also played an active role in the pretrial investigation and in the administration of the trial.<sup>56</sup> Although interfering with the integrity of another country's judicial system would not ordinarily be desirable, the Salvadoran judicial system at this time of internal disarray apparently has little integrity to lose. According to the U.S. State Department and independent human rights organizations, the

judicial system is virtually paralyzed.<sup>57</sup> Stephen Kass, speaking for the Association of the Bar of the City of New York, has testified that "the collapse of El Salvador's criminal justice system is general and pervasive,"<sup>58</sup> and Senator Christopher J. Dodd (D-Conn.) has declared that it "isn't a judicial system at all."<sup>59</sup> Far from interfering with its integrity, United States participation would probably improve the Salvadoran judiciary.

Finally, one could argue that the proposed legislation, by limiting the discretion of the Salvadoran army, could reduce the army's ability to pursue the counterinsurgency war against the guerillas. Limiting the discretion of the army, however, is precisely the purpose of the proposal: it is meant in the long term to eliminate certain unacceptable tactics used by an army supported by the United States government. The question of whether the utility of those tactics outweighs the losses inflicted on noncombatant civilians is debatable, perhaps, but in effect it has already been settled by the international law of warfare. The 1949 Geneva Conventions, to which the United States is a signatory, prohibit the murder, mutilation, or torture of civilian noncombatants, even in the absence of a declaration of war and even if the hostilities are confined to the territory of a single country.<sup>60</sup>

## V. CONCLUSION

Just as the presidential certification requirement permitted Congress to voice its concerns about human rights with more specificity than the general policy enunciated in section 502B of the Foreign Assistance Act, action specific conditions on military aid enable Congress to achieve greater specificity than the

<sup>53</sup> Congress has the power under the Constitution "to regulate commerce with foreign nations," U.S. CONST. art. I, § 8 cl. 3, and "to make rules for the government and regulation of the land and naval forces," *id.* cl. 14; see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 114 (1972); Moeller, *Human Rights and United States Security Assistance: El Salvador and the Case for Country Specific Legislation*, 24 HARV. INT'L L.J. 95 (1983); Comment, *supra* note 3, at 176-78. But see Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid* (pt. 1), 1970 DUKE L.J. 293 (arguing that it is unconstitutional for Congress to attach any conditions to foreign aid appropriations).

<sup>54</sup> See Comment, *supra* note 3, at 178-80, for a discussion of the relative merits of these contentions in the human rights field.

<sup>55</sup> See DEP'T STATE BULL., June 1984, at 79.

<sup>56</sup> See N.Y. Times, May 25, 1984, at A11, col. 2.

<sup>57</sup> While claiming that there had been some improvement, Ass't Sec'y of State Thomas Enders has testified that "[t]he basic issue in these cases is the nonfunctioning in most of its aspects of the Salvadoran judiciary system." *House Presidential Certification Hearings II*, *supra* note 8, at 68. For the views of representative human rights organizations, see Charney, *Failed Justice in El Salvador: Most Murder Cases End in Acquittals; Trial Procedures, Juror Alienation Blamed*, L.A. Daily J., Mar. 13, 1984, at 4, col. 3; *Visiting Lawyers Find Collapse of Justice in El Salvador*, N.Y.L.J., Feb. 17, 1983, at 1, col. 2; *House Presidential Certification Hearings II*, *supra* note 8, at 105 (statement of William Doherty, Exec. Dir., American Institute for Free Labor Development); *id.* at 381 (statement of Morton Halperin, Dir. Center for Nat'l Security Studies).

<sup>58</sup> *Senate Hearing on Certification on Progress*, *supra* note 10, at 480.

<sup>59</sup> *House Presidential Certification Hearings I*, *supra* note 8, at 59.

<sup>60</sup> Geneva Conventions, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

certification requirement. They also remove Congress from the quandary of either withholding all military aid, a choice inconsistent with its security objectives, or continuing to stand aside while human rights violations persist. Congress now has an opportunity to build on the tentative results of the Specter Amendment, not only increasing the accountability of Salvadoran military officers, but also extending greater protection to the least privileged members of Salvadoran society. In time, Congress could extend action specific legislation to other countries receiving United States aid, if and when Congress determines that more general human rights policies have failed to meet their objectives.

## COMMENT

### A NEW GENERATION OF STATE TAX AND EXPENDITURE LIMITATIONS

JUSTIN J.T. HUGHES\*

GARTH B. RIEMAN\*\*

Provisions restricting government spending have been common in state constitutions since the late nineteenth century.<sup>1</sup> For the most part, these constitutional controls on state finances have been of three basic types: 1) restrictions on the finances of local government;<sup>2</sup> 2) restricted financing of specific government programs;<sup>3</sup> and 3) limits on state government deficits.<sup>4</sup> Restrictions on local governments and specific programs were often responses to serious problems. For example, state constitutional limits on local government indebtedness followed closely on the heels of municipal bankruptcies in the 1870's.<sup>5</sup> The third type of control, limits on state deficits, simply precluded states from spending more money than they raised.<sup>6</sup> Today these old forms of budgetary restrictions are very much alive.<sup>7</sup>

\* B.A., Oberlin College, 1982; member, Class of 1986, Harvard Law School.

\*\* B.A., Pomona College, 1982; M.P.P., John F. Kennedy School of Government, Harvard University, expected 1985.

<sup>1</sup> See, e.g., MINN. CONST. art. XI, §§ 4-6 (adopted 1857); N.J. CONST. art. 17, § 6, ¶ 4 (adopted 1844); see generally J. WRIGHT, TAX AND EXPENDITURE LIMITATION: A POLICY PERSPECTIVE 42 (1981) (many of these restrictions were prompted by financial panics and widespread corruption).

<sup>2</sup> See, e.g., N.Y. CONST. of 1894, art. VIII, § 10; see also J. WRIGHT, *supra* note 1, at 41.

<sup>3</sup> See, e.g., TEX. CONST. art. 7, §§ 11, 11a (1876, amended 1932) (providing a permanent fund for the University of Texas); see also E. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE 1870-1900, at 18 (1974) (education funding was least disturbed by economic crashes).

<sup>4</sup> See, e.g., WIS. CONST. art. VIII, § 5 (adopted 1848); see also J. WRIGHT, *supra* note 1, at 41.

<sup>5</sup> See, e.g., N.Y. CONST. of 1894, art. VIII, § 10; see generally E. GRIFFITH, *supra* note 3, at 20 (legislators thought the best way to ensure economical government was to make it impossible to incur large debts).

<sup>6</sup> See, e.g., MD. CONST. of 1864, art. III, § 34; MICH. CONST. of 1874, art. XIV, § 3; W. VA. CONST. art. X, § 4.

<sup>7</sup> See, e.g., ALA. CONST. art. XI, § 213; ALASKA CONST. art. IX, §§ 8, 12; ARIZ. CONST. art. IX, § 5; CAL. CONST. art. XVI, § 1 (1849, amended 1908, 1956, 1960, 1962

MEMO FROM  
NEW YORK STATE ASSEMBLY

August 6

1985

ARTHUR O. EVE  
Deputy Speaker

From Deputy Speaker Arthur O. Eve  
New York State Assembly

To Hon Clarence Mitchel, President  
Natl. Conf. of Black Legislators

Subject NYS South Africa Divestiture  
Legislation

The attached are remarks made by Assemblyman John B. Sheffer II, a white Republican from Western New York.

Assemblyman Sheffer's remarks were instrumental in winning significant Republican support for South African Divestiture legislation which I sponsored with Speaker Stanley Fink and Assemblyman Herman "Denny" Farrell, Chairman of the Assembly Banking Committee. The legislation passed the Assembly 99 to 38 with all of the Democratic Majority voting for the bill.

Assemblyman Sheffer presented quite a compelling argument for the support of divestiture. I think you will find it interesting.



The Assembly  
State of New York  
Albany



THE HONORABLE STANLEY FINK, SPEAKER  
Presiding

RECORD OF PROCEEDINGS



FRIDAY, JUNE 28, 1985

THE CLERK: Bill No. 7858, Rules Report  
No. 1101, Fink. An act to provide for the divestiture  
of State economic involvement in South Africa.

ACTING SPEAKER GRABER: Mr. Sheffer.

MR. SHEFFER: My colleagues: A few seconds ago, Mr. Green mentioned Thomas Jefferson. In all of history, there is hardly a more prophetic or haunting thought, it seems to me, than when, referring to the existence of slavery in this Country decades before the Civil War, Jefferson said, "When I reflect that God is a just God, and His justice cannot sleep forever, I tremble for my Country."

As it turned out, Jefferson's fear was well-founded; and, indeed, it was on the backs of Jefferson, Lincoln and countless others no less committed and heroic, black and white, that the effort to abolish slavery was waged; taking years, decades, bathed in the blood of thousands of Americans in that awful war, that abolition effort, founded in equality, fairness, and justice, was successful, and the battle for civil rights in this Country certainly had not ended, but had begun.

And now, today, almost a century and a quarter later, a similarly just effort against not the same but the similarly obnoxious institution of apartheid, is being waged in South Africa. The names have changed -- Tutu, Mandella, like our Country,

countless others, and like our Country, taking decades and being bathed in the blood of thousands of South Africans, that abolition effort similarly founded in equality, and justice, and fairness, goes on and on.

It seems to me that the question presented to the House by this bill is a proper one: whether there is a legitimate role for this government in the State of New York to play, to assist in that effort to break the back of apartheid. Whether there is, in the final analysis, a proper relationship between our public policy, in particular our investment policy and our moral judgment; a relationship between our government and our commitment to equality, to justice.

In studying these issues, I found that relationship to be as complex, and as difficult as any that I have ever encountered in this House. But I will tell you what -- I found something else -- that, once again, Mr. Jefferson cuts right to the heart and, at least in my mind, blew away that smoke. He said, "I, for one, should like to be able to love my government, and love justice at the same time."

I rise, Mr. Speaker, in support of this bill. In reaching that conclusion, I have had to

overcome many, many questions and concerns in my mind. Some of them have been raised tonight, but there have been three primary concerns that I would like to take time only to list: The first is whether this bill, and the divestiture effort, is really not the easy way, the purist's or the lazy man's route out of this difficult issue for the State of New York, and whether, instead, a deliberate program of selective disinvestment, putting a responsibility on the Comptroller, and an affirmative obligation on the United States companies in which we invest to desegregate the workplace in South Africa and integrate their employees; to improve and equalize working conditions; improve and equalize wages and benefits; whether we ought to prohibit loans of any type to South Africa, and prohibit South African currency in the State of New York and take the Sullivan principles, improve upon them, strengthen them, and then mandate and impose them on United States companies in which we invest; whether that more complex and deliberate course of action to improve conditions within the apartheid structure is not ultimately the more constructive and effective route for the State of New York to go.

I want to say that I was not only open to that viewpoint, I was very strongly predisposed toward it. I read of the internal reform efforts by the minority government within South Africa; of the constructive engagement effort by the United States and others from without. The last thing I wanted to do was vote for a bill that sounded good, and makes me feel good but, as a practical matter, works against the interests of the very group that we are trying to help, the black majority in South Africa. I read that the public opinion polls show a large majority of those blacks against divestiture, and I was inclined to oppose this bill and support the constructive engagement effort.

Over the last several months of looking at these issues, I have come, I guess kicking and yelling, but I think, inevitably, to the conclusion that that is not the route to go; that the constructive engagement effort, the internal reform effort within South Africa have done, essentially, nothing with respect to the basic civil rights of the black majority in South Africa.

As Mr. Seabrook, and Mr. Green and others have mentioned, 75 percent of the population in

South Africa cannot vote, and it is the 75 percent that is black. They cannot live where they want; 75 percent of the population lives on 13 percent of the land. In those black reserves, one child dies out of every two because of rampant malnutrition, this in the Country of Africa, that is the largest exporter of food.

Ten times more is paid for the education of the small minority of white children in South Africa than is paid for the large majority of black children. They cannot say what they want. There is no such animal as the First Amendment. We are talking about public opinion polls that say a large majority of blacks are against divestiture. Get this -- it is illegal, it is an act of sedition in South Africa to support or to advocate divestiture. What kind of public opinion poll do you get in a situation like that?

Beyond that, looking to the economic considerations, less than one-half of one percent of the working black population in South Africa is employed by the United States companies in which we invest. Less than one-half of one percent. So, for us to have, as our goal in the State of New York, to

tolerate the apartheid system, to constructively engage this system, with the maximum purpose of marginally improving the lot of less than one-half of one percent of the black population, cannot possibly be a worthy or appropriate goal for the State of New York; and, instead, must be to work together with our neighbors in the free world in whatever rational and effective way that we can, not to work within the system, to engage the system, but to bring the curtain down on apartheid; to bring apartheid itself to an end.

I don't pretend, I don't think Mr. Fink, or Mr. Farrell, or anyone does, that this bill is going to achieve that goal, that the State of New York's divesting will bring that about. What is much more clear is that if a progressive and compassionate State such as the State of New York, with a heritage, a commitment of individual rights and responsibility, of individual liberty, of social justice, of fairness and equality, if even we are unwilling to take this step and exercise this initiative and leadership in joining with the other states and cities that have already taken that step, and help show the way for others that have yet to take it, then what kind of

shot we are giving, what kind of chance is the free world giving to representative government, to a democratic republic in the Country of South Africa, when apartheid is abolished, as it surely will be one day.

Let's make a commitment. Let's stand for something here. Let's, through the force of our moral commitment and initiative, at this point, give democracy a shot in South Africa, lest we, instead, rely on the force of our weapons and the lives of our sons five, or ten, or twenty years from now.

The second concern that I have is as to the precedent established by this bill. There are countless issues of policy, or morality, or justice throughout the world. Surely it is true, I believe it is, that we can't speak to all of those issues in our investment policy if we are to have a stability and growth to our investments, and protection for our pensioners. A line has to be drawn someplace. The question is where is that line properly drawn that would distinguish issues of such moral compulsion that we ought to divest our assets, that we ought not to do anything less.

I can't fully answer that dilemma.

What I do believe is that this line necessarily falls on the other side of the apartheid, an institution of racial and human exploitation that so profoundly offends every foundation upon which a free society is built.

About 1,000 times in the last few months you have heard the "U. S. A. for Africa" recording. I think they make a critically important point in the middle of that song. It says: "There is a choice we're making, we are saving our own lives." I think that that is true. In this case, if we reject this bill, not on its merits, but because we are intimidated by the provocative precedent that it sets, and we are unwilling to rely on the good judgment and good faith of this House and this State in future years, it seems to me we will have abandoned that heritage and that commitment to individual rights and liberty, and social justice and equality, and fairness, for which New Yorkers have lived, and fought, and died for generations, for centuries, and for which our own generation strives, imperfectly, today. "There is a choice we're making, we are saving our own lives."

The third concern -- and I will



LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAW CIV, WASHINGTON, D.C.

August, 1984

MEMORANDUM

RE: The Constitutionality of State  
and Local Divestiture Legislation

FROM: The Lawyers' Committee for  
Civil Rights Under Law\*

In the last few years a number of state and local governments have acted to withdraw investments of pension and other governmental funds from firms doing business in South Africa. This "divestiture" by state and local governments of funds invested in firms doing business in South Africa has been criticized as unconstitutional in the halls of Congress and elsewhere. State divestment, and in particular state divestiture legislation, these critics contend, both violates the foreign commerce clause of Article I of the Constitution and intrudes

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\* The Lawyers' Committee gratefully acknowledges the assistance of Mark P. Gergen, an associate at the law firm of Arnold & Porter, in the preparation of this memorandum. Please direct all inquiries regarding this document to Gay J. McDougall, Director, Southern Africa Project, Lawyers' Committee for Civil Rights Under Law.

upon the impliedly exclusive authority of the federal government to conduct foreign relations.<sup>1</sup>

The charge that state and local divestiture legislation is unconstitutional is misguided and without basis in either constitutional principle or judicial precedent. Divestiture is grounded on the undisputed authority of a state to manage its own finances and to determine what activities it will support. State divestiture legislation does not violate the Commerce Clause, for that clause is simply not concerned with this type of state proprietary decision. Nor does such legislation impermissibly intrude upon the federal foreign relations power. State divestiture legislation violates no statute, treaty or executive agreement of the United States, and so transgresses none of the grounds upon which state action has traditionally been deemed violative of national foreign policy. Further, as a form of proprietary action state divestiture is not so disruptive

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<sup>1</sup> Larry M. Eig (Legislative Attorney, American Law Div., Congressional Research Service). Analysis of Whether the District of Columbia South Africa Investment Act (D.C. Act 5-76) Violates the Commerce Clause of the Constitution and the Exclusive Federal Power To Conduct Foreign Relations (Jan. 31, 1984) ("CRS Memorandum"); Note, Constitutionality of the No Discrimination Clause Regulating University of Wisconsin Investments, 1978 Wis. L. Rev. 1059. See also Letter of Philip M. Crane to Members of the House of Representatives, Jan. 24, 1984.

of foreign relations to warrant its prohibition on the basis of some presumed constitutional principle prohibiting state action which impairs this nation's foreign relations.

#### I. The Divestiture Movement.

In recent years opponents of apartheid in this country have sought to compel American firms to cease doing business with or in South Africa. The movement has taken a variety of forms, including shareholder corporate governance resolutions, consumer boycotts of South African products, and, most prominently, threats by governments, labor unions, and other prominent institutions to withdraw funds invested in firms or banks doing business in South Africa. The divestiture movement is important, for American businesses play a significant role in South Africa, and those businesses depend upon investments from public and private pension funds.<sup>2</sup>

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<sup>2</sup> Currently, over 6,000 American companies do business in South Africa, and total United States investment in that country is over \$14 billion. American corporations play a significant role in such important sectors of the South African economy as petroleum, automobiles, and the computer industry. See Davis, Cason, and Hovey, Economic Disengagement and South Africa: the Effectiveness and Feasibility of Implementing Sanctions and Divestment, 15 L. & Pol. Int. Bus. 529, 545-49 (1983).

[Footnote continued on following page]

The divestiture cudgel has been picked up by private organizations as diverse as Yale University, the National Council of Churches, and trade union pension funds. This private action poses few legal difficulties, even though it has been argued that divestment by a trustee of a pension fund or a charitable trust might violate the fiduciary duty to the beneficiaries of the fund or trust to maximize investment return.<sup>1</sup> More problematic is divestiture by state and municipal governments, for that raises Constitutional issues not implicated by private action concerning the power of state and local governments to play a role in shaping this nation's commercial and political relations with South Africa.

States which have divested in some fashion include

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[Footnote 2 continued from preceding page]

It has been reported that public and private pension funds own one-quarter of all publicly traded stock and control more than two-fifths of all debt capital in this country. Id. Indeed, General Motors reports that 10% of its total debt is held by public funds, such as pension systems and state cash accounts. Wall Street Journal, April 13, 1984, at 33, col. 4.

<sup>1</sup> Note Socially Responsible Investment of Public Pension Funds: The South Africa Issue and State Law, 10 N.Y.U. Rev. L. & Soc. Ch. 408 (1980-81), responds to this criticism of private divestiture.

Connecticut,<sup>4</sup> Massachusetts,<sup>5</sup> Michigan,<sup>6</sup> Nebraska,<sup>7</sup> and Wisconsin.<sup>8</sup> Cities which have acted include the District of Columbia,<sup>9</sup> Philadelphia,<sup>10</sup> San Francisco, and Wilmington. Currently, similar initiatives are pending before numerous other state legislatures and city councils.<sup>11</sup>

The decision to divest has been made by states in a variety of fashions. In Massachusetts, for example, divestiture was in the first instance done informally

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<sup>4</sup> CONN. GEN. STAT. ANN. § 3-13f.

<sup>5</sup> MASS. GEN. LAWS ANN. ch. 32, § 23. See also 1979 MASS. ACTS ch. 393, item 0612-1500.

<sup>6</sup> MICH. COMP. LAWS §§ 25.145(5); 37.2402(1)(f).

<sup>7</sup> LR43, Neb. 86th Leg., 2d Sess. (Mar. 31, 1980). It has been reported that Nebraska recently enacted formal legislation imposing some restrictions on investments of public pension funds in firms doing business in South Africa. Wall Street Journal, April 18, 1984, at 33, col. 4.

<sup>8</sup> WIS. STAT. ANN. § 36.29(1), which prohibits University of Wisconsin investments in firms which discriminate on the basis of race, has been interpreted by the Wisconsin Attorney General to prohibit investment in companies that do substantial business in South Africa.

<sup>9</sup> D.C. Law 5-50 (1984).

<sup>10</sup> Bill 1060-A (June 17, 1982).

<sup>11</sup> It has been reported that divestiture bills are now pending in 26 states -- including New York and California, the two most populous states -- and 20 cities. Wall Street Journal, April 18, 1984, at 33, col. 4; Christian Science Monitor, March. 2, 1984, at 3.

by a decision of the Massachusetts State Treasurer to no longer place new investments in firms doing business with South Africa.<sup>12</sup> Later, the Massachusetts legislature formally acted to require divestment by state owned employee pension funds.<sup>13</sup> Other jurisdictions which have enacted legislation specifically requiring divestiture include Michigan, Connecticut and the District of Columbia. In Wisconsin, on the other hand, divestiture was ordered by the State Attorney General who interpreted a statute generally prohibiting the investment of state funds in firms which practiced race discrimination as prohibiting the investment of state funds in firms doing business in South Africa.<sup>14</sup> And, in Nebraska the state's policy of divestiture was first announced by an informal legislative resolution.

The fashion by which states divest is as varied as the process by which the decision to divest is reached. Connecticut, for one, merely requires that as a condition to the receipt of investments of state funds a company doing business in South Africa must agree to adhere to the Sullivan Principles and not to give succor to

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<sup>12</sup> N.Y.U. Note, supra, n.3 at 414-15, n.66.

<sup>13</sup> MASS. GEN. LAWS ANN. ch. 32, § 23.

<sup>14</sup> 67 Wis. Op. Att'y Gen. 20 (1978).

the South African armed forces or police.<sup>15</sup> Most other jurisdictions have required complete divestment and not merely adherence to the Sullivan Principles. So, Michigan prohibits investments in "organizations operating in South Africa."<sup>16</sup> Casting its net somewhat wider, the District of Columbia prohibits investment in any company or financial institution "doing business in or with the Republic of South Africa or Namibia."<sup>17</sup>

Divestiture legislation need not even identify South Africa as its subject. The Wisconsin experience illustrates how a general legislative mandate that funds not be invested in firms that practice race discrimination could be applied to bar investments in firms operating in South Africa, which of necessity must follow discriminatory employment practices. Similar legislation has been proposed in Oregon either to prohibit investments of state funds in firms which practice or condone discrimination or, alternatively, to prohibit investment

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<sup>15</sup> CONN. GEN. STAT. ANN. § 3-13f. The Sullivan Principles require that a corporation doing business in South Africa desegregate the workplace, treat workers equally, provide training for blacks, and seek to improve the quality of workers' lives. See Davis, et al., supra, n.2 at 550-53.

<sup>16</sup> Mich. Comp. Law § 37.2501(1)(f). The Michigan statute also requires divestment from organizations operating in the Soviet Union. Id. 37.2501(1)(g).

<sup>17</sup> D.C. Act 5-76, § 2.

"in any firm which conducts substantial business operations in any country whose laws on their face require invidious discrimination on the basis of race, color or national origin."<sup>18</sup> The Michigan statute is comparable in that its stated purpose is to not "encourage or condone legally required discrimination against an individual on the basis of race or color," however the law goes on to specifically prohibit investments in firms operating in South Africa.<sup>19</sup>

The diverse forms of divestiture complicate the analysis of the movement's constitutionality. The arguments which may be made against "purer" forms of divestiture legislation -- such as the Michigan or the District of Columbia laws which simply prohibit investments in firms doing business in South Africa -- are considerably muted when directed at other forms of action. So, divestment seems less an intrusion by a state into foreign relations where it is the consequence, as it was in Wisconsin, of the implementation by a state of a general edict not to support firms which practice discrimination. At the same time, it is impractical for federal courts to oversee state investment

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<sup>18</sup> Senate bill 957, 1979 regular session.

<sup>19</sup> MICH. COMP. LAW § 37.2501(f).

activities to ensure that divestiture is not accomplished informally, as it was first done, for example, in Massachusetts. The regulation of such informal divestment would require close scrutiny of the day-to-day investment decisions made by the fund administrator and a critique of his estimate of the comparative value of various investment strategies to determine if his decisions were made for some "invidious" reason. This memorandum does not address these and similar issues raised by the more subtle forms of state divestiture. Rather, it focuses on the most straightforward issue, the constitutionality of state legislation which explicitly prohibits the investment of state funds in firms doing business in or with South Africa.

## II. The Constitutional Basis for Divestiture.

That the Constitution endows a state with authority to determine how its own funds will be invested is indisputable. The Supreme Court has recognized that an essential element of state sovereignty is the control by a state over its own finances.<sup>20</sup> Further, the Court has recognized that the Constitution leaves a state with considerable discretion to determine which activities

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<sup>20</sup> National League of Cities v. Usery, 426 U.S. 833, 855 (1975).

it will subsidize.<sup>21</sup> Divestiture implicates both of these functions. On one hand, divestiture involves a decision by the state as to how best to administer its own funds. At the same time, divestiture represents an effort by the state to invest its funds in a socially responsible manner so that it does not support the South African system of apartheid.

Critics of divestiture argue that no legitimate state interest is served by divestiture.<sup>22</sup> However, they ignore the primary justification of divestiture:

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<sup>21</sup> The issue of the constitutional restraints on subsidy choices by a state has arisen most starkly in the abortion funding cases, where the Court has held that a state may refuse to fund abortions while funding childbirth. Harris v. McRae, 448 U.S. 297 (1980); Maier v. Roe, 432 U.S. 464 (1977). In Maier v. Roe, the Court explained:

There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consistent with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader. 432 U.S. at 475-76, citing Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>22</sup> CRS Memorandum, supra, n.1 at 18, 34; Wisconsin Note, supra, n.1 at 1063-65.

that is, the interest of a state as a financier to ensure that its investments are made in a socially responsible manner. The clarion call of the divestiture movement, in both public and private quarters, has been the principle that investor is morally responsible for the use to which his funds are put. No constitutional principle bars a state from so noticing the moral consequences of its actions.

### III. The Foreign Commerce Clause.

Opponents of divestiture legislation argue that it violates the foreign Commerce Clause of Article I of the Constitution. The clause, which empowers Congress "To regulate Commerce with foreign Nations, and among the several States," has long been interpreted by the Supreme Court to prohibit, by implication, overly burdensome state regulation of foreign or interstate commerce or "parochial" state regulation which discriminates against foreign or interstate commerce.<sup>21</sup> Critics of state divestment urge that it impermissibly restricts commerce with South Africa, in violation of the Commerce Clause, and that it furthers no corresponding

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<sup>21</sup> The leading case of the modern era enforcing the dormant commerce clause is Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

state interest which might justify the action.<sup>24</sup>

The argument that divestiture legislation violates the Commerce Clause is of little weight. The Commerce Clause simply does not apply to this type of state proprietary decision. In a bevy of recent decisions the Supreme Court<sup>25</sup> held that the Commerce Clause restricts only the power of a state to regulate or tax commerce, and that the clause imposes no restrictions on the right of a state to choose who it will do business with as a buyer or a seller in the free market.<sup>25</sup> Divestiture, of course, does not involve the regulation or taxation of commerce. Rather, it simply involves the refusal by a state or local government to deal with companies or banks which support the South African system of apartheid.

Hughes v. Alexandria Scrap Corp.<sup>26</sup> is the first case to consider whether the Commerce Clause governs state action of a proprietary nature. At issue in Hughes was the constitutionality of a Maryland program providing

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<sup>24</sup> CRS Memorandum, supra, n.1 at 9-25; Wisconsin Note, supra, n.1 at 1063-66.

<sup>25</sup> White v. Massachusetts Council of Construction Employers, 75 L. Ed. 2d 1 (1983); Reeses, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

<sup>26</sup> 426 U.S. 794 (1976).

bounties to junkyards for scrapped automobiles which required out-of-state junkyards to provide more thorough documentation of ownership of the vehicle on which the bounty was claimed than was required of Maryland junkyards. A Virginia junkyard challenged the disparate documentation requirements as discriminatory against interstate commerce, invoking precedent declaring state discrimination against interstate commerce to be impermissible per se under the Commerce Clause.<sup>27</sup> The Court rejected that argument, reasoning that the purpose of the Commerce Clause was to prevent states from erecting barriers to interstate commerce by taxation or regulation, and concluding that the clause was not concerned where a state participated in the market to favor its own citizens.<sup>28</sup>

The issue of Commerce Clause limitations on state proprietary action was next raised in Reeves, Inc. v. Stake.<sup>29</sup> At issue in Reeves was a decision by South Dakota to confine the sale of cement from a state owned cement plant to state residents. As in Hughes v. Alexandria Scrap, the plaintiff argued that the Commerce

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<sup>27</sup> Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

<sup>28</sup> 426 U.S. at 807-08.

<sup>29</sup> 447 U.S. 429 (1980).

Clause prohibited such discrimination by a state against interstate commerce. The Court held otherwise, concluding that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."<sup>10</sup> The Court reasoned that the freedom of the state to restrict sales as it wished was counseled by "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."<sup>11</sup>

The issue of state proprietary action was addressed by the Court most recently in White v. Massachusetts Council of Construction Employers, 75 L. Ed. 2d 1 (1983). There the Supreme Court rejected a Commerce Clause challenge to a Boston requirement that half the workforce in municipally funded construction projects be residents of Boston -- again, on the ground that the Commerce Clause does not reach proprietary activity.

In light of this authority, the argument that divestiture might in some way violate the Commerce Clause is mystifying. Critics of divestiture have suggested

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<sup>10</sup> Id. at 437.

<sup>11</sup> Id. at 438-39, quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

that this precedent is inapposite to the issue of the constitutionality of divestiture legislation since Alexandria Scrap and its progeny concerned interstate, and not foreign commerce.<sup>12</sup> There is, however, no basis for restricting the principle that states may deal with whom they please in the marketplace to market decisions of a purely domestic character. The only court to face the question has held that the proprietary action doctrine applies to foreign commerce as well as domestic. At issue in K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Co.,<sup>13</sup> was the constitutionality of New Jersey's "Buy American" statute, which provided a preference for United States-produced goods in state procurement. The New Jersey Supreme Court upheld the law against a Commerce Clause challenge, reasoning that Alexandria Scrap immunized a state's proprietary conduct from scrutiny under that clause. In reaching that result the court specifically rejected the argument that proprietary activities were of a significantly different

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<sup>12</sup> CRS Memorandum, supra, n.1, at 21. In Reeves the Court remarked that "[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause," and observed that "Commerce Clause may well be more rigorous when a restraint of foreign commerce is alleged." 447 U.S. at 438 n.9.

<sup>13</sup> 75 N.J. 272, 381 A.2d 774 (1977), appeal dismissed, 435 U.S. 982 (1978).

tenor when they involved foreign commerce.<sup>14</sup>

The CRS Memorandum relies upon Japan Line Ltd. v. County of Los Angeles<sup>15</sup> as authority for restricting the proprietary action doctrine to the domestic context. In that case the Supreme Court held unconstitutional a California ad valorem tax imposed on shipping containers temporarily within the state which were used exclusively in foreign commerce. The Court posited that the tax might withstand scrutiny if imposed on instrumentalities of interstate commerce, but concluded that "more extensive constitutional inquiry is required" where foreign commerce was at stake.<sup>16</sup> The Court identified two factors present in the international context not present in the domestic context which compelled invalidation of the California tax. First, the Court observed that the danger of multiple taxation was greater in the international context since it had no power to allocate authority to tax among the competing jurisdictions, as it does when the dispute

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<sup>14</sup> 381 A.2d at 788. A decision by a lower court in California striking down that State's "Buy American" statute, Bethlehem Steel Corp. v. Board of Commissioners, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), predates Alexandria Scrap.

<sup>15</sup> 441 U.S. 434 (1979).

<sup>16</sup> Id. at 445-46.

over power to tax is between states.<sup>17</sup> Second, the Court reasoned that the tax undermined a significant national interest in the uniformity of treatment of cargo containers, an interest the Court found evidenced by federal statutes and treaties.<sup>18</sup>

Japan Lines does not, however, suggest that the "foreign commerce" clause might restrict the freedom of a state to deal with whom it pleases in the international marketplace.<sup>19</sup> The decision involved regulatory, rather than proprietary, state action. Proprietary state action simply does not implicate one concern identified in Japan Lines -- the risk that states might subject persons to multiple or inconsistent regulatory burdens. Moreover, as is explained fully below, divestiture does not run afoul of some pressing national interest in uniformity. Unlike the tax at issue in Japan Lines, divestiture violates no plainly expressed policy of the United States with respect to foreign

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<sup>17</sup> Id. at 446-48.

<sup>18</sup> Id. at 448, 452-53.

<sup>19</sup> The principles enunciated in Japan Lines are far from absolute. In a case decided four years later, Container Corp. v. Franchise Tax Board, 77 L. Ed. 2d 545 (1983), the Court upheld a state unitary tax imposed on subsidiaries of foreign corporations, even though the unitary tax created some risk of double taxation and was disturbing to foreign nations.

commerce.<sup>40</sup>

Critics of state divestiture further argue that such legislation violates the Commerce Clause because it advances no legitimate local interest.<sup>41</sup> However, the Supreme Court did not inquire into whether the challenged action served some legitimate interest in Alexandria Scrap and the other proprietary action cases. Instead, the Court simply held state proprietary action to be immune from scrutiny under the Commerce Clause. Thus, the nature of the interest served by divestiture legislation is seemingly irrelevant to the question of its constitutionality under the proprietary action doctrine. Moreover, divestiture does serve a legitimate state interest; that is, the interest by a state in the responsible investment of its funds. While this interest is largely moral in character, that does not diminish its legitimacy under constitutional doctrine.

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<sup>40</sup> In Japan Lines the Court emphasized that the tax was inconsistent with the policy of the United States, expressed both in treaty and statute, to eliminate impediments to the use of shipping containers in commerce. 451 U.S. at 452-53. In Container Corp., in comparison, where the tax at issue violated no explicit policy of the national government, the Court concluded that the tax was constitutional even though foreign countries were strongly opposed to it. 77 L. Ed. 2d at 571-73.

<sup>41</sup> CRS Memorandum, supra, n.1 at 18; Wisconsin Note, supra, n.1 at 1063-65. Traditional Commerce Clause analysis requires that state regulation of interstate commerce serve some local interest that outweighs the burden cast by the regulation on interstate commerce. See Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

## IV. The Foreign Affairs Power.

The second objection raised to state divestiture legislation is that such action by a state impermissibly intrudes upon the "exclusive" authority of the federal government to conduct this nation's foreign relations. Critics of divestiture legislation observe that the effect and apparent purpose of such legislation is to disappoint or injure the South African government. This, the critics of divestiture legislation contend, states may not do because the Constitution implicitly forbids them from so interfering in the foreign relations of the national government.<sup>42</sup>

It is important to keep in mind the limited ground upon which state divestiture is claimed to be objectionable. It is not argued that divestiture violates any of the few Constitutional provisions specifically defining the proper role of states in matters of "foreign relations."<sup>43</sup> It is plain that state divestiture does

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<sup>42</sup> Wisconsin Note, supra, n.1 at 1066-70; CRS Memorandum, supra, n.1 at 25-33. See also Letter of Philip M. Crane to Members of the House of Representatives, Jan. 24, 1984.

<sup>43</sup> It has been said that "where foreign relations are concerned the Constitution seems a strange, laconic document: although it explicitly lodges important foreign affairs powers in one branch or another of the federal government, and denies important powers to the States, many others are not mentioned." L. Henkin, Foreign Affairs and the Constitution (1972) 16.

not violate any express constitutional mandate. In the area of foreign relations the only powers specifically denied to states by the Constitution are the power to enter into treaties or agreements with foreign states, to engage in war, and to tax imports and exports.<sup>44</sup> Divestiture runs afoul of none of these prohibitions.

Nor is it claimed that divestiture is inconsistent with any statute, treaty or executive agreement of the United States. Rather, state divestiture legislation is consistent in principle with the national policy toward South Africa and apartheid.<sup>45</sup> The absence of any inconsistency between state divestiture legislation

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<sup>44</sup> Article I, section 10 of the Constitution provides that "No state shall enter into any Treaty, Alliance, or Confederation [or] grant Letters of Marque and Reprisal"; it requires that Congress consent to state "Imposts or Duties on Imports or Exports"; and, it mandates that states not "enter into any Agreement or Compact . . . with a foreign Power, or engage in war" without the consent of Congress.

<sup>45</sup> The official position of the United States government is that it is opposed to apartheid. Thus, the United States has imposed a ban on the export by American firms to South Africa of arms, military equipment, and any other goods which might be used by the military or police. See Mehlman, Milch, and Toumanoff, United States Restrictions on Exports to South Africa, 73 Am. J. Comp. L. 581 (1979). And, Congress is now considering legislation to impose even further restrictions on trading by American firms with South Africa. H.R. 3231, 98th Cong., 2d Sess., which was passed by voice vote in the House last fall, would amend the Export Administration Act of 1978 to ban all new investment in South Africa by United States firms and banks.

and federal law is of crucial importance, for in almost every instance where the Supreme Court has held unconstitutional an action by a state because it was overly intrusive on the federal foreign relations power, that action was found to violate some specific provision of a federal statute, treaty, or executive agreement.<sup>46</sup> The Supreme Court has ruled that in the absence of such authority federal courts are properly reluctant to presume any inconsistency between an action by a state and federal foreign policy requiring invalidation of the action.<sup>47</sup>

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<sup>46</sup> So, in Hines v. Davidowitz, 312 U.S. 52 (1941), the Court struck down a state alien registration system because it conflicted with the federal system. The Court expressly declined to address the argument that ". . . the federal power in this field, whether exercised or unexercised, is exclusive." Id. at 62. Similarly, two other cases which are prominently cited as support for the proposition that the federal foreign relations power is exclusive -- United States v. Pink, 315 U.S. 203 (1942), and United States v. Belmont, 301 U.S. 324 (1937) -- involved the refusal by a state to honor the claim of the Soviet Union to the domestic assets of a nationalized Russian company in contravention of an executive agreement that the Soviet claim would be honored by this nation.

<sup>47</sup> Recently, in Container Corp. v. Franchise Tax Board, 77 L. Ed. 2d 545 (1983), the Supreme Court stated that it would not strike down a state tax on multi-national enterprises, despite the tax's impact on the foreign relations of the United States, where the tax violated no act of Congress and was not opposed by the Justice Department as *amicus curiae*. The Court concluded that, while not dispositive, the absence of such authority "does suggest that the foreign policy of the United States -- whose nuances we must emphasize again, are much more the province of the Executive Branch and Congress than of this Court -- is not seriously threatened" by the tax. Id. at 573.

Because of the absence of any contrary constitutional provision, federal statute, or treaty, the argument that state divestiture in some way intrudes upon the foreign relation power of the federal government rests on the extreme premise that states are simply prohibited by the Constitution from acting in a manner which might irritate a foreign government. There is little authority to support the argument that the Constitution so inhibits the power of states. Rather, by precedent and historical practice, it is plain that states are free to undertake actions done in a traditional capacity even though their action injures or offends a foreign government. Thus, it has been held that a state may adopt reciprocal legislation conditioning the right of an alien to inherit property on the grant of a similar right to United States citizens by the alien's country.<sup>48</sup> A State court may examine the fairness of judicial process of a foreign country to determine if it will enforce a judgment rendered there, and in choice of law a state court may refuse to apply foreign laws it finds distasteful.<sup>49</sup> And, state legislatures

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<sup>48</sup> Clark v. Allen, 331 U.S. 503 (1947); Gorun v. Fall, 287 F. Supp. 725 (D. Mont. 1968), affirmed, 393 U.S. 398 (1969).

<sup>49</sup> See, e.g., J. Zeevi & Sons, Ltd. v. Grandlavs Bank, Ltd., 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 158, cert. denied, 423 U.S. 866 (1975) (confiscation of funds  
[Footnote continued on following page]

and state officials have traditionally used their office to criticize the actions of foreign governments. No one has ever suggested that this practice, which has long been a part of the process by which the United States' foreign policy is shaped democratically, might potentially be constitutionally infirm.<sup>51</sup>

In only one case has the Supreme Court held an action by a state forbidden on the basis of its impact on the foreign relations of the United States where the action did not also violate some federal statute or treaty. That case is Zschemig v. Miller,<sup>51</sup> a 1968

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[Footnote 49 continued from preceding page]  
by Uganda not recognized as a defense in action for reimbursement); Uniform Foreign Money-Judgments Recognition Act Sec. 4(a)(1) (foreign money judgment will not be recognized if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.") The Supreme Court has consistently recognized that a state need not enforce a foreign judgment or apply a foreign law in its courts "where to do so would be repugnant to good morals." Bond v. Hume, 243 U.S. 15, 21 (1917). See also United States v. Pink, 315 U.S. 203, 231 (1942) (noting "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 Federal statute or treaty does not dictate otherwise.)

<sup>51</sup> Professor Henkin observes that the State Department has little "influence to prevent embarrassing 'sense resolutions' of state legislatures on foreign issues." Henkin, supra, n.43 at 247.

<sup>51</sup> 389 U.S. 429 (1968).

decision.<sup>52</sup> In Zschernig, the Supreme Court held unconstitutional an Oregon law which escheated alien inheritances where the alien's homeland practiced confiscation of private property, did not permit United States citizens to remove inheritances to the United States, or did not grant United States citizens a reciprocal right of inheritance. The Court held the Oregon law was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."<sup>53</sup> In reaching that result, the Court focused on several aspects of the Oregon law it thought particularly damaging to this nation's foreign relations. Most notably, the Court stressed repeatedly that it thought it improper for state court judges to closely examine and criticize the practices of foreign governments.<sup>54</sup> In addition, the Court remarked upon the notoriety of such inheritance statutes<sup>55</sup> and observed that in a few cases the administration of such laws had provoked protests from

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<sup>52</sup> Louis Henkin has said that "[u]ntil 1968 there was no sign of . . . some larger principle limiting the States in matters that relate to foreign affairs." Henkin, supra, n.43 at 238.

<sup>53</sup> Id. at 432.

<sup>54</sup> Id. at 435-40.

<sup>55</sup> Id. at 440.

foreign governments.<sup>56</sup> In sum, the Court concluded that the Oregon law could not stand since it would "impair the effective exercise of the Nation's foreign policy" and would have "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."<sup>57</sup>

Zschernig did not establish an absolute rule barring states from acting in a manner that might influence the foreign relations of the United States. Rather, shortly after Zschernig was decided, the Court summarily reaffirmed the right of a state to adopt reciprocal inheritance legislation.<sup>58</sup> Thus, it is generally agreed that Zschernig requires a careful balancing of the interest of the state in a challenged action with the adverse impact that action has on foreign relations: if a state action has a significant adverse effect on foreign relations without advancing some correspondingly weighty state interest it is forbidden.<sup>59</sup>

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<sup>56</sup> Id. at 437 n.7.

<sup>57</sup> Id. at 440-41.

<sup>58</sup> Gorun v. Fall, 287 F. Supp. 725 (D. Mont. 1968), affirmed, 393 U.S. 398 (1969).

<sup>59</sup> See Henkin, supra, n.43, at 241; Maier, The Basis and Range of Federal Common Law in Private International Matters, 5 Vand. J. Trans. L. 133 (1971); Developments, The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 245 (1968).

So, in Zschernig the Oregon statute could not stand since the seizure by a state of an alien's property out of distaste for the form of government of the alien's homeland significantly disturbed this Nation's foreign relations without advancing any proper state interest.

[Footnote 59 continued from preceding page]

Zschernig has been applied, most prominently, in cases concerning the constitutionality of state "Buy American" legislation, which directs that a preference be given to American-made products in state procurement. In a decision rendered shortly after Zschernig, a lower state court in California held that state's statute unconstitutional because of its impact on foreign relations. Bethlehem Steel Corp. v. Board of Commissioner of Dept. of Water & Power, 276 Cal. App. 2d 221, 80 Cal. Rptr. 300 (1969). The New Jersey Supreme Court, on the other hand, has upheld that state's law, rejecting the argument that state "Buy American" legislation unconstitutionally interfered in the federal foreign relations power. K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm., 75 N.J. 272, 381 A.2d 774 (1977). The court reasoned that, unlike the law condemned in Zschernig, state "Buy American" legislation did not involve inquiry into or criticism of the ideology of a foreign nation. The court also noted the law's consistency with federal policy. Id. at 783-84.

Similar questions concerning the power of a state to interfere in foreign relations have been raised in cases involving an attempt by a city to prohibit the publication of advertisements for employment in South Africa. New York Times Co. v. New York, 41 N.Y.2d 345, 361 N.E.2d 963 (1977); see Note, 16 Harv. Int. L.J. 456 (1975); Note, 15 Va. J. Int. L. 473 (197 ), an effort by a state to investigate or penalize businesses which comply with the Arab boycott against Israel, General Elec. Co. v. New York State Assembly Comm. on Governmental Operations, 425 F. Supp. 909 (N.D.N.Y. 1975); see Comment, The Arab Boycott and State Law: The New York Anti-Boycott Statute, 18 Harv. Int. L.J. 343 (1977), and the denial by a state university of admission to Iranian students in retaliation for Iran's seizure of the American embassy, Tayvari v. New Mexico State University, 495 F. Supp. 1365 (D.N.M. 1980).

By this calculus, state divestiture is easily distinguishable from the action condemned in Zschernig. The interest of a state in divestiture is legitimated by the presumptive right of a state to manage its own finances,<sup>60</sup> to determine what activities it will subsidize,<sup>61</sup> and to choose with whom it will deal in the marketplace.<sup>62</sup> Thus, a state is legitimately interested in divestiture. At the same time, because divestiture is proprietary action, and involves neither regulation nor any other onerous intrusion by a state into private affairs, the burden cast by divestiture on international relations is slight.<sup>63</sup> This is in marked distinction with Oregon's seizure of private property in Zschernig, which represented state interference in private affairs of the most extreme sort. At the same time, divestiture poses little threat to the foreign policy of the United States, for it is

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<sup>60</sup> National League of Cities v. Usery, 426 U.S. 933, 955 (1976).

<sup>61</sup> Maher v. Roe, 432 U.S. 464, 475-76 (1977).

<sup>62</sup> Reeves Inc. v. Stake, 447 U.S. 429, 438-39 (1980).

<sup>63</sup> Both in the abortion funding cases, supra, n.21, and the proprietary action cases, text and notes accompanying supra, n.25 to n.31, the Supreme Court reasoned that states enjoyed wide discretion in undertaking such activities because they involved little disruption of private affairs.

not inconsistent with this nation's policy towards South Africa.<sup>64</sup> For these reasons, state divestiture does not violate the principle of implicit prohibition of state interference with foreign relations erected in Zschernig.

#### CONCLUSION

States may freely adopt legislation restricting investment of state pension or other funds in firms which do business in or with South Africa. The action is grounded upon the authority of a state to manage its own finances and to determine what activities warrant its subsidization. Divestiture does not violate the Commerce Clause, for that clause simply is not concerned with proprietary state action. Divestiture does not improperly interfere in the conduct of foreign relations by the federal government, for divestiture violates no federal law and advances legitimate state interests without being overly disruptive of foreign relations.

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<sup>64</sup> In Container Corp., supra, n.47 and K.S.B. Technical Sales Corp., supra, n.60, the courts emphasized the absence of any manifest inconsistency between the state action at issue and the foreign policy of the United States as reason for not finding those actions disruptive of the foreign policy of the United States.

SUMMARY CHART ON PUBLIC FUND DIVESTMENT

Since 1976, binding measures restricting public fund investment related to South Africa have been enacted in 7 states, 28 cities, 3 counties and one U.S. Territory (Virgin Islands). These measures mandate a total of 1.8 billion dollars in divestment from U.S. corporations and banks involved in South Africa. Below is a summary chart of the binding measures that have been passed.

<u>STATE</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Connecticut	Divestment from companies that sell strategic products or services to the South African govt. or are not in top two categories of Sullivan Principles.	June 1983	\$70 million
Iowa	Divestment of pension and educational funds from all companies investing in South Africa not in top two categories of Sullivan Principles; and from those that supply strategic products to the South African military or police; and from banks with loans to S.A. or companies doing business there.	May 31, 1985	\$110 million
Maryland	1) No deposit of state funds in banks making loans to the South African Govt or national companies.	May 29, 1984	Not determined
	2) moratorium on investment of state funds in companies which invest in S.A. but do not meet top two categories of Sullivan Principles; Maryland-National Capital Park and Planning Commission has adopted a policy barring transactions with firms doing business in or with S.A.	April/June 1985	Not determined
Massachusetts	Divestment of all state pension funds from firms doing business in South Africa.	January 4, 1983	\$90 million
Michigan	1) No deposits of state funds in banks making loans to South Africa.	1980	Not determined
	2) Public educational institutions required to sell all investments in companies doing business in South Africa.	1982	Not determined

<u>STATE</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Nebraska	Divestment of pension funds not meeting highest rating of Sullivan Principles.	April 9, 1984	Not determined
Wisconsin	investment of state educational funds in corporations doing business in South Africa violated the state civil rights act.	May 19, 1977	\$11 million
Virgin Islands (Territory)	Territorial Senate passed bill to divest territorial pension fund of South Africa linked holdings within two years.	October 1984	Not determined (Total size of fund \$35 million, SA-linked part not specified.)
<u>CITY/COUNTY</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Amherst (MA)	Town Council voted to divest from companies doing business in South Africa or producing nuclear weapons.	October 1984	Not determined
Atlantic City (NJ)	Divestment within two years of city funds in companies operating in South Africa and banks with loans to South Africa.	April 1983	Not determined
Berkeley (CA)	Binding referendum removed funds from banks doing business in or with South Africa.	April 17, 1979	\$12 million
Boston (MA)	Prohibition on investment of city funds in any bank with outstanding loans to South Africa or Namibia or any company doing business in these countries.	January 7, 1985	\$11 million
Burlington (VT)	divestment ordinance of city funds	April 30, 1985	\$1.8 million
Cambridge (MA)	Cambridge Retirement Board will make no new investments in companies which do business in South Africa.	February 1980	Not determined

<u>CITY/COUNTY</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Charlottesville (VA)	Divestment of pension funds from firms that have not signed the Sullivan Principles.	December 1984	\$700,000- \$1 millio
Cuyohoga County (OH)	County Investment Board banned from investing public funds in banks lending to the South African Govt.	March 12, 1984	Not determined
Davis (CA)	No further investment in banks doing business in South Africa.	1980	Not determined
East Lansing (MI)	City Council measure for selective purchasing to favor companies not linked to South Africa.	August 3, 1977	Not determined
Grand Rapids (MI)	City Commission prohibits deposit of idle funds in banks loaning to South African Govt or to companies doing business in South Africa.	October 26, 1982	Not determined
Hartford (CT)	Prohibition of investments of city pension funds in firms operating in South Africa that have not signed the Sullivan Principles.	1980	Not determined
Madison (WI)	Ordinance on selective purchasing urges city to seek contracts with firms not in South Africa; investment in South Africa was an enforceable reason for ending the contract.	December 1976	Not determined
Miami (FLA)	Divestment ordinance for withdrawal of city funds from U.S. firms in South Africa or Namibia and from banks lending to the South African or Namibian Govts. or to SA national corporations.	February 14, 1985	Not determined

<u>CITY/COUNTY</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Montgomery County (MD)	no investment of county pension fund in South African related holdings	March 1985	Not determined
Newark (NJ)	1) Ordinance mandating divestment from banks or companies with loans or investments in South Africa or Namibia to be carried out within two years. 2) A ban on city purchasing from companies operating in South Africa or Namibia.	August 1984	Not determined
New Orleans (LA)	all city agencies must report to the New Orleans City Council on their deposits in banks doing business with the South African Govt or companies doing business in South Africa; and a recommendation that no city funds remain on deposit in these banks.	May 22, 1985	Not determined
New York (NY)	1) NYC Employee Retirement System adopts 5-year phased divestment plan from companies operating in South Africa. 2) City Council prohibits deposit of city funds in banks which make loans to the South African Govt or which advertise or promote the Krugerrand. 3) A ban on city purchases of South African goods and severe restrictions on purchases from U.S. firms which sell to the South African military, police, prisons or Ministry of Cooperation.	March 15, 1985	\$665 million
Oakland (CA)	City Council bans new investments of idle funds in financial institutions doing business with South Africa.	December 1984	Not determined

<u>CITY/COUNTY</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Philadelphia (PA)	Divestment ordinance providing for withdrawal within two years of city pension funds from any companies in South Africa or any bank making loans to the Govt of South Africa or Namibia.	June 4, 1982	\$100 million
Pittsburgh (PA)	Pension Board voted to adopt divestment policy affecting funds in corporations doing business in South Africa.	January 17, 1985	Not Determined
Rahway (NJ)	Ordinance prohibits deposit of city funds in banks with loans to the South African Govt, national companies, or to any corporation operating in South Africa.	June 1984	Not determined
Richmond (VA)	No further investment of public funds in companies doing business in or with South Africa.	June 10, 1985	Not determined
Rockland County (NY)	Ban on deposit of county funds in Barclays Bank due to its operations in South Africa and support of British rule in Northern Ireland.	1984	Not determined
San Francisco (CA)	City Retirement Board votes to fully divest city pension funds from companies operating in South Africa; to be implemented over two years.	April 30, 1985	\$335 million
San Jose (CA)	No further buying of securities issued by the South African Govt, South African companies or U.S. firms with South African subsidiaries; and no further links to banks that invest in or do business with South Africa or its companies or that lend money to U.S. companies operating in South Africa.	June 1985	Not determined

<u>CITY/COUNTY</u>	<u>NATURE OF LAW</u>	<u>DATE ENACTED</u>	<u>AMOUNT AFFECTED</u>
Santa Cruz (CA)	Ordinance prohibiting the investment of public funds in banks doing business in or with South Africa.	November 8, 1983	Not determined
Stockton (CA)	Divestment of state funds from South Africa linked holdings.	June 1985	Close to \$1 million
Washington DC	City Council ordinance to divest DC pension fund from South Africa related holdings over two years.	October 4, 1983	\$70-80 million
Wilmington (DE)	Divestment of pension funds from companies doing business in South Africa.	July 18, 1982	\$400,000
Youngstown (OH)	City Council ordinance mandates withdrawal of city funds from banks investing in South Africa or in institutions related to the South African or Namibian Govt,	Jan. 24, 1985	Not determined

Inadvertently Omitted:

Cincinnati	Divestment of city funds from all companies which do business in South Africa.	Jan 16, 1985	Not determined
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BILL SHEFFIELD, GOVERNOR

AGENCY HEADQUARTERS  
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(907) 276-7374

NORTHERN REGION  
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FAIRBANKS, ALASKA 99701  
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SOUTHEASTERN REGION  
POUCH A4  
314 GOLDSTEIN BUILDING  
JUNEAU, ALASKA 99801  
(907) 465-3560

## HUMAN RIGHTS COMMISSION

August 15, 1985

David Rose  
Executive Director  
Alaska Permanent Fund Corp.  
Pouch 4-100  
Juneau, AK 99811


Dear Mr. Rose:

At their recent meeting in Valdez, Alaska on July 26, 1985, the Human Rights Commissioners passed a resolution asking "that Permanent Fund monies should not be invested in South Africa".

This resolution was passed unanimously after a brief discussion the apartheid policy of the South African government and the resultant oppression of Blacks in that country.

The Commissioners asked that you be advised of their resolution.

Sincerely,

  
Janet L. Bradley  
Executive Director

CLB:5

cc: The Honorable Bill Sheffield, Governor  
Members of the Alaska Legislature  
Jim Kelly, Research and Liaison,  
Alaska Permanent Fund Corp.

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# American Committee On Africa

198 Broadway, New York, N.Y. 10038 / (212) 962-1210 / Cable AMCOMMAF

MEMO

## FINANCIAL CONSEQUENCES OF DIVESTMENT FROM SOUTH AFRICA

Prepared by

Jennifer Davis

Executive Director

November, 1983

In twenty-five states, legislation is pending to prohibit the investment of public pension funds in U.S. corporations operating in South Africa. Connecticut and Massachusetts are the first states to pass this legislation and have started the divestment process. Preliminary data indicates that these states are not losing money through divesting but rather are realizing a net gain. This experience together with previous computerized projections should meet frequently raised fiduciary reservations about divestment.

There are two methods of assessing the financial consequences of divestment: by examining the results obtained by those entities which have already divested, and by theoretical models, using modern portfolio theory to construct models to project the long term performance of portfolios with and without South Africa-related stocks. We have assembled and are enclosing both kinds of evidence, all leading to the same conclusion; divestment can be carried out without adverse financial consequences.

### Entities Which Have Divested

#### The State of Connecticut

The State of Connecticut passed divestment legislation on June 9, 1982. As of July 30, 1983, the state had divested itself of \$39,025,078 worth of equities and fixed income investments, and realized a total gain of \$5,716,817.00. The State Treasurer's Office further reports that as of July 30, state funds remained



CONNECTICUT  
SALE OF SECURITIES NOT IN COMPLIANCE WITH SOUTH AFRICAN INVESTMENT LAW

<u>Corporation</u>	<u>Units/ Per Value</u>	<u>Inventory</u>	<u>Redemption</u>	<u>Gain/Loss</u>
<u>EQUITIES</u>				
Air Products & Chemicals (Non-Signatory)	159,127 shs	\$ 5,040,079.	\$ 5,153,392.	\$ 113,313.
Alexander & Alexander (Non-Signatory)	100,900	2,723,208.	2,301,065.	(422,143.)
American Home Products (Non-Signatory)	56,900	1,716,104.	2,543,431.	827,327.
Coca-Cola Company (Rating)	85,000	3,283,550.	4,441,151.	1,157,601.
Dun & Bradstreet (Non-Signatory)	25,000	1,659,000.	1,939,460.	280,460.
Eli Lilly & Company (Rating)	52,000	2,908,880.	2,728,824.	(180,056.)
Martin Marietta Corporation (Non-Signatory)	60,000	2,187,000.	2,380,554.	(806,446.)
Mabisco Brands (Rating)	50,000	1,600,000.	1,708,443.	108,443.
VF Corporation (Non-Signatory)	106,000	2,282,180.	4,664,752.	2,382,572.
Warner Communications (Rating)	90,000	2,332,800.	4,155,361.	1,822,561.
TOTAL EQUITIES		<u>\$25,732,801.</u>	<u>\$31,016,433.</u>	<u>\$ 5,283,632.</u>
<u>FIXED INCOME</u>				
Martin Marietta Corporation (Non-Signatory) 7% 3/15/11	2,800,000.	\$ 1,507,380.	\$ 1,507,520.	\$ 140.
Motorola, Inc. (Rating) 8% 10/1/07	1,250,000.	1,111,830.	913,625.	(198,205.)
Upjohn Company (Rating) 14% 6/1/91	5,000,000	4,956,250.	5,587,500.	631,250.
TOTAL FIXED INCOME		<u>\$ 7,575,460.</u>	<u>\$ 8,008,645.</u>	<u>\$ 433,185.</u>
TOTAL EQUITIES & FIXED INCOME (6/9/82 to 7/30/83)		<u>\$33,308,261.</u>	<u>\$39,025,078.</u>	<u>\$ 5,716,817.</u>

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**



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page two

invested in 56 corporations covered by the divestment law with an inventory value of \$274,821,288.00 and a current market value of \$344,610,271.00.

The list of securities which have been sold to date are on the next page.

#### The State of Massachusetts

In January 1983, the State of Massachusetts passed legislation to sell from their public pension fund portfolio all investments in firms doing business in South Africa. We do not have exact financial information on the results because the State Treasurer has taken the position that Massachusetts law forbids him to report the results of individual pension fund transactions. However, we are enclosing a letter from Governor Michael Dukakis stating, in part, "It has been our experience that divestiture not only makes a strong moral statement against apartheid but divestiture has proven to have had no significant impact on our pension earnings."

We are also enclosing a projection by Franklin Research that through arbitrage (bond swapping) Massachusetts could realize a \$2,377,987.00 net gain through divestment if the transactions had been effective as of November 30, 1982. We are also enclosing a commentary on this research in Business and Society Review.

#### Michigan State University

In 1979 Michigan State University sold all \$12,075,492.00 of South Africa related investments in its portfolio. In 1980 they produced an analysis which we enclose comparing the sales proceeds with the 1980 value of the stock and evaluating the replacement investments by deducting their total cost from their 1980 value. The report concludes that the University had made \$100,092 more on the sale of the South Africa related investments than they would have been worth in 1980 and that the value of the replacement stocks in 1980 exceeded the total cost of acquiring them by \$2,034,355.00. It is therefore safe to say that Michigan State University had made a profit of over \$2,000,000 by divesting from South Africa-related corporations.

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## The City of Philadelphia

In June of 1982 Philadelphia became the first major American city to pass an ordinance calling for the sale of all investments in South Africa-related corporations. In testimony before the Washington D.C. City Council, Philadelphia City Councilmember Joan Specter declared that the law affects securities valued at approximately \$80 million out of the city's \$600 million portfolio. She testified that although the law allows two years to complete the divestiture about one-half the sales required had been completed in the first nine months after the law took effect. The city treasurer reported no difficulty in trading the South African-related holdings for equally profitable securities, Mrs. Specter testified.

### Portfolio Projections

The other major means of assessing the financial consequences of divestment is to examine projections of probable portfolio performance once South Africa-related securities have been excluded. We have access to three studies in which an investment service was asked to examine the probable consequences of divestment for a particular fund. Described below are projections for the California Retirement Systems, and the pension funds of Connecticut and Washington, D.C.

### State of California

In 1980 the Council on Economic Priorities issued a report on the possible consequences of excluding securities of corporations which were Equal Employment Opportunity violators or who invested in South Africa from the California State Teachers' Retirement System and the Public Employees Retirement System.

The Council constructed a computer model to evaluate the performance of a portfolio without the South Africa-related corporations or EEO violators. They compared the Standard & Poor (S&P) 500, a widely used stock market proxy, with the S&P

500 minus 132 corporations excluded by these standards. They then studied the degree of diversification of the two portfolios, the amount of non-market risk, and the expected return on the post-exclusion portfolio. On diversification they concluded that "over 99% of the movement of each portfolio can be accounted for by movements in the market. In the practical world of portfolio management, this is an extremely high degree of diversification:"

They then compared the amount of non-market risk in the excluded portfolio with that found in mutual funds designed to perfectly track the S&P 500. They found that while these mutual funds usually have a non-market standard deviation of around 1.5% the excluded portfolio's non-market deviation would be 1.9% effectively increasing the non-market risk by .4%. In contrast the median non-market deviation for all institutional portfolios is about 6%.

They concluded that "the expected annual returns on the post-exclusion portfolios are not lower than the baseline portfolio's (S&P 500) expected return." Actually the projected returns were a little higher (1.01 times return on the market versus 1.00 times the market). The study found that the increase in non-market risk for exclusion in a bond portfolio will be even less than with the equity portfolio. They said the lost opportunities for diversification in the bond market would be smaller than with stocks.

In summarizing their findings, the Council reported that "Exclusion only produces a very small increment of unnecessary risks. The universe of still available securities remains large enough to construct a highly efficient portfolio." This study, Pension Funds & Ethical Investment, is available for \$35 from the Council on Economic Priorities, 84 Fifth Avenue, NYC, 10011.

#### The State of Connecticut

The United States Trust Company did a similar analysis of the considerably smaller Connecticut state pension fund in 1982, prior to the passage of that state's divestment legislation.

page five

They concluded that if all South Africa -related stocks had been sold at the end of 1981 the state would have realized a net gain of \$17,125,893. "Consequently we assume that there would have been no adverse accounting consequences which would have required larger future contributions from the taxpayers."

They felt the more significant question was that of finding suitable alternative investments. They explored this question by comparing the performance over the past ten years of the S&P 500 and the 380 companies in the S&P 500 which do not do business in South Africa. They found that the 380 had outperformed the entire index for the past ten years but not to a statistically significant extent. They concluded that "there is no more risk in owning the 380 than in owning the entire 500."

Washington D.C.

Washington D.C. passed a divestment ordinance in October of this year. Before doing so they asked Franklin Research and Development Corporation to prepare an analysis of the consequences for their portfolio. Franklin Research reported that the pension fund would have to sell their investments in the common stock of 31 companies. If those stocks had been sold as of December 31, 1982 a gain of about \$2,000,000 would have been realized.

They further ran nine year comparisons of the performance of the companies investing in South Africa versus those that did not. The result was that while the South Africa-related corporations had a growth in earnings and price appreciation of 8% a year, those that did not invest in South Africa averaged 11.2% a year. The South Africa-related stocks were selling at about 17 times earnings while those not involved in South Africa were selling at 24 times earnings.

Noting that of the approximately 6,350 companies listed on the major exchanges in this country, fewer than 400 do business in South Africa, Franklin Research stated, "In our opinion there is no material investment disadvantage created by excluding less than 1% of the listed companies from the approved investment list."

Companies like Waste Management, Polaroid, Wang Labs, Signal, Ralston Purina, Quaker Oats, and Digital Equipment come to mind as alternatives."

Risk of Investing in South Africa

In considering divestment one must also weigh the risks posed by continued investment in South Africa. We are enclosing a document from Business Environment Risk Information (BERI S.A.), a Geneva-based firm specializing in risk analysis for international firms.

BERI S.A. feels that operational and socio-political problems will become more acute in South Africa throughout the 1980's. They cite continued black labor unrest, the expense of protecting against sabotage, the increased cost of labor, and increasing bureaucratic interference by the government, especially "security" measures which prohibit local managers from reporting many aspects of their operations to headquarters abroad.

They recommend that management: 1. de-emphasize South African operations and prepare to shift production elsewhere if possible; 2. protect industrial sites and personnel against violence; 3. consider the costs of exclusion from other African markets because of South African operations, and the cost and management difficulties of handling stockholder initiatives and adverse publicity from anti-apartheid groups; 4. examine the possibility of an orderly withdrawal early in the decade to avoid financial losses.

This report suggests another factor in the divestment equation: the risk to pension fund of reliance on South Africa-related investments. Certainly this is something that must be carefully weighed by anyone who proposes to maintain South Africa-related corporations in their pension fund portfolio.

CONNECTICUT

REPORT TO THE INVESTMENT ADVISORY COUNCIL ON SOUTH AFRICAN INVESTMENT LAW

(7/1/82 to 1/31/83)

On June 9, 1982 Governor William O'Neill signed into law Public Act #82-324, "An Act Concerning the State Investment Policy in Relation to South Africa." The new state law directs the Treasurer of the State to disinvest all state funds invested in companies doing business in South Africa that do<sup>A</sup> meet three specific guidelines, as follows:

NOT

- 1) Corporation must be a Sullivan signatory with a rating in the top two categories;
- 2) Corporation does not supply strategic products and services for use by the South African government, police or military, and;
- 3) Corporation must recognize the right of all South African workers to organize and strike for economic and social objectives.

The passing of the South African investment law distinguished Connecticut and established the state as a role model for other public pension funds in the area of social responsibility. The Treasurer, recognizing the importance of meticulous analysis and implementation, assigned the South African project to his executive assistant, and hired a Yale University School of Organization and Management graduate student as a summer intern, charging them with the responsibility of reviewing the state's portfolio for compliance with the new investment law, and developing an ongoing method of monitoring corporate activity. These efforts to analyze the portfolio and establish procedures were coordinated with the Investment Division and the Investment Advisory Council.

Discussions were held with a number of data gathering organizations that provide much of the research in the broad area of social responsibility, including monitoring U.S. corporate activity in South Africa. Many of these organizations are assisting in developing the Treasury Department's research files which are basic to the implementation of the law. In addition to developing an ongoing data exchange network, invaluable advice and information has been received from the following organizations:

African American Labor Center  
American Committee on Africa  
Corporate Data Exchange  
Center for Economic Organizing

Council on Economic Priorities  
Connecticut Anti-Apartheid Committee  
Interfaith Center on Corporate Responsibility  
Investor Responsibility Research Center  
International Council for Equality of Opportunity Principles, Inc.  
Washington Office on Africa  
United Nations Centre on Africa

Corporations in the state's portfolio have been sorted according to their Sullivan performance rating and a preliminary review of the products and services offered in South Africa has been conducted. Information about their compliance with Standard III, recognizing the right to organize and strike, will take longer to gather and will be conducted in a company by company review. This initial review revealed that on July 30 Connecticut had investments in 230 corporations, 70 or 30% of them doing business in South Africa.

At the end of July, 1982, the Treasurer sent letters to the Chief Executive Officers of the 230 corporations in the portfolio advising them of the law and requesting an official company response. The 70 identified South African investors were requested to return a questionnaire dealing with the three specific guidelines in the law. Companies were given a period of five weeks to respond, allowing them the time to present the request to their Boards, if desired. By the end of the September, 75% of the companies contacted had responded, at which time a second request was made to companies doing business in South Africa that did not respond to the first. Each of the 70 corporations was reviewed for compliance.

An in-house system of reviewing prospective new buys for compliance was established to assist the state's professional investment managers, and to ensure that current and future purchases would be in compliance with the law.

A new position, Investment Officer - Social Compliance, has been established in the Investment Division and is accountable for the development, implementation and management of the Treasurer's Corporate Social Responsibility Program. The appointment of a candidate has been made, and clears the way for a systematic approach to divesting the State's portfolio of all investments which fail to meet compliance guidelines.

The intent of the legislation is to encourage positive change in the social and environmental practices of companies. The Investment Officer-Social Compliance has the initial responsibility of meeting with targeted companies to determine their continued eligibility and develop a schedule of divestment for those that cannot or will not comply.

The Investment Advisory Council, which has monitored the process monthly, has established a sub-committee on social responsibility that will assist in policy and make recommendations concerning the schedule of divestment and other social responsibility issues such as proxy voting.

Of the 70 corporations reviewed for compliance with the law, 56 are currently held in the portfolio. Total dollar values for portfolio held securities of corporations that are in South Africa:

	<u>Inventory</u>	<u>Market</u>
7/30/82 Equities	219,711,700	210,713,500.
7/30/82 Fixed Income	<u>140,232,300.</u>	<u>118,870,700.</u>
7/30/82. TOTALS	359,994,000.	329,584,200.
1/31/83 Equities	206,267,434.	273,562,989.
1/31/83 Fixed Income	<u>87,826,138.</u>	<u>76,360,767.</u>
1/31/83 TOTALS	294,093,573.	350,423,756.

Of the 70 corporations identified as doing business in South Africa, and reviewed for compliance with the law, 42 are in compliance, while 28 corporations have not met the requirements of the law and have been placed on an "Avoid List." Being on the "Avoid List" means that our position in the corporation will not be increased, and if we cannot convince the corporation to comply with the law, the security will be sold.

To date, eight corporations have been sold off the "Avoid List". Total dollar values for sales, as follows:

	<u>Inventory</u>	<u>Redemption</u>	<u>Gain/(Loss)</u>
Equities	18,126,043.	22,565,774.	4,439,731.
Fixed Income	<u>2,619,210.</u>	<u>2,421,145.</u>	<u>(193,065.)</u>
TOTALS	20,745,253.	24,986,919.	4,241,666.

The remaining 22 corporations on the "Avoid List" have total dollar values, as follows:

	<u>Inventory</u>	<u>Market</u>
Equities	66,125,904.	83,800,113.
Fixed Income	<u>32,439,548.</u>	<u>30,848,327.</u>
TOTALS	98,565,452.	114,658,140.

SALE OF SECURITIES NOT IN COMPLIANCE WITH SOUTH AFRICAN INVESTMENT LAW

<u>Corporations</u>	<u>Units/ Par Value</u>	<u>Inventory</u>	<u>Redemption</u>	<u>Gain/(Loss)</u>
<u>EQUITIES</u>				
Air Products & Chemicals Non-Signatory	159,127 shs	5,040,079.	5,153,392.	113,313.
American Home Products Non-Signatory	56,900	1,716,104.	2,543,431.	827,327.
Dun & Bradstreet Non-Signatory	25,000	1,659,000.	1,939,460.	280,460.
Eli Lilly & Company Rating	52,000	2,908,880.	2,728,824.	(180,056.)
Martin Marietta Corporation Non-Signatory	60,000	2,187,000.	1,380,554.	(806,446.)
V F Corporation Non-Signatory	105,000	2,282,180.	4,664,752.	2,382,572.
Warner Communications Rating	90,000	2,332,800.	4,155,361.	1,822,561.
TOTAL EQUITIES		<u>18,126,043.</u>	<u>22,565,774.</u>	<u>4,439,731.</u>
<u>FIXED INCOME</u>				
Martin Marietta Corporation Non-Signatory	2,800,000. 7% 3/15/11	1,507,380.	1,507,520.	140.
Motorola, Inc. Rating	1,250,000. 8% 10/1/07	1,111,830.	913,625.	(198,205.)
TOTAL FIXED INCOME		<u>2,619,210.</u>	<u>2,421,145.</u>	<u>(198,065.)</u>
TOTAL EQUITIES & FIXED INCOME		<u>20,745,253.</u>	<u>24,986,919.</u>	<u>4,241,666.</u>

As Of 1/31/83



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE • BOSTON 02133

MICHAEL S. DUKAKIS  
GOVERNOR

August 8, 1983

The Honorable Marion S. Barry  
Mayor, District of Columbia  
District Building  
Washington, DC 20004

Dear Mayor Barry:

In April of this year I had the honor of hosting a reception for state and local officials attending a weekend conference on the issue of divestiture from South Africa.

I met and talked with officials from throughout the nation including John Ray of the District of Columbia, where I understand you are about to consider a divestiture bill.

We here in Massachusetts are proud to have been the first state in the nation to vote to sell from our public pension fund portfolio all those investments in firms doing business in South Africa.

This landmark action was the result of a four year coalition effort that brought together representatives of labor, religious, civic and Black community organizations. Although the legislation was vetoed by the prior administration, the veto was overridden by an overwhelming margin -- 23 to 5 in the Senate and 132 to 2 in the House.

I urge you as Mayor of the District of Columbia and as one long active in the pursuit of civil rights to give serious consideration to both the moral and the financial arguments surrounding the divestiture debate. It has been our experience that divestiture makes not only a strong moral statement against apartheid but divestiture has proven to have had no significant impact on our pension earnings As the attached analysis shows, timely and careful divestiture can result in net increases in pension earnings.

Thank you for your interest. I hope to have the opportunity to talk with you personally about this and other critical issues.

Sincerely yours,

Michael S. Dukakis

MSD/saf  
attachment