



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 26, 2007

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

Dear Mr. President:

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

I. Background

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

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

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

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

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

I. Constitutional Concerns

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

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

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

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

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

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

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

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

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

II. Other Legal and Policy Concerns

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

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

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

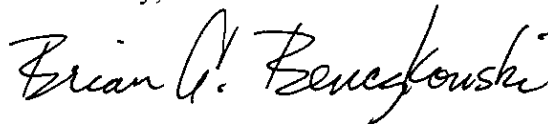
The President has flexibility under existing federal laws to ensure that United States sanctions policy is highly targeted and carefully calibrated to account for nuances in relevant political and diplomatic climates. This kind of flexibility is important because, as the State Department testified, and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

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

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

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

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Christopher Dodd

The Honorable Richard C. Shelby