WRITTEN TESTIMONY OF PAUL H. SCHWARTZ
BEFORE THE COMMITTEE ON FINANCIAL SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES
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Chairman Frank, Ranking Member Bachus, Distinguished Members of the Committee:

My name is Paul H. Schwartz. I am a partner in the Colorado office of Cooley Godward Kronish LLP, a national law firm, and counsel to the Sudan Divestment Task Force, a project of the Genocide Intervention Network (the "Task Force"). I have been asked to testify concerning the constitutionality of state and local divestment measures authorized by the Sudan Accountability and Divestment Act of 2007, Pub. Law 110-174 (SADA), in light of President Bush's signing statement accompanying the legislation. SADA permits states and local governments to adopt and enforce measures "to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in," certain companies that support the Government of Sudan, a regime whose atrocities in Darfur both Congress and the President have labeled genocide. SADA § 3(b). I appreciate the opportunity to address this important question.

Summary and Conclusions

In my view, state and local divestment measures that comply with SADA are constitutional regardless of the President's signing statement. The President claims that the measures the law authorizes might "interfere with implementation of national foreign policy" and thus contravene the Constitution's vesting of "exclusive authority to conduct foreign relations with the Federal Government." Statement by the President (Dec. 31, 2007). But properly enacted federal law *is* policy of the United States. In the case of SADA, that policy was

declared by Congress and, pursuant to Article I, § 7 of the Constitution, "approve[d]" by the President by virtue of his signature on the law. SADA, therefore, necessarily reflects the judgment of the federal government that state and local measures that comply with the law do *not* interfere with the nation's policy in respect to Sudan. Indeed, it makes those measures *part of* U.S. policy. Accordingly, such measures cannot violate the constitutional principle that states may not impede federal foreign policy.

Presidential signing statements do not have the force of law. They are merely expressions of opinion. In this case, that opinion is legally insupportable. Nevertheless, the President's signing statement could, as a practical matter, create a false impression among states and local governments considering targeted Sudan divestment that SADA does not effectively protect their actions in the event of a constitutional attack. The risk of states and local governments being misled threatens not only the ongoing Sudan divestment movement, but the fundamental principles of separation of powers and checks and balances that underlie our constitutional system. For if the President can undercut a law he has signed by casting doubt on its legality, he arguably assumes for himself not merely the executive, but also the lawmaking and judicial functions of government. For all these reasons, therefore, I hope these hearings will clarify the solid constitutional ground on which the state and local measures authorized by SADA rest.

Background and Qualifications

By way of introduction and background, I graduated in 1992 with Highest Honors from the University of North Carolina School of Law. From 1992 to 1994 I served as law clerk to Judge Phyllis A. Kravitch of the United States Court of Appeals for the Eleventh Circuit. From

1994 to 1995, I clerked for Associate Justice Stephen Breyer and Associate Justice (Retired) Harry A. Blackmun of the Supreme Court of the United States. Since 1995, I have been in the private practice of law, first in Georgia and now in Colorado. I have litigated cases in federal and state courts throughout the country.

In late 2006, I helped draft the Task Force's model state targeted-divestment statute, to ensure that legislation based on the model (even absent express federal authorization) would comport with all constitutional requirements. Thereafter, I provided advice with respect to the constitutionality of state divestment legislation to legislators and other officials around the country. In addition, for more than a year I have analyzed the constitutional impact that federal statutory authorization would have on state divestment measures. In his floor remarks prior to the Senate's unanimous approval of SADA, Senator Dodd cited my analysis approvingly. I believe it is clear that Congress has constitutional power to authorize divestment from foreign companies, and state measures that comply with the terms of any such authorization likewise are constitutional.

The Relevant Constitutional Framework

The Foreign Commerce Clause of the Constitution says that "Congress shall have Power . . . To regulate Commerce with foreign Nations . . . [and] To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. I, § 8, cl. 3 & 18. Investment in and divestment from equity and debt securities of foreign companies is a quintessential commercial activity. Thus, Congress had clear constitutional power to enact a law governing divestment from foreign companies doing business in Sudan.

To my knowledge, the Administration does not dispute this congressional power emanating from the Foreign Commerce Clause. Nevertheless, it has argued that the state and local divestment measures SADA authorizes themselves might be unconstitutional. *See* Letter from Princ. Dep. Ass't Attorney General Brian A. Benczkowski to Vice-President Richard B. Cheney at 1-4 (Oct. 26, 2007) ("Justice Dep't Letter"). In support of this incongruous position, the Justice Department has cited the "dormant foreign affairs preemption doctrine" articulated in two Supreme Court cases, *Zschernig v. Miller*, 389 U.S. 429 (1968) and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). Simply stated, that doctrine holds that states may not intrude into or interfere with the federal government's conduct of foreign policy even absent conflicting federal law. *See Garamendi*, 539 U.S. at 417; *Zschernig*, 389 U.S. at 432 (cited in Justice Dep't Letter at 3).

The chief flaw with this argument is that neither *Zschernig* nor *Garamendi* suggests that a state would intrude into or interfere with the federal government's conduct of foreign policy when the state's actions are *specifically permitted by federal law*. *Zschernig* involved Oregon's law that precluded certain non-citizens from receiving the benefits of state inheritance laws only if their countries afforded Americans reciprocal inheritance rights. *See* 389 U.S. at 430-31. *Garamendi* invalidated California's law requiring insurance companies to make certain disclosures concerning their Holocaust-era insurance policies. 539 U.S. at 409. In neither situation did federal law authorize the states to take the actions in question. In neither case, therefore, did the Supreme Court hold that state measures *authorized by federal law* could constitute an unconstitutional interference with U.S. foreign policy.

The Constitution expressly recognizes that Congress may consent to state actions that touch on foreign relations. Article I, section 10, for instance, says:

> No State shall, *without the Consent of Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10, cl. 3 (emphasis added). Based on this provision, the Supreme Court has long held that Congress may consent to compacts between states and foreign nations. *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840); *see also* 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1396 (1833) ("[A] state may, *with the consent of congress*, enter into an agreement, or compact with another state, or with a foreign power.") (emphasis in original). If states may, with congressional consent, keep troops and warships in time of peace, enter into compacts with foreign nations, and the like, it is difficult to believe that the Constitution somehow prohibits them, also with consent issued pursuant to Congress's Article I powers, from taking the far more limited step of requiring state pension funds to divest from companies that support a government both Congress and the President have said is perpetrating genocide. This is especially so given the important interest states have in protecting their pension fund beneficiaries and citizens from the financial and reputational risks associated with investments in companies that facilitate genocide. *See* SADA § 3(a) (expressing sense of Congress that states and local governments should be permitted to protect against "financial or reputational risk"); *Garamendi*, 539 U.S. at 420 n.11 (recognizing importance of strength of state concern even absent federal statutory authorization).

"[W]hen the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340-41 (1897). It is only logical, therefore, that when federal law authorizes state measures that touch on foreign relations, the federal government has expressed a judgment that the measures do *not* "intrude" into or

"interfere" with federal foreign policy, but rather complement that policy. That is particularly so when, as here, the President signs the legislation. Article I, § 7 of the Constitution directs the President to sign a bill that Congress has passed "[i]f he approve" it. "[I]f not," it says – that is, he does not approve it – "he shall return it," *i.e.*, veto the bill. By signing SADA, therefore, President Bush has *approved* it. As one leading scholar has said: "It is difficult to believe that the Court would find constitutionally intolerable state intrusions on the conduct of foreign relations that the political branches formally approved or tolerated." Louis Henkin, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 165 (1996).

The premise underlying the President's position seems to be that his general Article II foreign affairs powers can trump an otherwise proper federal statute. *See* Justice Dep't Letter at 3 ("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 Justice Department implies that only the President can "speak for the Nation with one voice in dealing with other governments." *Id*. (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000)). This premise is false, however, for Congress, too, plays an important role in foreign affairs. And, in the end, mere Executive Branch policies, which do not have the force of law, must yield to a properly enacted federal statute.

In *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), several multinational companies challenged the way California calculated its corporate franchise tax on the ground that it "prevent[ed] the Federal Government from 'speaking with one voice' in international trade." *Id*. at 320. For support, they pointed to Executive Branch statements they said expressed a foreign policy opposed to the state's taxation method. *See id.* at 328-30. The

Supreme Court rejected the argument, however, because "Congress implicitly ha[d] *permitted* the States to use" the challenged method. *Id*. at 326 (emphasis in original). Because "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations,'" the Court explained, that congressional authorization carried the day. For when it comes to "the Nation's ability to speak with one voice" in respect to foreign commercial matters, the Court said, Congress, not the President, is "the preeminent speaker." *Id*. at 329 (citing U.S. CONST. art. I, § 8, cl. 3). Thus, Executive Branch policies relating to foreign commerce which "lack the force of law *cannot render unconstitutional [a state's] otherwise valid, congressionally condoned" actions*. *Id*. at 330 (emphasis added); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (striking down military commissions created by the President that contravened federal law; stating that whatever implicit powers the President might have under Article II, "he may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers").

Investment in and divestment from foreign companies unquestionably fall within Congress's power to regulate foreign commerce. By enacting SADA, Congress sanctioned explicitly, in the clearest possible terms, the state and local divestment measures the act covers. As long as states and local governments comply with SADA's requirements, therefore, the statute's authorization of their divestment measures is constitutionally effective.

The Effect of the President's Signing Statement

The President's signing statement does not alter this constitutional analysis. Presidential signing statements have no legal force. They certainly cannot modify a law Congress has passed. As the Supreme Court has said: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown Sheet & Tube*, 343 U.S. at 587. As noted, in the case of SADA, the President chose not to exercise that veto power.

Presidents, of course, are entitled to their opinions concerning the constitutionality of federal legislation, and signing statements are one way they express those opinions. But the statements are just those - opinions. Ultimately, it is the role of the Judicial Branch, not the President, to determine what the Constitution means. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."). And as evidenced by Supreme Court decisions through the decades, sometimes the Court agrees with the opinions of the Executive Branch and sometimes it does not. *See, e.g.*, *Hamdan*, 126 S. Ct. at 2798 (striking down President's military commissions at Guantanamo Bay, Cuba); *Clinton v. New York*, 524 U.S. 417, 448 (1998) (holding presidential line-item veto unconstitutional); *United States v. Nixon*, 418 U.S. 683, 713-14 (1974) (enforcing subpoena against President); *Youngstown Sheet & Tube*, 343 U.S. at 589 (invalidating President's seizure of steel mills in support of Korean War effort).

That courts are the final arbiters of constitutionality is especially important when considering the effect of the President's signing statement in respect to SADA, because unlike many laws that have been the subject of signing statements in recent years, SADA's

authorization of state and local divestment measures does not require any Executive Branch action. *See generally* T.J. Halstead, *Congressional Research Serv. Report for Congress - Presidential Signing Statements: Constitutional and Institutional Implications* at 2-12 (Sept. 17, 2007) (describing historical usage of presidential signing statements).[1] When Congress passes a law requiring the Executive Branch to take some action the President believes unconstitutionally impinges on his power, he can, as a practical matter, decline to comply, putting the onus on Congress or other interested parties to try to force his hand, say, by seeking judicial review of the matter or exercising the power of the purse. SADA's authorization of state and local divestment measures, however, asks nothing of the President; it is self-executing. To try to blunt that authorization, therefore, the onus would be on *him* affirmatively to act – to challenge such measures in court. In any such case, the Judicial Branch would have the final say.

For the reasons above, in my view, any challenge to the constitutionality of the state and local divestment measures authorized by SADA would be patently meritless and completely unjustified. SADA reflects the explicit policy judgment of the federal government – articulated by Congress and approved by the President through his signature pursuant to Article I, § 7 – that state and local divestment measures that comport with the statute also comport with U.S. foreign policy and should be supported. Accordingly, such measures cannot violate the constitutional rule that states may not interfere with the foreign policy of the United States.

Unfortunately, despite its lack of constitutional grounding, the President's signing statement could have the practical effect of raising doubt in the minds of some state and local legislators who are considering whether to enact targeted Sudan divestment measures. Although

[1] Other parts of SADA – for example, its prohibition on certain federal contracts, *see* SADA § 6 – do require Executive Branch enforcement. The signing statement, however, does not dispute the constitutionality of those provisions.

the fifteen states that already have enacted or implemented targeted Sudan divestment measures should not be affected, active campaigns regarding such measures are ongoing in at least twenty-three others. It would be tragic were erroneous expansive assertions of executive power contained in the signing statement able to derail those states' efforts to protect their beneficiaries and end the genocide. It is my fervent hope, therefore, that this hearing will make clear what should be evident – that the divestment measures SADA permits are constitutional, and that, unfettered by constitutional concerns, states and local governments may make the investment judgments they believe are in the best interests of their beneficiaries and their citizens.

Once again, I thank the Committee for permitting me to testify, and I stand ready to assist it in any way I can.