IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: REFINED PETROLEUM PRODUCTS ANTITRUST LITIGATION MDL No. 1886	This Document Relates to: CIVIL ACTIONS 4:06-cv-03569 4:07-cv-04409 4:07-cv-04413 4:07-cv-04415 4:08-cv-00241

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

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Testimony of Richard G. Parker, Federal Trade Commission, March 29, 2000, www.ftc.gov/os/2000/03/opectestimony.htm.....9, 10

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INTRODUCTION

The federal courts are neither well-equipped nor constitutionally permitted to disrupt the politics, diplomacy, and economy of the United States by pronouncing on the legitimacy of the actions of corporate subsidiaries of foreign state-owned companies taken in furtherance of foreign sovereigns' decisions about how much state-owned oil to produce. The Chamber urges the court to dismiss this lawsuit, now, because it is barred by the political-question and act-of-state doctrines. Letting the lawsuit proceed would frustrate the constitutional principle of separation of powers underpinning those doctrines and cause serious practical harms to the American businesses that are the Chamber's constituents.

The American constitutional design wisely commits to each of the three coordinate branches of government the functions most suited to their particular competencies, and the federal courts have developed specific legal doctrines to implement and secure that division. The political-question doctrine keeps courts out of decisions that are committed by the Constitution to a different political department or that require determinations the judiciary is unequipped to make, in order to prevent disrupting the Executive's and the Legislature's action within their own competent spheres. The act-of-state doctrine is a second-order protection of that same separation, preserving the stage for the Executive's conduct of diplomacy with foreign sovereigns by keeping the judiciary out of the business of pronouncing on the validity of foreign sovereigns' acts. Plaintiffs' suits violate both doctrines.

First, plaintiffs' suits raise nonjusticiable political questions. American negotiations with OPEC sovereigns about their decisions about natural-resource production are [subjects of intense and prolonged diplomacy] because they are vital to the national security and economic health of the United States. Plaintiffs' suits would disrupt, perhaps irreparably, that nuanced and delicate

diplomacy, by threatening to impose liability on corporate subsidiaries of foreign state-owned companies for foreign sovereigns' decisions about how to manage, produce, and conserve their natural resources. The likely result would be diplomatic affront, economic retaliation, and the consequent frustration of decades of foreign policy. The political-question doctrine directs the Court to stay out of this arena, beyond the competencies of the judiciary, by dismissing the complaints for lack of subject-matter jurisdiction.

The act-of-state doctrine also requires dismissing the complaints. As important as questions about oil production are to American national security and diplomacy, they are just as important (if not even more so) to the oil-producing sovereign nations that make up OPEC, and they are at the heart of those nations' sovereign authority. Despite plaintiffs' attempts to plead artfully, it is inescapable that their complaints depend on finding that the acts of OPEC sovereigns, within their sovereign territory, violate American antitrust laws. The act-of-state doctrine forbids American courts from passing on the validity of those activities, because our courts' presuming to do so will insult and provoke those foreign sovereigns, and so greatly complicate the Executive's conduct of diplomacy with them. The Court should therefore dismiss the complaints.

If, instead, the complaints are allowed to go forward, it will cause particular, practical, grievous harms that exemplify the sound reasons for the political-question and act-of-state doctrines and the underlying constitutional balance they secure. Of particular interest to the Chamber, allowing these lawsuits to proceed would greatly harm American business and the American economy. It would threaten to disrupt the supply of oil to American businesses at a time when rising oil prices already are dragging on the American economy. It would create a strong incentive for OPEC members to divest their investments in the United States, harming

American businesses and costing American jobs. It would put American businesses at a serious disadvantage in attempting to partner with OPEC sovereigns abroad, as those sovereigns will likely prefer to deal with foreign companies when dealing with American companies could subject the foreign sovereign to jurisdiction and liability based on that sovereign's domestic decisions about its production of state-owned natural resources. And, it would expose those American corporations that do operate ventures with sovereign members of OPEC to liability in copycat lawsuits following upon this one, on the theory that they are furthering the purported illegal conspiracy. To prevent these harms, the Court should employ the political-question and act-of-state doctrines to their intended use and dismiss the complaints.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of business, trade, and professional organizations in the United States. The Chamber represents an underlying membership of over three million businesses and organizations of every size, in every sector, and in every region of the United States. The Chamber serves as the principal voice of the American business community.

A primary function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. While ordinarily the Chamber's amicus activities are focused on cases in the Supreme Court and in the courts of appeals, this case involves issues that are of such great concern to the nation's business community that the Chamber is weighing in at the district court level and at the motion-to-dismiss stage of the litigation. The Chamber believes that this litigation, if not headed off at the earliest possible stage, will have major detrimental effects for American business, both at home and abroad.

ARGUMENT

I. THE ACT-OF-STATE AND POLITICAL-QUESTION DOCTRINES SECURE THE CONSTITUTIONAL SEPARATION OF POWERS.

Both the act-of-state and political-question doctrines have "constitutional underpinnings" in the Constitution's separation of powers between the three branches of government. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 938 (1964). The Constitution delegates to each branch its own sphere in which to act, not only to preserve liberty, but also to operate in its own area of particular competency. *Id.* (noting differences in the "competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations"). While there is not a complete separation of functions, *see, e.g.*, THE FEDERALIST NO. 47 (James Madison) (Attach. 1),[1] and indeed even deliberate overlap to allow each branch to check the encroachments of the others, *id.* NO. 51 (James Madison) (Attach. 2), the Constitution still enforces and requires separation sufficient for the branches to not disrupt each other's performance of its proper constitutional role. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870 (1952) (Jackson, J., concurring) ("[T]he Constitution . . . enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). To implement the constitutional design of separation with respect to the province of the judiciary, federal courts have developed, among other tools, the act-of-state and political-question doctrines to secure necessary limitations on the judicial sphere of action and prevent damaging judicial encroachments into the executive and legislative roles in formulating and implementing policy.

Thus, the political-question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for

[1] References to Legal Authorities attached to this Brief are to "Attach. _____".

resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866 (1986); *accord Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1203 (5th Cir. 1978). It reflects a judicial recognition that there are, under the Constitution, questions that are neither committed to the courts nor within their competency to resolve. The area of foreign relations, which is textually committed expressly to the President and Congress, and to which the competencies of the Executive are particularly well-suited, has been noted as particularly likely to raise nonjusticiable political questions. *See, e.g.*, *Occidental of Umm al Qaywayn*, 577 F.2d at 1203.

Similarly, the act-of-state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers," *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 938, operating to prevent "judicial interference with the role of the executive branch in international affairs." *Airline Pilots Ass'n, Int'l. v. TACA Int'l Airlines, S.A.*, 748 F.2d 965, 969 (5th Cir. 1984); *accord Occidental of Umm al Qawayn*, 577 F.2d at 1201 n.4. Recognizing that judicial "engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere," the act-of-state doctrine forbids the courts from denying the validity of the acts of foreign sovereigns, and reserves to the political branches the right of doing so. *Sabbatino*, 376 U.S at 425, 84 S.Ct. at 938.

In short, both the political-question and act-of-state doctrines are rooted in the judiciary's proper recognition of its own limited, though coequally important, role in the constitutional design. The Constitution recognizes, wisely, that judges should not be formulating United States policy, especially foreign policy, nor directing the United States' response with regard to foreign

sovereign acts. Statecraft is for the State, not judges. The animating constitutional principle behind the legal doctrines at issue here provides an instructive background when considering the narrower legal issues in this lawsuit, as well as the serious practical harms that would flow from allowing these complaints to proceed.

II. PLAINTIFFS' LAWSUITS RAISE NONJUSTICIABLE POLITICAL QUESTIONS AND SEEK TO IMPOSE LIABILITY FOR UNREVIEWABLE ACTS OF STATE.

A. United States Policy Toward Foreign Sovereigns' Implementation of Their Oil-Production Decisions Through Their Corporate Subsidiaries Is a Nonjusticiable Political Question.

Plaintiffs' complaints seek to impose liability on the corporate subsidiaries of foreign sovereigns, as well as one private foreign company, for those corporations' participation in the sovereigns' activities and decisions about domestic production of state-owned oil. But the United States' response to, and negotiations with, those foreign sovereigns over their decisions about how much oil to produce is an inextricable and crucial subject of the United States' foreign policy, which is singularly committed to the political branches. Plaintiffs' claims therefore raise nonjusticiable political questions the Court has no jurisdiction to consider, and the complaints must be dismissed.

The political question doctrine prohibits the courts from hearing cases requiring them to decide issues the Constitution commits exclusively to the political branches. *See, e.g.*, *Bancoult v. McNamara*, 445 F.3d 427, 432-33 (D.C. Cir. 2006). A case presents a nonjusticiable political question when any one of the following six factors is "inextricable from the case":

> 1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department";
> 2) "a lack of judicially discoverable and manageable standards for resolving it";
> 3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion";
> 4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government";

> 5) "an unusual need for unquestioning adherence to a political decision already made"; or
> 6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962).

The Constitution textually commits the formulation of foreign policy to the President and Congress, and to the President alone the conduct of that policy through diplomacy: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." U.S. CONST. art. II §2, cl. 2; *see also id.* art. I §8, cl. 3. Because the Constitution expressly commits foreign policy to the political branches, courts have well and often recognized that claims implicating foreign relations are among the most common subjects of the political-question doctrine. *See, e.g., Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 436 (1948) ("[E]xecutive decisions as to foreign policy . . . are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring) ("Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied.").

Plaintiffs' complaints present nonjusticiable political questions inexctriably bound up in the conduct of United States foreign policy. The plaintiffs are challenging the actions of corporate subsidiaries of foreign state-owned companies, and one private company, in implementing and assisting foreign sovereigns' decisions about domestic oil production. Consol. Compl. ¶¶52-55, 60-63; Spectrum Compl. ¶¶1, 52, 79, 82, 85; *see also* Consol. Mot. to Dismiss

at 7-9. Those actions and decisions are the subject of intense, extended American diplomacy, which is itself the product of deeply considered and hotly debated national policy. Indeed, because the United States depends on imported oil, our relations with oil-producing nations are singularly important to U.S. economic and foreign policy. Nor is plaintiffs' requested interference with those relations justiciable simply because plaintiffs are seeking to interfere in foreign policy by attacking corporate subsidiaries, instead of foreign sovereigns themselves. *See Fisher v. Halliburton, Inc.*, 454 F.Supp.2d 637, 641 (S.D. Tex. 2006) (fact that named defendants were private entities "does not preclude the application of the political question doctrine").

The Executive and Legislature have decided to pursue a policy of conciliation, cooperation, and compromise with oil-producing foreign sovereigns. *See* Consol. Mot. to Dismiss at 13-19.[2] Indeed, President Bush is personally pursuing that policy, now, at the highest levels of diplomacy. *See Bush Prepares to Press Saudis on Rising Price of Oil*, Agence France Presse, May 14, 2008, http://afp.google.com/article/ALeqM5jtwX4mGpl4UIsb3EaRKMW-SyLPdPA (Attach. 4) ("The White House has said Bush will stress US concerns about soaring oil prices when he meets King Abdullah in Saudi Arabia on May 16, and is expected to press the

[2] This policy is not beyond debate. Both currently pending congressional legislation and current candidates for President seek to pursue a more confrontational policy with OPEC sovereigns. *See* No Oil Producing and Exporting Cartels Act of 2007 ("NOPEC"), H.R. 2264, 110th Cong. (2007) (Attach. 9); Richard Cowan, *Senators Pressure Saudis to Boost Oil Output*, Reuters, May 13, 2008, http://uk.reuters.com/article/oilRpt/idUKN1340364120080513 (Attach. 5) (Democratic senators threatening to block arms sale to Saudi Arabia over oil prices); *Hillary Clinton Sits Down With Bill O'Reilly*, Fox News, May 1, 2008, *available at* http://www.foxnews.com/story/0,2933,353759,00.html (Attach. 6) (Hillary Clinton proposing to change United States policy to sue OPEC sovereigns and file international trade complaints). *But see* Office of Mgmt. & Budget, Exec. Office of the President, Statement of Admin. Policy on NOPEC, May 22, 2007, *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2264sap-h.pdf (Attach. 12) (opposing NOPEC bill). But the existence of this debate simply reinforces that these questions are intensely, inextricably political, and are actively being debated and worked on by the political branches, who have a much wider variety of tools at their disposal to resolve them. These issues are thus not fit for resolution by the federal courts.

Saudis to boost their oil production as a way of curbing spiraling fuel prices."). This Court should not unilaterally shift the United States' policy to one of confrontation. But that is just what allowing plaintiffs' complaint to proceed would do, by attacking the corporate instrumentalities that carry out foreign sovereigns' decisions on crude oil production.

Administration officials have explained how a decision by the federal government to sue OPEC under the United States antitrust laws only "ought to be made at the highest levels of the executive branch" because it "would raise significant diplomatic considerations" that "involve not only, and perhaps not even primarily, competition policy, but also defense policy, energy policy, foreign policy, and natural resource issues." Testimony of Richard G. Parker, Federal Trade Commission, March 29, 2000, www.ftc.gov/os/2000/03/opectestimony.htm (Attach. 13) ("Parker Testimony"). Plaintiffs' attempt to invalidate foreign sovereigns' decisions about oil production—by attacking their corporate subsidiaries, intermediaries, and partners operating in the United States—raises all these concerns but is even more problematic from a political-question perspective, because it would put the courts in open confrontation with foreign sovereigns without any Executive decision to pursue such a course of action.

The complaints demonstrate the interconnection of plaintiffs' claims with questions of international oil diplomacy. Consol. Compl. ¶¶52-55, 60-63; Spectrum Compl. ¶¶1, 79, 82, 85. Defendants have marshaled from a wide variety of experts and officials extensive, impressive evidence of the extent to which their challenged acts are inextricably intertwined with American foreign relations. *See* Consol. Mot. to Dismiss at 13 (and attached exhibits referenced there). The intervention of nearly all the OPEC sovereigns and the Russian Federation in support of the motion to dismiss further confirms the diplomatic ramifications of this case and its potential to provoke a series of diplomatic crises. And, finally, the inextricably political and diplomatic

aspects of the case are resonant to anyone who simply follows current events—rising oil prices, and the question of how to deal with oil-producing nations' actions taken to affect prices, are a topic of intense national attention and political debate. The federal courts lack the competency to make national foreign policy in this arena, and this Court should decline plaintiffs' invitation to do so. *See, e.g.*, *Chicago & S. Airlines*, 333 U.S. at 111, 68 S.Ct. at 436 ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").

For the Court to shift American foreign policy on its own, by allowing plaintiffs' complaints to proceed, would require "an initial policy determination" about foreign oil policy "of a kind clearly for nonjudicial discretion," would express a "lack of the respect" for the political branches' primacy in diplomatic matters, and would create "multifarious pronouncements" on the question whether the United States will pursue a strategy of retaliation and reprisal for foreign sovereigns' domestic decisions about oil production. *Baker*, 369 U.S. at 217, 82 S.Ct. at 710; *accord Doe I v. State of Israel*, 400 F.Supp.2d 86, 112 (D.D.C. 2005) ("A ruling on any of these issues would draw the Court into the foreign affairs of the United States, thereby interfering with the sole province of the Executive Branch."); *see also* Parker Testimony at III B(1)(b) (Attach. 13) ("[A]ny decision to undertake such a challenge ought to be made at the highest levels of the executive branch."). Under the political-question doctrine, these are things the Court lacks jurisdiction to do. Because the complaints cannot be resolved without challenging foreign sovereigns' decisions about how much oil to produce, and because they cannot proceed except by disrupting American diplomacy with those sovereigns about those decisions, they raise political questions that are nonjusticiable.

B. Plaintiffs' Lawsuit Is Barred by the Act-of-State Doctrine Because It Depends on Illegalizing Foreign Nations' Domestic Decisions About Oil Production.

OPEC sovereigns' decisions about how much state-owned oil to produce are acts of state that cannot be second-guessed by United States courts. Since plaintiffs' claims depend on holding that those acts violate American antitrust laws, the complaints must be dismissed.

The act-of-state doctrine recognizes that foreign governments are sovereign within their own borders and that United States courts have no right to judge the exercise of that sovereignty. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404, 110 S.Ct. 701, 704 (1990); *see also Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). "[W]hen it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action or the merit of the result . . . must be accepted by our courts as a rule for their decision." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 38 S.Ct. 312, 314 (1918). Thus, when allegations in a case require a court to review or judge a foreign sovereign's acts, even if only indirectly, the case must be dismissed. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165-66 (D.C. Cir. 2002).

Dismissal is required in this case because the allegations require the Court to review and judge foreign sovereigns' oil-production decisions. Courts have rejected prior attempts to directly hold OPEC members liable for their oil-production decisions. *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. O.P.E.C. (IAM)*, 477 F.Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F.Supp. 343, 346 (S.D. Tex. 1989) ("A sovereign's conduct with respect to its natural resources is presumptively a governmental function."). This case is not substantively different, because

plaintiffs' claims all require the Court to hold unlawful the domestic decisions of OPEC nations about oil production. The fact that defendants are corporations (albeit primarily state-owned corporations) does not matter because the lawsuit requires the Court to judge the validity of foreign sovereign decisions about oil production. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) ("In the act of state context, even if the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act, we nevertheless decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory.").

The counts of both complaints require a finding that foreign sovereigns are engaged in an unlawful price-fixing conspiracy. *See, e.g.*, Consol Compl. ¶52. While the complaints allege on their face conspiracies to fix prices for refined products, the mechanism of fixing alleged is, in fact, crude-oil production and pricing decisions. Consol. Compl. ¶¶52-53; Spectrum Comp. ¶¶1, 52, 79, 82; *see also* Consol Mot. to Dismiss at 7-9. Thus, for the Court to find that defendants have engaged in an illegal anticompetitive conspiracy would require the Court to hold illegal and invalid OPEC sovereigns' determinations as to levels of crude oil production and exports, determinations that are recognized as sovereign acts by the law of those nations, international law, and the decisions of United States courts. *See World Wide Minerals*, 296 F.3d at 1165; *IAM*, 477 F.Supp. at 568; U.N. Resolution on Perm. Sovereignty Over Natural Res., G.A. Res. 1803 (XVII), ¶I(1), (7), U.N. Doc. A/C/2/5 R 850 (Dec. 14, 1962) (Attach. 3); Consol. Mot. to Dismiss 27 nn. 37 & 38 (collecting citations to foreign laws reserving to the state control over oil resources).

One clear way to see that plaintiffs' claims require the Court to pass upon foreign sovereigns' domestic acts of state is to consider their claims absent any allegations about the

domestic acts of foreign sovereigns. Without condemning as illegal the conduct and decisions of foreign sovereigns, there is no conspiracy that defendants could have joined. There is no mechanism by which the remaining acts, alleged to have been committed by the named corporate defendants alone, could have affected prices for refined petroleum products. The complaints thus hinge on domestic acts of foreign sovereigns, and the claims against the named defendants therefore must be dismissed. *See Callejo*, 764 F.2d at 1122 (applying act of state doctrine to dismiss claims against a nonsovereign defendant).

The necessity of dismissing the complaints under the act-of-state doctrine is confirmed by the presence of two factors the Fifth Circuit has noted should guide the doctrine's application. *TACA*, 748 F.2d at 970. The "degree of involvement of the foreign state[s]" is high, in a number of ways. *Id.* Foreign sovereigns ultimately own almost all the defendants; the lawsuits threaten to intrude upon decisions that those foreign sovereigns consider to be at the heart of their domestic sovereignty, policy, and economy; and those foreign sovereigns have expressed an intense opposition to the case through their energetic amicus participation.

"[T]he effect a judicial decision in [this] case will have on our foreign relations," is, similarly, huge. *Id.* Adjudicating plaintiffs' claims on the merits will affect United States foreign relations by disrupting decades of careful Executive diplomacy in this area. *See supra* Part II. Letting the lawsuit proceed would provoke foreign sovereigns, by putting the Court into the business of reviewing their domestic oil-production decisions, as assisted and implemented by their corporate subsidiaries. This is exactly the kind of diplomatic dispute the act-of-state doctrine is designed to prevent. *See, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304, 38 S.Ct. 309, 311 (1918) ("[P]ermit[ting] the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the

amicable relations between governments and vex the peace of nations.'"). The Court should apply the act-of-state doctrine to its intended use and dismiss the complaints.

III. ALLOWING THESE LAWSUITS TO PROCEED WILL SERIOUSLY DAMAGE AMERICAN BUSINESS BOTH AT HOME AND ABROAD.

The political-question and act-of-state doctrines, rooted in the constitutional separation of powers, require dismissing plaintiffs' complaints. The grave practical consequences if those lawsuits are not dismissed, now, demonstrate the necessity for those doctrines and the wisdom of the constitutional plan. For this Court to accept plaintiffs' invitation to disrupt American foreign policy by allowing this suit to proceed would cause predictable domestic evils that flow from the inappropriateness of conducting through the courts the underlying discussion by the United States with foreign sovereigns about their oil production, and from the judiciary's lack of the proper tools to evaluate and resolve that dispute. Of particular interest to the Chamber are the enormous practical harms and risks to American business from allowing these suits to proceed.

These suits could cause disruptions and price spikes in oil imports to the United States at a time when Americans and American businesses can ill afford them. Oil prices are literally at an all-time high. *See, e.g.*, Martin Zimmerman & Walter Hamilton, *Oil Prices Breach $125 a Barrel to New Record High*, L.A. TIMES, May 10, 2008, *available at* http://www.latimes.com/-business/investing/la-fi-markets10-2008may10,0,1263773.story (Attach. 14). Allowing plaintiffs to sue the corporate subsidiaries of foreign sovereigns for money damages could well lead those sovereigns to restrict or delay shipments of oil to the United States in protest or retaliation. They may think this a more plausible response given that the American oil market, as a share of the global market, is becoming less important, although it is still the largest single market in the world. *See, e.g.*, Mark Shenk, *Emerging Market Oil Use Exceeds U.S. as Prices Rise*, Bloomberg, April 21, 2008, http://www.bloomberg.com/apps/news?pid=20601109-

&sid=acpwND3.n05g (Attach. 11) ("As far as the oil market is concerned, demand growth is going to be continued to be driven by China and the Middle East."). Disruption of supply would lead to further price rises or spikes that would operate as a drag on an already weak American economy, or worse. The resulting increase in energy costs would harm American businesses of every size and in every sector of the economy.

Further, allowing these lawsuits to proceed would create a strong incentive for OPEC members to divest their investments in the United States. If OPEC sovereigns' having corporate subsidiaries that operate in the United States will expose those subsidiaries to liability in United States courts for the sovereigns' decisions about the management and production of their most crucial natural resource, those sovereigns and corporations will surely have a strong incentive to reduce their United States corporate operations as much as they possibly can. *See, e.g.*, Letter from Henry M. Paulson, Jr., Sec'y of the Treasury, to Jeff Bingaman, U.S. Senator (Oct. 16, 2007) ("Paulson Letter") (Attach. 7) ("At a minimum, we believe that OPEC countries would reconsider their financial investment in the United States."). They will divest current investments, choose not to make new investments, and remove assets from the country. Indeed, the Spectrum plaintiffs expressly suggest divestment as their purported solution to the obvious encroachments their lawsuit will cause upon the sovereignty of OPEC members with respect to their decisions about oil production. Spectrum Opp. to CITGO's Mot. to Dismiss for Lack of Subj. Matter Jurisdiction at 16. ("OPEC's member nations can effectively immunize themselves from both injunctive and monetary relief by simply refraining from furthering their price-fixing agreement in the United States."). Even a partial divestment of OPEC sovereigns' corporate subsidiaries from the United States would deprive domestic markets of valuable capital investment at a time when such investments are especially sought and needed, and foreign

sovereign investment is of increasing importance. *Cf., e.g.*, David Litterick, *Sovereign Wealth Funds to Dwarf U.S. Economy*, THE DAILY TELEGRAPH, Apr. 30, 2008, *available at* http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2008/04/29/cnswf129.xml. (Attach. 8) The result, again, would be serious harm to American business and the loss of many American jobs. Paulson Letter (Attach. 7) ("A loss of this foreign investment would unquestionably cost American jobs and damage the U.S. economy.").

Relatedly, foreign sovereigns' fear of exposure to liability of the sort sought to be imposed in this case will also put American businesses at a serious disadvantage in attempting to partner abroad with OPEC sovereigns and their corporate subsidiaries. Those sovereigns will likely prefer to deal with foreign companies if dealing with American companies subjects the foreign sovereigns, or their corporate subsidiaries, to American jurisdiction and liability based on that sovereign's domestic decisions about its production of state-owned natural resources.

At the same time, allowing these suits to proceed will also pose great risks to American businesses that do successfully operate overseas in the global oil market. Domestic American corporations frequently work with OPEC sovereigns, or their corporate subsidiaries, on oil exploration and production ventures abroad. These American corporations that operate ventures with, or work in conjunction with, sovereign members of OPEC could be exposed to liability in copycat lawsuits following upon this one on the theory that they are furthering the OPEC principals' purported illegal conspiracy. Already, plaintiffs have pleaded their case against one private company, Lukoil. Their theory of how the named defendants have participated in the purported illegal conspiracy through providing technical and price information, and through attending OPEC meetings, *see* Spectrum Compl. ¶¶21-22, could easily be applied to American oil companies that work with OPEC, and (for obvious reasons) monitor OPEC decisions about

production with great interest. It is no great stretch to envision that domestic American corporations will be hit with similar complaints for assisting the purportedly illegal OPEC conspiracy. American companies would then be faced with the choice of either: (1) fighting these lawsuits and risking the massive liabilities they present (without the option, available to foreign sovereigns and corporations, of simply picking up stakes and divesting from the United States), or (2) not doing business with OPEC sovereigns and their corporate subsidiaries—that is, removing themselves from the market for services for over 40% of the world's oil supply. Either alternative will unnecessarily cause those companies significant economic harm.

On the broader scene, allowing these lawsuits to go forward could lead to reprisal in other economic sectors from oil-producing sovereigns. Paulson Letter (Attach. 7) ("[T]he countries singled out for special treatment could retaliate against U.S. assets and block investments in their countries."). In particular, it could lead foreign courts to feel justified, in retaliation, to attempt to meddle extraterritorially with the domestic natural-resource decisions of the United States. (Imagine, for example, a lawsuit in Russian courts seeking to impose liability for the United States's failure to allow drilling in the Arctic Natural Wildlife Reserve). And, finally, it would enhance American courts' "reputation around the world as venues for abusive, lengthy, and excessively costly litigation." President's Export Council, "Civil Justice Reform Letter of Recommendation" to President George W. Bush, Aug. 23, 2007, *available at* http://www.ita.-doc.gov/td/pec/Civil_Justice_Reform.pdf (Attach. 10).

All of these harms and risks can and should be avoided. At the very least, if they are to be incurred, it should be only because of a well-considered, fully debated decision by the politically accountable branches of government. The political-question and act-of state doctrines exist to prevent just the sort of interference with and disruption of international relations that

these lawsuits will cause. The constitutional balance those doctrines secure wisely commits to the political branches, not the judiciary, decisions about how to negotiate with foreign sovereigns over those sovereigns' decisions about what to do with their natural resources. The Court should respect the wisdom of that constitutional design, apply the implementing legal doctrines as they are intended, and reject plaintiffs' invitation to interfere in global energy diplomacy.

CONCLUSION

For these reasons, the Court should dismiss plaintiffs' complaints.

Respectfully submitted,

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I hereby certify under Fed. R. Civ. P. 5(b) and Local Rule 5.5 that on the 16th day of May 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/EMF system, and the foregoing was served on the counsel of record listed below via electronic notice through the United States District Court for the Southern District of Texas:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

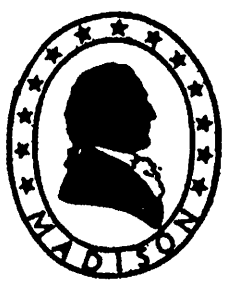
IN RE: REFINED PETROLEUM PRODUCTS ANTITRUST LITIGATION MDL No. 1886	This Document Relates to: CIVIL ACTIONS 4:06-cv-03569 4:07-cv-04409 4:07-cv-04413 4:07-cv-04415 4:08-cv-00241

INDEX OF LEGAL AUTHORITIES ATTACHED TO THE SERVED BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

From the New York Packet, Friday, February 1, 1788

NUMBER XLVII

THE PARTICULAR STRUCTURE OF THE NEW GOVERNMENT AND THE DISTRIBUTION OF POWER AMONG ITS DIFFERENT PARTS



To the People of the State of New York:

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let

us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body

had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.* Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*" Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been

laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other *as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.*" Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative departments shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department.

In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention.

The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals,

and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department, and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive council are made EX-OFFICIO justices of peace throughout the State.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches, constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States, it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX-OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial

powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares, "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly." Yet we find not only this express exception, with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia, where it is declared "that the legislative, executive, and judiciary departments shall be

separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

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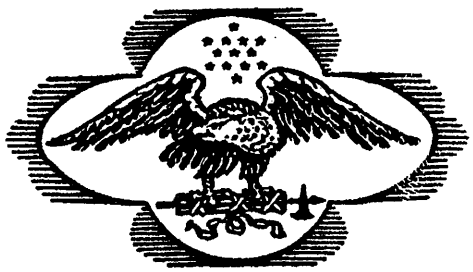
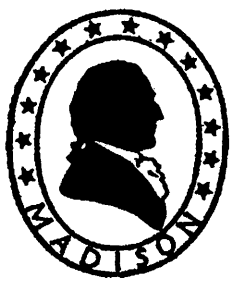


From the New York Packet, Friday, February 8, 1788

NUMBER LI

THE STRUCTURE OF THE GOVERNMENT MUST FURNISH THE PROPER CHECKS AND BALANCES BETWEEN THE DIFFERENT DEPARTMENTS



To the People of the State of New York:

To WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defects must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which

to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The

interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should

be fortified. An absolute negative on the legislature appears, at first view, to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution, it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different

classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizens, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice

is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the *republican cause*, the practicable sphere may be carried to a great extent, by a judicious modification and mixture of the *federal principle*. PUBLIUS

have an adverse effect on the exports of developing countries and on the expansion of international trade in general;

(*d*) Methods and machinery to implement measures relating to the expansion of international trade, including:

(i) A reappraisal of the effectiveness of the existing international bodies dealing with international trade in meeting trade problems of developing countries, including a consideration of the development of trade relations among countries with uneven levels of economic development and/or different systems of economic organization and trade;

(ii) The advisability of eliminating overlapping and duplication by co-ordination or consolidation of the activities of such bodies, of creating conditions for expanded membership and of effecting such other organizational improvements and initiatives as may be needed, so as to maximize the beneficial results of trade for the promotion of economic development.

1190th plenary meeting,
8 December 1962.

1803 (XVII). Permanent sovereignty over natural resources

The General Assembly,

Recalling its resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952,

Bearing in mind its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries,

Bearing in mind its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,

Noting that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission,

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

Considering that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State,

Considering the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connexion,

Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence,

Noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,

Desiring that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries,

I

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary

to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

II

Welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly;[1]

III

Requests the Secretary-General to continue the study of the various aspects of permanent sovereignty over natural resources, taking into account the desire of Member States to ensure the protection of their sovereign rights while encouraging international co-operation in the field of economic development, and to report to the Economic and Social Council and to the General Assembly, if possible at its eighteenth session.

1194th plenary meeting,
14 December 1962.

1820 (XVII). The Cairo Declaration of Developing Countries

The General Assembly,

Having considered the Cairo Declaration of Developing Countries[2] emanating from the Conference on the Problems of Economic Development attended by a large number of developing countries,

Welcoming the general approach of the Declaration, namely, that the problems of social and economic development should be solved in a spirit of international co-operation and within the framework of the United Nations,

Taking cognizance of the principles of the Declaration relating to the needs of the developing countries, the implication of the process of their economic and social growth, and the effective measures to be undertaken on the national and international levels, for the attainment of rapid and balanced economic and social development,

1. *Notes with appreciation* the Cairo Declaration of Developing Countries submitted to the General Assembly and included in the agenda of its seventeenth session;

2. *Recommends* that Member States, the Economic and Social Council, other United Nations bodies and the specialized agencies should take into consideration the principles of the Declaration when dealing with subjects in the field of economic and social development.

1197th plenary meeting,
18 December 1962.

1821 (XVII). Activities of the United Nations in the field of industrial development

The General Assembly,

Recalling its resolution 1712 (XVI) of 19 December 1961, as well as Economic and Social Council resolutions 872 (XXXIII) and 873 (XXXIII) of 10 April 1962 and 893 (XXXIV) of 26 July 1962,

Noting with satisfaction the programme of work and the recommendations contained in the report of the Committee for Industrial Development on the work of its second session,[3] the appointment by the Secretary General of a United Nations Commissioner for Industrial Development, and the steps which have been taken to strengthen the activities of the United Nations in the field of industrial development,

I

Noting that the Economic and Social Council, in its resolution 873 (XXXIII), requested the Secretary-General to appoint an Advisory Committee of ten experts to examine the question of the further organizational changes that might be necessary in order to intensify, concentrate and expedite the United Nations effort for the industrial development of the developing countries, including the advisability of establishing a specialized agency for industrial development or of strengthening or modifying the existing organizational structure in that field,

Taking into consideration that the efforts of the United Nations—including the specialized agencies and the regional economic commissions—related to industrial development should be closely linked with activities in the field of natural resources, as well as in all other related fields, since the process of industrialization is dependent upon adequate progress in these fields,

1. *Recommends* that the Advisory Committee established under Economic and Social Council resolution 873 (XXXIII) should take into account, in its work and recommendations:

(*a*) Whether it is advisable to deal with problems of industrial development, natural resources, energy, and possibly other related fields, within the framework of one organizational structure;

(*b*) Whether it is possible to bring about a closer co-ordination of all activities related to industrialization at the national, regional and international levels;

2. *Requests* the Economic and Social Council to submit to the General Assembly, at its eighteenth session, the report of the Secretary-General on the work of the Advisory Committee, after consideration of that report by the Committee for Industrial Development, together with the comments of the Committee and the Council;

II

Aware of the fact that the process of industrialization in the economically less developed countries is closely dependent on the expansion of the foreign trade of those countries and that, as the industrialization of the developing countries proceeds, the trade structure of the world will undergo considerable changes,

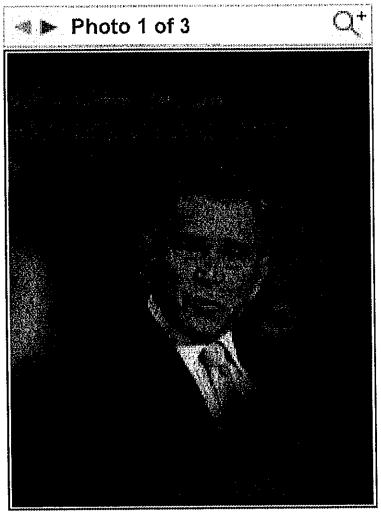
Recommends to the Economic and Social Council and to the Committee for Industrial Development that the Committee, in its study of the relationship between accelerated industrialization and international trade, should take into account the urgent need of the developing countries for a steadily increasing income from exports, their need for imports of capital goods on favourable terms, as well as the long-term influence of the industrialization of the developing countries upon the structure, direction and volume of world trade and,

[1] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209), paras. 67-69.

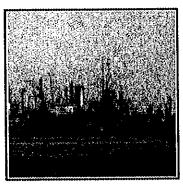
[2] *Ibid., Seventeenth Session, Annexes,* agenda items 12, 34, 35, 36, 37, 39 and 84, document A/5162.

[3] *Official Records of the Economic and Social Council, Thirty-third Session, Supplement No. 2* (E/3600/Rev.1).

Attachment 4



George Bush is expected to press Saudi Arabia to contain oil prices when he visits the Middle East this week



Bush prepares to press Saudis on skyrocketing price of oil

2 days ago

WASHINGTON (AFP) — As he travels to the Middle East this week, President George W. Bush is expected to press US ally Saudi Arabia to do more to contain runaway oil prices which threaten to depress both the US and world economies.

Bush departs Tuesday on his Mideast travels, with a return set for May 18.

His visit to Saudi Arabia commemorates the 75th anniversary of the formal establishmer of US-Saudi relations.

The White House has said Bush will stress US concerns about soaring oil prices when he meets King Abdullah in Saudi Arabia on May 16, and is expected to press the Saudis to boost their oil production as a way of curbing spiraling fuel prices.

"I have made the case that the high price of oil injures economies. But I think we better understand that there's not a lot of excess capacity in this world right now," Bush told a press conference late last month.

"Hopefully high prices will spur more exploration to bring excess capacity on, but demand is rising faster than supply. And that's why you're seeing global energy prices rise."

The US leader, a former oil company executive, is said to be especially eager to avoid spiraling oil prices in the months leading up to the November presidential election, which could scuttle presumptive Republican candidate John McCain's hopes to succeed Bush in the White House.

"I think that if there was a magic wand, and say, okay, drop price, I'd do that," Bush said last month. "But there is no magic wand to wave right now."

Analysts said it was unclear that the Saudis have any more power to control the ratcheting prices than the Americans.

"If it came down to answering the question: If Saudi Arabia was able to lower prices would they, I think the answer is yes," said James Williams of West Texas Research Group Economics.

"The real question is, in this environment, are they able to do it? And the answer is, I don't know," he added.

Williams said that producing more oil may not prove effective in dropping prices. But an even bigger worry than inflating oil prices, he said, is a potentially precipitous price drop.

"If stocks build up at a time of recession, it creates the possibility of an unmanageable collapse in oil prices," he said.

"If a weak US economy was contagious and it hits Asia, oil could drop like a rock," he said.

Oil prices retreated slightly Monday, but still remained at near historic highs. At Monday' close they were at 124.23 dollars a barrel, down one dollar from Friday, although crude prices still remain close to historical highs.

John Alterman of the Center for Strategic and International Studies issued a caveat of a different sort, warning that the US president should not be too hopeful about winning Saudi cooperation.

"In past years, the Saudis have really put themselves out to help American presidents,"

Alterman said, adding that "they're not really going to put themselves out to help this president."

Washington, he said, will be hampered by the legacy of its massive missteps in Iraq and elsewhere around the globe over the past few years.

"There is suddenly a need to hedge against US incompetence. That changes the whole way these meetings go, and it changes what happens when the US president says I really need you to do this," Alterman said.

The president's Mideast trip will celebrate America's close ties with Israel on the occasio of the 60th anniversary of the Jewish state, and will highlight US cooperation with its Mideast allies in the fight against global terrorism.

Bush was to meet with Israeli President Shimon Peres and Prime Minister Ehud Olmert i Israel before heading to Saudi Arabia for talks with King Abdullah.

The US leader was also to meet Egyptian President Hosni Mubarak, Palestinian president Mahmud Abbas, and deliver remarks at the World Economic Forum on the Middle East, at the Egyptian Red Sea resort of Sharm el-Sheikh.

REUTERS
UK

Attachment 5

Print | Close this window

Senators pressure Saudis to boost oil output

Tue May 13, 2008 10:05pm BST

By Richard Cowan

WASHINGTON (Reuters) - Democrats trying to pressure Saudi Arabia to boost oil output introduced legislation in the Senate on Tuesday that would stop a $1.4 billion U.S. arms sale to the kingdom.

"We are saying that we need real relief and we need it quickly. You (Saudi Arabia) need our arms, but we need you to cooperate and not strangle American consumers," said Sen. Charles Schumer, a New York Democrat.

The resolution to disapprove the Saudi arms sale the Bush administration outlined in December and January could be voted on in coming days, timed for President George W. Bush's trip to Saudi Arabia this week.

Democratic and Republican lawmakers are also scurrying in this election year to show voters they are trying to do something about rapidly rising gasoline prices.

Earlier on Tuesday, the Senate voted 97-1 to suspend oil deliveries to the U.S. Strategic Petroleum Reserve to put more oil onto the market and slightly lower the price at the pump. The House of Representatives was expected to pass the measure later in the day, despite opposition from Bush.

There was little chance the legislation killing the Saudi arms sale would prevail. If the Senate were to pass it, it still would have to be approved by the House and signed by Bush, who would oppose it.

But Senate Democrats made no secret their real motive was to pressure Saudi Arabia, the world's largest oil producer and most influential member of OPEC, to increase output that has fallen off in recent years.

In 2005, the Saudis produced 9.55 million barrels of oil per day. The kingdom's output fell to 9.15 million barrels a day in 2006 and then dropped to 8.72 million barrels per day last year.

Schumer told reporters that Democrats hoped that with the legislation "hanging over their heads," Saudi Arabia would "do a lot more than they have done before. The bottom line is energy prices are burning a hole in every American's wallet and pocketbook."

Bush last visited Saudi Arabia in January, when he called on OPEC to increase production. His plea was largely ignored and oil prices have since risen more than $30 a barrel to a record of nearly $127.

The four proposed U.S. arms sales to Saudi Arabia include $123 million in

Joint Direct Attack Munition bomb kits made by Boeing Co and $631 million in light armored vehicles built by General Dynamics Corp.

The Bush administration has also proposed to sell Saudi Arabia $220 million worth of advanced targeting equipment built by Lockheed Martin Corp for its F-15 fighter jets, and up to $400 million in Boeing communications equipment for its AWACS aircraft.

All the weapons are aimed at helping to balance Iran's growing military clout in the region.

Congress can try to block arms sales until they are actually delivered to a foreign country.

(Editing by David Storey and Peter Cooney)

Attachment 6

Hillary Clinton Sits Down With Bill O'Reilly

Thursday , May 01, 2008

FOX NEWS

This is a rush transcript from "The O'Reilly Factor," April 30, 2008. This copy may not be in its final form and may be updated.

Watch **"The O'Reilly Factor"** *weeknights at 8 p.m. and 11 p.m. ET and listen to the* **"Radio Factor!"**

BILL O'REILLY, HOST: Earlier this week we got a call that Senator Clinton would be available in South Bend, Indiana, this morning. So we flew out last night, and we spent about an hour with her in the a.m. The interview will be in four parts over two days. Thursday, we'll take a look at illegal immigration, the War on Terror and foreign policy. Tonight, we'll look at what's happening in America right now and the campaign. Roll the tape.

(BEGIN VIDEOTAPE)

BILL O'REILLY, HOST: Senator, first of all, thank you for talking to us.

SEN. HILLARY RODHAM CLINTON, D-N.Y., PRESIDENTIAL CANDIDATE: I'm happy to talk to you, Bill.

O'REILLY: Are you really? So few people are.

CLINTON: Well, you know, I ended up thinking that, you know, I had to try to help you out here.

O'REILLY: And I need all the help I can get. And also, we're in the land of the Fighting Irish.

CLINTON: Well, I'm a fighter. So, you know, we've got something in common there.

O'REILLY: And I'm Irish, so we've got that thing going on. All right.

CLINTON: Absolutely.

O'REILLY: Can you believe this Reverend Wright guy? Can you believe this guy?

CLINTON: Well, you know...

O'REILLY: What do you think?

CLINTON: Well, I'm going to leave it up to voters to decide, you know.

O'REILLY: No, but what do you think as an American? You're an American.

CLINTON: Well, what I said when I was asked directly is that I would not have stayed in that church.

O'REILLY: No, no, no, no. But you're an American citizen. I'm an American citizen. He's an American citizen, Reverend Wright. What do you think when you hear a fellow American citizen say that stuff about America? What do you think?

CLINTON: Well, I take offense at it. I think it's offensive and outrageous. And, you know, I'm going to express my opinion. Others can

express theirs. But, you know, it is part of, you know, just an atmosphere that we're in today where all kinds of things are being said. And people have to, you know, decide what they believe. And I sure don't believe the United States government was behind AIDS.

O'REILLY: Now, when I see people jumping up and applauding when he says that, and other things — we're the moral equivalent of Al Qaeda — when I see my fellow citizens, I don't care what color they are, jump up and applaud that, that disturbs me.

CLINTON: Well, Bill, this is part of the mosaic and diversity of America. And obviously, on opinions like that...

O'REILLY: That's hateful.

CLINTON: Well, you know, I happen to think that is just totally off base. It's, you know, so far out it's hard to even understand and take seriously. But what people are talking to me about is not that, I've got to tell you. What I hear is what's happening in their lives. I mean...

O'REILLY: No, I know that.

CLINTON: ...let somebody else worry about, you know, taking on whatever someone said.

O'REILLY: But trust me on this.

CLINTON: But you know...

O'REILLY: ...television ratings for Reverend Wright, through the roof.

CLINTON: Really?

O'REILLY: Folks are engaged here.

CLINTON: Well, I think though they're making up their minds. They're weighing it.

O'REILLY: Yes.

CLINTON: They're trying to figure it out. But I think for the presidential campaign, they want to know more about what I'm going to do about gas prices, to be blunt. You know...

O'REILLY: But look, I feel sorry for Barack Obama on this one, all right? I feel sorry for him. His whole campaign has been derailed by some loony guy. Isn't that amazing?

CLINTON: Well, he spoke out forcefully yesterday. And...

O'REILLY: Do you feel sorry for Obama?

CLINTON: Well, I think that he made his views clear finally that he disagrees. And I think that's what he had to do.

O'REILLY: OK. Oil prices. Now, you want us to suspend the federal gas tax. So does John McCain. Obama doesn't. But when I hear that, I say, it's the same old politician stuff, because the Democratic Party was opposed, is opposed to ANWR drilling. You voted against nuclear energy seven times. And I'm saying to myself, both parties, both parties have sold the folks out on energy. And now the folks are getting hammered and they should be angry at both parties. Where am I going wrong?

CLINTON: Well, here's what I think. I think there's plenty of blame to go around. We have not done what we should have done...

O'REILLY: Even for you?

CLINTON: ...for more — oh, for all of us, for everybody.

O'REILLY: OK. So you're taking some blame.

CLINTON: But consumers, drivers, political officials, the oil companies, you name it. We're not acting like Americans, Bill. We're not in charge. And I want to put us back in charge, and that's going to...

O'REILLY: OK, so you're going to change your votes on drilling and nukes?

CLINTON: Well, here's what I'm going to do, and I've said this very clearly. In the short term, I do want a gas tax holiday, but to pay for it by putting a windfall profits tax on the oil companies.

O'REILLY: What's that mean though?

CLINTON: Well, here's what...

O'REILLY: What does that mean?

CLINTON: Now look, what it means is that the oil companies have made out like bandits. You know that.

O'REILLY: Right. Record profits.

CLINTON: We all know that, right?

O'REILLY: Yes.

CLINTON: And there is no basis for them to have these huge profits. They're not inventing anything new.

O'REILLY: So, but what do you do? Take 20 percent of their profits away from them?

CLINTON: You set a baseline, and above that baseline you begin to tax their profits.

O'REILLY: So Congress has got to say yes to this.

CLINTON: Congress has got to say yes. Now, I know that's an uphill climb.

O'REILLY: You bet.

CLINTON: But I'm trying to lay the groundwork so that when I'm president we can get in there and say this has been going on way too long. I also want to take on OPEC. You know, OPEC is a cartel, it's a monopoly.

O'REILLY: You want to take them on?

CLINTON: Yes.

O'REILLY: They don't care what you say.

CLINTON: Well...

O'REILLY: They're in Saudi Arabia and Venezuela.

CLINTON: Nine of the 13 biggest oil-producing countries that are in OPEC are also members of the WTO. I would file complaints. I would also change the law so that citizens and businesses could file anti-trust actions. We're going to begin to hold them accountable.

O'REILLY: And then if you hold them accountable, they'll say we'll slap another $20 on the price of oil, so there.

CLINTON: Well, see, but at the same time, we're not going to be sitting idly by acting, you know, like we can just get away with this. We've got to change the way we behave, the way we drive. We have not paid attention for more than 35 years as to what's been happening to us.

O'REILLY: All right. And I'm with you 100 percent.

CLINTON: Good. Good.

O'REILLY: Your husband was president for eight years, and Al Gore, Mr. Global Warming, was vice president for eight years, and they didn't do bupkis about this.

CLINTON: Can I say that we got an elected president who's a fighter, who's going to take on the oil companies, going to take on the oil companies, and is going to say to Americans, you know, we've got to be really focused on how we're going to...

(CROSSTALK)

O'REILLY: All right. As long as you understand that I'm angry and so is everybody watching here, because both parties sold us out.

You know you're going to bankrupt the country with "Hill Care," right? The health care program. You're going to...

CLINTON: Oh, no, I'm not.

O'REILLY: Wait, wait, wait, wait, wait.

CLINTON: No, I'm not.

O'REILLY: You're going to bankrupt the country.

CLINTON: No, I'm not. That is not true.

O'REILLY: Look, California — California, OK...

CLINTON: Yes.

O'REILLY: ...$20 billion deficit. Our home state, you and I...

CLINTON: Right.

O'REILLY: We both live in New York.

CLINTON: Right.

O'REILLY: $5 billion deficit, OK? The biggest expenditure in both California and New York? Medicaid, Medical. Fraud, between 10 and 20 percent. So you're going to tell me President Clinton, Hillary Clinton, is going to, A, run this efficiently and B, not bankrupt the country, when California and New York are already bankrupt? How are you going to do that? Moses going to come down?

CLINTON: Well, he could help. Don't you think?

O'REILLY: Yes, that's who you're going to need.

CLINTON: On those tablets, here's what's going to be written: If we don't get to universal health care, we will continue to bleed money. If we don't have more accountability, like through electronic medical records, we will never catch up to the fraud. If we don't make a decision right now that we're actually going to protect what is best about the American health care system, we won't recognize it in 10 or 20 years.

So here's what I say: Everybody who has health insurance who's happy with it, you keep it. No changes. But what I am going to do is take an already existing plan — it's not government-run, it's not a new bureaucracy. It's the way Congress and federal employees get their health care. And we're going to open it up to every American, because I think it's about time...

O'REILLY: But you're going to subsidize it.

CLINTON: Well, we are. But here's why. You already are subsidizing it. Your family policy has a $900 hidden tax. Why? Because when some poor person who doesn't have health insurance...

O'REILLY: Goes to the emergency room...

CLINTON: That's right.

O'REILLY: ...you've got to pick it up.

CLINTON: You pick it up.

O'REILLY: And I don't mind doing it.

CLINTON: Well, but we're going to get the costs down for everybody, because people should pay something if they can afford to pay it. So under my plan, we're going to tell the insurance companies, no more discrimination, you've got to take care of people with pre-existing conditions. We're going to regulate them differently. And we're going to give them a different business model.

O'REILLY: All right. It's a complicated issue, and I don't think you can do it.

CLINTON: But you know, Bill, it's a moral issue.

O'REILLY: It is and it isn't.

CLINTON: It is a moral issue. Oh, no, it is.

O'REILLY: I mean, there's a self-reliance that has to kick in, you know?

CLINTON: That's right. There is a self-reliance. But...

O'REILLY: I mean, I don't want to be paying for someone who's taking heroin and drinking a bottle of gin a day.

CLINTON: But I assume you want to pay for some hardworking family whose kid has juvenile diabetes.

O'REILLY: I do.

CLINTON: Or some woman...

O'REILLY: I don't mind doing it.

CLINTON: ...that just gets diagnosed with Multiple Sclerosis.

O'REILLY: I think there should be safety nets, but I don't know if you're going to be able to do this.

CLINTON: There — well, but if we don't do it, we'll meet here again in five or 10 years. We'll have more uninsured people. The prices will have continued to go up, because we will not have put into place the safeguards and the accountability that our health care system needs.

O'REILLY: All right.

(END VIDEOTAPE)

O'REILLY: In a moment, we'll continue our conversation with Senator Clinton. We'll zero in on whether she believes she herself is a polarizing personality and some of the unfair treatment she's gotten from liberal news outlets. Right back with it.

(COMMERCIAL BREAK)

O'REILLY: Continuing now with our lead story, Senator Hillary Clinton enters the No Spin Zone. I spoke with her this morning in South Bend, Indiana. And the conversation quickly became personal.

(BEGIN VIDEOTAPE)

O'REILLY: You know, your husband and I make a lot of money. Did you know that?

CLINTON: I've heard that.

O'REILLY: Yes, we make a lot of money. And you, if you're president, are going to take more of my money and your husband's money away. Away. OK, now I'm paying 33 percent fed tax now. You're going to raise that to what?

CLINTON: I'm going up to what we had in the 1990s...

O'REILLY: 39.5, all right.

CLINTON: ...36, 39. People...

O'REILLY: All right. So I'm getting a 6.5 percent bump, and so is Bill Clinton.

CLINTON: Well, it's only for the people making more than $250,000.

O'REILLY: No, that's me. That's me. You're talking to him.

CLINTON: I know.

O'REILLY: OK. All right. All right.

CLINTON: And I am very happy...

O'REILLY: So 6.5 percent...

CLINTON: ...that you're going to pay more...

O'REILLY: I know you are.

CLINTON: ...so that we can cut middle-class taxes...

O'REILLY: Fine.

CLINTON: ....on people who get up every day...

O'REILLY: I'm a generous guy.

CLINTON: ...and do hard work to keep our country going.

O'REILLY: But before I vote for you, I want to know exactly how much you're going to take out of my wallet, all right?

CLINTON: I'm going to take...

O'REILLY: So you got 6.5...

CLINTON: ...as much as you were paying in the '90s. And as I recall, you did pretty well in the '90s.

O'REILLY: Yes.

CLINTON: Yes.

O'REILLY: 6.5, OK. Now, payroll tax, you're going to knock that out?

CLINTON: I have not made any commitment on what we're going to do on Social Security.

O'REILLY: Well, why? You're going to run for president. Are you going to do it or not?

CLINTON: Well, because here's why. I learned a lesson from Ronald Reagan. In 1980, when he was elected, our Social Security system was in a mess. The Democrats weren't agreeing and a lot of the Republicans were nervous. So Speaker Tip O'Neill, another great American politician, the two of them, the two Irishmen, got together and said, let's have a commission, because the only way we're going to fix this is if everybody said, hey, we've got to make some changes. I am not going to raise the payroll tax on people who are already paying more than their share.

O'REILLY: But I could pay it on every nickel I make.

CLINTON: No. I am not in favor...

O'REILLY: So that would be another 8 going on to 6.5. That's 14.

CLINTON: I am not in favor of lifting the cap. That's Senator Obama.

O'REILLY: Oh, you're not?

CLINTON: I am not in favor of lifting the cap.

O'REILLY: OK. So you're going to keep it $109,000?

CLINTON: We're going to see what happens here.

O'REILLY: All right.

CLINTON: We're going to — but...

O'REILLY: So you're kind of waffling here, right?

CLINTON: No, I'm not waffling. I'm saying I'm not going to impose additional burdens on middle-class families. And there are a lot of people...

O'REILLY: But I'm not a middle-class family. I'm a rich guy.

CLINTON: Well, and you know what? Rich people, God bless us. We deserve all the opportunities...

O'REILLY: All right.

CLINTON: ...to make sure our country and our blessings continue to the next generation.

O'REILLY: I'm going to assume — because I'm a saver and I'm prudent — I'm assuming that I'm going to get a 14 percent hit.

CLINTON: Don't assume that. You can't assume that from me.

O'REILLY: All right. Now...

CLINTON: I've not said anything like that.

O'REILLY: OK. You're going to raise taxes on the wealthy, and that's income redistribution. You know what that is. And income redistribution is why some conservatives don't like you, all right? It's because you take from the wealthy and you give to the less affluent. That's socialism. That has a socialist component.

CLINTON: No it isn't.

O'REILLY: Sure it is.

CLINTON: Teddy Roosevelt — was Teddy Roosevelt a socialist?

O'REILLY: Somewhat.

CLINTON: Oh, I think that Teddy Roosevelt was a great American...

O'REILLY: So do I.

CLINTON: ...who understood that our country works better when we're all in it together. Now...

O'REILLY: But you're taking and giving. Robin Hood, taking and giving.

CLINTON: ...90 percent of the benefits of income in the last decade have gone to people like us. Income distribution was much broadly dispersed. You were growing up on Long Island. I was growing up outside of Chicago. You know, my dad got up every day. He was a small business man. He worked his head off, but he didn't feel like the deck was stacked against him.

O'REILLY: OK.

CLINTON: He thought, OK, I'm going to be treated fairly if I do my part.

O'REILLY: Here's where you're wrong. In my neighborhood, Levittown, there was no income distribution at all. There was earning money.

CLINTON: That's right.

O'REILLY: And you kept most of it because taxes were really low.

CLINTON: That is not true. That is not...

O'REILLY: Now...

CLINTON: Look at the tax rates in the '40s, the '50s and the '60s. You know...

O'REILLY: For the wealthy they were high, but not for my dad.

CLINTON: Well, so why don't we go back to what we had in the '50s and the '60s then? Go back to 70 percent...

O'REILLY: Because there were no wealthy people then.

CLINTON: Well, when...

O'REILLY: There were very, very few.

CLINTON: ...when President Kennedy made that dramatic announcement he was going to cut the top rate from 90 percent to 70 percent, people stood up and cheered. All I want to do is get back to what worked in the '90s.

O'REILLY: OK.

CLINTON: In the '90s, we had one of the strongest, fairest economies we've ever had. Yes, did people like you and me pay a little bit more? We sure did. But so did everybody else benefit, because middle-class taxes stayed pretty even.

O'REILLY: We had a pretty good economy under Bush in the last — except for the last year.

CLINTON: No. We've had a really — you know, in the last seven years, the typical American family has lost $1,000 in income. Their energy costs have gone up $2,000. The average tax cut that they got out of whatever he was doing was $600. People are net losers under the Bush economy. They were net winners under the Clinton economy.

O'REILLY: All right.

CLINTON: We're going to bring back a good, positive economy for the vast majority of Americans.

O'REILLY: I'm going to let you go on that because I want to get on to other stuff, but I think that's debatable.

CLINTON: We could go on all day.

O'REILLY: Yes, we could. You could.

OK. Now look, some people say there's not a big difference between you and Barack Obama, overall philosophy, overall outlook. It's a Democratic liberal line. He's more liberal than you, but it's the same thing. And it's a personality run, which is why before Reverend Wright derailed him, Barack Obama had some momentum because you're a more polarizing personality than he is. Would you agree with that?

CLINTON: Well, I...

O'REILLY: He's perceived as a nicer guy?

CLINTON: Well, I've been around a long time. You know, I bear a lot of the scars...

O'REILLY: Yes.

CLINTON: ...of the ideological and the political battles. I stand up for what I believe in. I believe, for example, universal health care is something we have to achieve in this country.

O'REILLY: So does he.

CLINTON: So — no he doesn't, actually. His plan is not a universal health care plan.

O'REILLY: No, but it's the same thing.

CLINTON: But no, but my point is I've been doing that for 15 years. So the people who disagree with me, you know, it's fair.

O'REILLY: But you...

CLINTON: This is the way our system is. They take shots at me. You know when I started running in New York people didn't think I could win. And then I came back and won with 67 percent of the vote.

O'REILLY: Look, you've done...

CLINTON: And the reason is...

O'REILLY: ...in New York.

CLINTON: ...because I reached across party lines. I'm the one with the record of bipartisanship.

O'REILLY: But you're a more polarizing personality. You're like I am. And I hate to say that, with all due, but you are. And Obama's such a nice guy. And that's what this is all about.

CLINTON: No. I happen to think if you want to take on the health insurance companies, the drug companies...

O'REILLY: You got to be tough.

CLINTON: ...the oil companies, you've got to be tough.

O'REILLY: I've got to ask you this.

CLINTON: And we've got to have a president who's a fighter again.

O'REILLY: All right.

CLINTON: Now will that create, you know, some folks who are a little upset? Yes. But if we don't get back to fighting for the American people, we're not going to recognize our country.

O'REILLY: All right. But I'm just trying to tell you that it's a personality contest, a lot of this. That's what it is.

Now, in New York you said you were going to improve upstate New York.

CLINTON: Yes.

O'REILLY: And you didn't. And the economy's worse than it was before you took over eight years ago. And you blamed it on Bush. Just for the record, you've done some good things. I live in the state. But New York, New Yorkers, highest tax in the union.

Now, final question. Are you surprised — and you've got to tell me the truth here. You're looking me in the eye, so I'm going to believe you. Are you surprised that FOX News has been fairer to you than NBC News and a lot of the other liberal news networks? Are you surprised?

CLINTON: I wouldn't expect anything less than a fair and balanced coverage of my campaign.

O'REILLY: Now, I know you're being a little — but really, aren't you surprised?

CLINTON: Well, I have — you know, look, I am not a pundit or a commentator. I will leave that to you.

O'REILLY: But they hammer you every single night.

CLINTON: You know, that comes with the territory.

O'REILLY: I know, but aren't you surprised?

CLINTON: This is — I'm running for the toughest job in the world. And it goes with the territory.

O'REILLY: So you're not going to tell me whether you're surprised.

CLINTON: Well, you know, I think a lot of people know that it's a campaign of firsts. I'm sitting down today, another first in this campaign.

O'REILLY: And isn't this fun so far?

CLINTON: Oh, I've been having a good time, except I want to correct the record on New York, because we do have to make some big changes in New York, changes that I've advocated. And I hope we'll finally get around to doing it. Look, we've got business to do in this country.

(END VIDEOTAPE)

O'REILLY: All right. Thursday, as mentioned, we'll talk about the War on Terror, including water-boarding in Iran, Iraq, and Afghanistan. I think you'll find it very interesting.

Attachment 7

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

October 16, 2007

The Honorable Jeff Bingaman
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20515

Dear Chairman Bingaman:

Advancing legislation that would improve this Nation's energy security while at the same time protecting the environment is a high priority of this Administration. I understand that Allan Hubbard wrote congressional leaders yesterday to discuss broadly the Administration's position on energy issues. I am writing today to express my grave concerns with a single aspect of the energy legislation – but one that is extremely important: the No Oil Producing and Exporting Cartels Act of 2007 (NOPEC Act).

The NOPEC Act would eliminate key protections that are widely available to foreign sovereigns in U.S. courts. And although this unusual step would presently apply only to OPEC countries, it will no doubt be viewed across the world as a dangerous precedent that could threaten our broader international economic relations. Simply put, this legislation, if passed, is likely to cost American jobs.

The Administration's position on this measure is set out clearly in the Statement of Administration Policy of May 22, 2007 (enclosed). If such a provision were included in legislation presented to the President, I would recommend that the President veto the legislation due to the risks that it poses to foreign investment flows into the United States.

The United States must continue to send a clear signal to the rest of the world that our economy remains open and that we welcome foreign investment. We likewise actively encourage other countries to deepen their commitment to open investment policies. As President Bush made clear in his May 10 Open Economies Policy Statement, "growing inflows of foreign investment are necessary to expand levels of employment, innovation, and competitiveness in this country." Foreign-owned companies directly provide jobs to over five million U.S. workers, or almost five percent of our domestic workforce. These jobs typically pay 30% higher compensation than the U.S. average. Foreign direct investment supports a similar number of jobs indirectly because foreign-owned subsidiaries source about 80 percent of their inputs domestically. And foreign direct investment generates a disproportionately higher level of R&D spending in the United States and for U.S. exports than does domestic investment. When a foreign investor makes an investment in our nation, it is the ultimate vote of confidence in our economy.

A decision to bar sovereign immunity and prohibit reliance on the act of state doctrine for certain countries would send a very negative signal and undermine such confidence. At a minimum, we believe that OPEC countries would reconsider their financial investment in the United States. A loss of this foreign investment would unquestionably cost American jobs and damage the U.S. economy. In addition, the countries singled out for special treatment could retaliate against U.S. assets and block investments in their countries.

Finally, non-OPEC countries may speculate whether they and their assets – both portfolio and direct investment – could be deprived of immunity by legislation in the future, discouraging foreign investment in the United States that creates jobs and keeps our economy strong.

As we seek to attract foreign capital, we are competing for investment dollars against an increasing number of attractive economies across the globe. It would be a serious mistake to take steps that would put us at a disadvantage. The United States must continue to be the most attractive place in the world for investment. Deputy Secretary Kimmitt and I continue to meet with foreign leaders to encourage investment in the United States and to promote open investment policies worldwide. The NOPEC Act, if it were to become law, would undermine these efforts.

If you have any further questions, please do not hesitate to contact me.

Sincerely,

Henry M. Paulson, Jr.

Enclosure

Attachment 8

Sovereign wealth funds to dwarf US economy

By David Litterick
Last Updated: 1:21am BST 30/04/2008

Sovereign wealth funds grew to $3,500bn (£1,750bn) last year, putting them on track to surpass the entire economic output of the United States within seven years, according to a new study.

While China remains the operator of the largest fund at $1,200bn, the fastest-growing pools of capital are controlled by previously overlooked regimes in Nigeria, Oman and Kazakhstan.

In total, the world's sovereign funds have managed 24pc compound annual growth over the past three years.

According to Global Insight, the US financial research organisation, the funds invested almost $80bn in US banks last year and are expected to provide even more capital in 2008 and 2009.

Jan Randolph, head of sovereign risk, said: "Sovereign wealth funds are the new financial power brokers, replacing the combined financial muscle of hedge funds and private equity, and usurping central banks as the international capital providers of last resort.

- **More from the banking and financial services sector**

"There has been a shift of financial weight from West to East, particularly to China, Asia, the Middle East and other energy countries," he said.

"Riding the energy and commodities boom, together with the wilting dollar, sovereign wealth funds will continue to be the key players in the changing financial landscape of the global economy thrown into flux by the credit crunch."

The research company said that in January 2008 alone, worldwide acquisitions by the funds totalled $20.6bn, or nearly one-third of the total $60bn the funds made in mergers and acquisitions for 2007. The funds accounted for 35pc of world M&A activity in 2007, and 28pc of all M&A in the US during January 2008.

The organisation said this shows that the funds are taking the place of private equity firms, where M&A activity has fallen as the credit crunch prevents them from raising the same amount of debt.

The funds have attracted controversy, especially in the US - often due to the security threats posed by the countries they are run by - but have been welcomed in the UK, where they have snapped up a significant stake in BP, for example.

II

Calendar No. 169

110TH CONGRESS
1ST SESSION

H. R. 2264

IN THE SENATE OF THE UNITED STATES

MAY 23, 2007
Received; read twice and placed on the calendar

AN ACT

To amend the Sherman Act to make oil-producing and exporting cartels illegal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "No Oil Producing and Exporting Cartels Act of 2007" or "NOPEC".

SEC. 2. SHERMAN ACT.

The Sherman Act (15 U.S.C. 1 et seq.) is amended by adding after section 7 the following:

"SEC. 7A. (a) It shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state, to act collectively or in com-

bination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of co-operation or joint action—

"(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;

"(2) to set or maintain the price of oil, natural gas, or any petroleum product; or

"(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product;

when such action, combination, or collective action has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States.

"(b) A foreign state engaged in conduct in violation of subsection (a) shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States in any action brought to enforce this section.

"(c) No court of the United States shall decline, based on the act of state doctrine, to make a determination on the merits in an action brought under this section.

"(d) The Attorney General of the United States may bring an action to enforce this section in any district court

of the United States as provided under the antitrust laws.".

SEC. 3. SOVEREIGN IMMUNITY.

Section 1605(a) of title 28, United States Code, is amended—

(1) in paragraph (6), by striking "or" after the semicolon;

(2) in paragraph (7), by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(8) in which the action is brought under section 7A of the Sherman Act.".

Passed the House of Representatives May 22, 2007.

Attest: LORRAINE C. MILLER,

Clerk.

Calendar No. 169

110TH CONGRESS
1ST SESSION

H. R. 2264

AN ACT

To amend the Sherman Act to make oil-producing and exporting cartels illegal.

MAY 23, 2007

Received; read twice and placed on the calendar

THE PRESIDENT'S EXPORT COUNCIL
WASHINGTON, D.C. 20230

August 23, 2007

The President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

A recent study comparing the structural cost burden shouldered by American companies with the burden shouldered by our trading partners showed an increase from 22% to 32% over the last three years alone. Chief among the causes of this differential is the excessive amount and cost of civil litigation in the United States. Despite the mandate in Federal Rule of Civil Procedure 1 for "the just, speedy, and inexpensive determination of every action," our courts, federal and state, have gained the reputation around the world as venues for abusive, lengthy, and excessively costly litigation. The Members of your Export Council commend your leadership as an advocate for systemic reforms such as the Federal Class Action Fairness Act and the recently adopted electronic discovery amendments to the Federal Rules of Civil Procedure, but much more is needed if our exports are to compete, and the United States is to continue to attract foreign direct investment.

To this end, the Council recommends that your Administration promote common sense civil justice reforms including the following:

1) Rationalize pretrial discovery. The cost and disruption of pretrial discovery in US courts is so excessive that defendants are often forced to settle meritless cases. Information gathering and production in significant cases can run into the hundreds of thousands or even millions of dollars. Such excessive discovery is unnecessary. Civil justice systems in other industrialized nations obtain evidence sufficient to resolve cases fairly without American-style pretrial discovery. Similarly, parties resolve disputes by international arbitration without abusive discovery. In our federal system and in most state court systems, the general rule is that the party producing information pays the costs of production. This practice creates an incentive for adversaries to make expansive discovery requests. Shifting at least some of the cost of producing information to the party requesting the information would place the cost-benefit decision on the proper party. We urge that the Administration propose and support enactment of a statute mandating cost-shifting when a party requests discovery of information that is not reasonably accessible in the ordinary course of business.

2) Eliminate "junk science" from the courtroom. The Supreme Court decisions of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire, Co. v. Carmichael*, 526 U.S. 137 (1999), and the subsequent amendment of the Federal Rules of Evidence with respect to expert evidence have gone part way to set standards that reduce the risk that juries will hear so-called "expert" evidence based on unreliable theories and

methodologies; nevertheless, legislation clarifying the standards for the admission of expert evidence to ensure that it reflects sound principles is needed. We recommend that the Administration propose and support passage of legislation that would require that expert evidence be based on valid analysis and methodology generally accepted in the relevant area of expertise.

3) Enact a federal standards defense. Even when products and warning labels meet all federal government standards, manufacturers are subject to claims for compensatory and punitive damages for allegedly defective products or warnings. The problem is particularly acute in state courts. The unpredictability that arises from the inability to rely on federal standards inhibits the creation and introduction of new products. We urge that the Administration propose and support enactment of a federal standards defense that would protect manufacturers and sellers of products that meet federal manufacturing and labeling standards. The federal standards should apply in federal courts and preempt any other standard that a state court might attempt to apply.

4) Develop policies and practices to limit use of US courts by foreign claimants for claims arising out of acts committed in foreign countries by governments of those countries. Citizens of foreign countries are using US courts to assert claims under the Alien Tort Statute or under US state law against American companies for allegedly aiding and abetting foreign government security forces to commit wrongful acts. To defend itself on the merits, the American company may be faced with the virtually impossible task of obtaining documents and testimony from foreign government and security officials. Exposure to such claims is a major disincentive for American companies to invest in developing countries and puts our companies at a competitive disadvantage with their foreign competitors. Many of these cases have foreign policy implications. We urge the Administration to continue to provide its views to courts on the legal and policy issues raised by these cases.

Clearly, having a legal system that exposes U.S. companies to significant litigation risk, inhibits creation of new products and services, discourages investment, and puts American companies at a competitive disadvantage with respect to foreign competitors. Mr. President, the PEC applauds your unwavering commitment to a fair civil justice system and to the competitiveness of this nation. The foregoing recommendations do not impede litigants with valid claims. They would lead to a fairer, more predictable, less expensive system for resolving such claims and would help maintain American competitiveness in the global marketplace.

Sincerely,

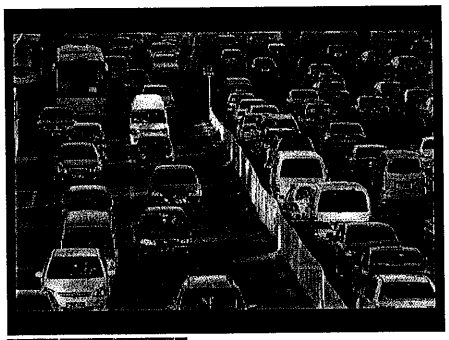
Bill Marriott

Attachment 11

Bloomberg.com

Emerging Market Oil Use Exceeds U.S. as Prices Rise (Update2)

By Mark Shenk



April 21 (Bloomberg) -- Traffic jams in Beijing and humming air conditioners in Dubai are replacing U.S. highways and suburbs as the driver of global oil prices.

China, India, Russia and the Middle East for the first time will consume more crude oil than the U.S., burning 20.67 million barrels a day this year, an increase of 4.4 percent, according to the International Energy Agency in Paris. U.S. demand will contract 2 percent to 20.38 million barrels daily, the IEA says.

Economic growth of more than 8 percent in China and India, coupled with increasing car ownership among the countries' combined populations of 2.45 billion people, will more than compensate for falling U.S. demand. Oil use worldwide will increase 2 percent this year because of growth in emerging markets, the Paris-based IEA says.

``Does the U.S. matter anymore?'' said **Mike Wittner**, head of oil research at Societe Generale SA in London. ``Has the U.S. mattered for the last few years? It is debatable. As far as the oil market is concerned, demand growth is going to be continued to be driven by China and the Middle East.''

The rising oil price will benefit Exxon Mobil Corp., BP Plc and Royal Dutch Shell Plc, while punishing a U.S. airline industry that recorded four bankruptcies in a month. Higher energy costs will push up food costs at a time when corn and rice are close to new highs.

Crude oil futures rose 79 cents to settle at a record $117.48 a barrel on the New York Mercantile Exchange today, more than twice the level of three years ago.

Emerging Markets

CIBC World Markets, Societe Generale and Barclays Plc say oil prices are heading higher because of increasing fuel consumption in emerging markets, regardless of a U.S. downturn.

``The U.S. recession will be a footnote as far as the oil market is concerned,'' says **Jeffrey Rubin**, chief economist at CIBC World Markets Inc. in Toronto, who has correctly forecast higher oil prices since 2000. ``Supply isn't growing and demand is growing robustly in the developing world.''

Oil will average $120 a barrel for all of 2008, compared with almost $98 in the first quarter of the year, and reach $150 ``by the end of the decade,'' Rubin said.

Historically, a recession in the U.S. would lead to lower prices. Oil fell 26 percent to $19.84 a barrel in New York in 2001 when the economy contracted. The U.S. consumes 24 percent of the world's oil, down from 26 percent seven years ago.

Oil demand in both China and India will rise by 4.7 percent, according to the IEA. China, the world's second-biggest energy user, will consume 7.89 million barrels of oil a day this year. India will use 2.92 million barrels of oil a day in 2008, more than is pumped by OPEC member Venezuela.

Energy Use

Emerging markets burn a fraction of the energy of the U.S., leaving room for growth. The 2.45 billion people in China and India used only half as much crude as 301 million Americans last year. The average person in China consumed less than 20 percent as much energy as the average American in 2005, according to U.S. Energy

Department. In India, energy use is less than 10 percent of America on a per-capita basis.

China's passenger car sales jumped 22 percent to 6.298 million last year and may rise 16 percent to about 7.3 million this year. China may boost vehicle output by a million units a year for the next decade to reach 20 million a year by 2017, according to the China Association of Automobile Manufacturers.

Russia and the Middle East are benefiting from rising oil prices. Russia's economy expanded at an annual 8 percent rate in the first quarter, the Economy Ministry said on April 17. Russia, the world's second-biggest oil exporter, will probably grow 7.1 percent this year, Russian Finance Minister **Alexei Kudrin** said on April 11.

Russian Growth

The Russian government plans to spend some of its new wealth on updating Soviet era transport links. Russia may invest as much as 21 trillion rubles ($895 billion) to improve transportation infrastructure during the next seven years, Transport Minister **Igor Levitin** said on Feb. 1.

Middle Eastern economic growth will probably accelerate to 6.1 percent this year from 5.8 percent in 2007, the International Monetary Fund said April 9. Oil demand in the region will surge 5.8 percent to 6.97 million barrels a day this year, according to the IEA.

``Many emerging economies are relatively isolated from the impact of the U.S. recession,'' said **Edward Morse**, chief energy economist at Lehman Brothers Holdings Inc. in New York. ``In the Middle East demand is expected to grow 350,000 barrels a day this year. These are a large number of very small countries having rampant demand growth.''

Hot Summer

Prices may rise as much as $20 a barrel this summer because of Middle East power needs, Morse said. A hot summer would likely result in more burning of crude oil for power generation and a diversion of natural gas from enhanced recovery of oil deposits.

``The predominant market view is that the emerging economies will overcompensate for any possible demand slump in OECD countries,'' said **Eugen Weinberg**, an analyst at Commerzbank AG in Frankfurt. ``I couldn't rule out that oil may go to $150.''

The Paris-based Organization for Economic Cooperation and Development represents 30 industrialized nations, including the U.S., Japan and Germany.

Government price caps and subsidies in India, China and the Middle East protect the public from higher gasoline and diesel prices, measures designed to limit inflation. In Iran, OPEC's second-biggest oil producer, subsidized gasoline pump prices are 1,000 rials a liter, about 11 U.S. cents.

Price Subsidies

``Subsidies of commodity prices buffer populations in oil emerging economies from price increases,'' Morse said. ``This has the effect of increasing fuel demand.''

U.S. pump prices have followed crude oil higher. Regular gasoline, averaged nationwide, rose 2.7 cents to a record $3.445 on April 18, according to AAA, the nation's largest motorist organization. In the U.K. a gallon of gasoline cost $7.99 on average on March 31, according the Automotive Association.

``Even if the fundamentals in general, particularly this quarter, were to weaken, we would think investment flow could be pushing prices to records anyway,'' Wittner said.

Investors have transferred money into commodities, especially energy, during the past year because their returns have outpaced stocks and bonds. Oil gained 22 percent, while the S&P 500 slid 5.6 percent and government bonds returned 12 percent, according to Merrill Lynch & Co. indexes.

Investments tied to commodity indexes rose as much as $4 billion in the first quarter, a third more than in the final three months of last year, Standard & Poor's said April 18.

``It makes sense for investors and hedge funds to invest in these commodities with the weakness of other markets,'' said **Eric Wittenauer**, an energy analyst at Wachovia Securities in St. Louis.

To contact the reporter on this story: **Mark Shenk** in New York at **mshenk1@bloomberg.net**.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 22, 2007
(House)

STATEMENT OF ADMINISTRATION POLICY

H.R. 2264 – No Oil Producing and Exporting Cartels Act of 2007 (NOPEC)
(Rep. Conyers (D) Michigan and 5 cosponsors)

The Administration strongly opposes House passage of H.R. 2264. This bill has the potential to lead to oil supply disruptions and an escalation in the price of gasoline, natural gas, home heating oil, and other sources of energy. The Administration has proposed initiatives, like the Advanced Energy Initiative and Twenty-in-Ten, to diversify our energy resources and promote advanced technologies in order to strengthen our energy security and address environmental challenges. The Administration will continue to work with Congress to pass beneficial and effective legislation; H.R. 2264 is not such a bill.

The Administration supports a market-based international energy trade and investment system. However, the Administration believes that the appropriate means for achieving that objective lies in diplomatic efforts by the United States with the countries involved in that trade, rather than lawsuits against those countries in U.S. courts. This legislation: (1) intends to compel foreign countries that produce oil to submit to the jurisdiction of U.S. courts; and (2) purports to eliminate sovereign immunity and the "act of state" doctrine as defenses to an antitrust lawsuit brought pursuant to the bill. This would result in a targeting of foreign direct investment in the United States as a source of damage awards and would likely spur retaliatory action against American interests in those countries and lead to a reduction in oil available to U.S. refiners. Such a result would do little to achieve a free market in international trade in petroleum, would substantially harm other U.S. interests abroad, and would strongly discourage investment in the United States economy. If H.R. 2264 were presented to the President, his senior advisors would recommend that he veto the bill.

* * * * *

Attachment 13

Prepared Statement of the Federal Trade Commission

Solutions to Competitive Problems in the Oil Industry

Presented by Richard G. Parker[1]
Director
Bureau of Competition

Before The

Committee on the Judiciary
United States House of Representatives

March 29, 2000

I. Introduction

Mr. Chairman and members of the Committee, I am Richard G. Parker, Director of the Federal Trade Commission's Bureau of Competition. I am pleased to appear before you today to present the Commission's testimony concerning the important topic of competitive problems in the oil industry. Competition in the energy sector - particularly in the petroleum industry - is vitally important to the health of the economy of the United States. Antitrust enforcement has an important role to play in ensuring that the industry is, and remains, competitive. Today, we will describe the Commission's recent antitrust enforcement efforts in the oil industry. We will also provide a brief discussion of legal and other complications that would arise in an antitrust lawsuit against the Organization of Petroleum Exporting Countries ("OPEC").

Consumers have experienced considerable price increases in gasoline and home heating oil in the past year, and domestic refineries have had to bear a large increase in the price of crude oil. The price of imported crude oil rose from $10.92 per barrel in the first quarter of 1999 to over $31.00 in March, 2000. Gasoline prices were $.95 per gallon and heating oil was $.80 per gallon in the first quarter of 1999. One year later, both peaked at over $1.70.[2] Increases of this magnitude call for scrutiny by antitrust enforcement authorities to determine whether they result from collusion or exclusion. They also remind us that effective merger enforcement remains critical to preserving competition among domestic and foreign private oil companies.

The FTC is a law enforcement agency with two distinct but related missions: preserve competition in the marketplace and protect the consumer. The Commission's statutory authority covers a broad spectrum of sectors in the American economy, including the companies that comprise the energy industry and its various components. The Commission's Bureau of Competition enforces two antitrust laws, the FTC Act[3] and the Clayton Act.[4] The Commission shares jurisdiction with the Department of Justice under section 7 of the Clayton Act to prohibit mergers or acquisitions that may "substantially lessen competition or tend to create a monopoly."[5] Under section 5 of the FTC Act, the Commission prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The Commission shares its expertise in competition and consumer protection matters by providing advice and guidance to states and other federal regulatory agencies.[6]

Consumer protection is the goal of antitrust enforcement across all industries; its importance is particularly clear in the energy industry, where even small price increases can have a direct and lasting impact on the entire economy. Towards that end, the Commission has expended a substantial part of its resources in recent years enforcing antitrust laws in energy industries. In fiscal years 1999 and 2000 to date, the Bureau of Competition spent 115 work years on investigations in energy industries, almost one-third of its total enforcement budget. So far in fiscal 2000, the Bureau has spent over 35 work years on energy related matters.

II. Causes of the Current Price Spike

The recent spike in gas and heating oil prices appears to be caused by several factors, all related to the imbalance of supply and demand. During 1998 and 1999, OPEC countries and several other non-OPEC exporting countries curtailed the supply of crude oil available to the world market. During the same time period, a number of Asian economies began to recover from a regional recession, causing increased demand for petroleum products. The result was that worldwide consumption exceeded production, and inventories were drawn down. The price increase in crude oil caused by the excess of demand over supply also reduced refiners' margins, causing them to cut production and use inventories to meet demand.

To exacerbate the situation, the weather on the East Coast was also unusually severe in January, which had a two-fold effect: it both caused the demand for heating oil to increase, and decreased supply because frozen rivers and high winds delayed product movement. Demand for electric power also increased, causing utilities to turn to distillates as a substitute for interruptible natural gas supplies. In addition, several refinery outages in January contributed further to the supply-demand imbalances.

III. Protecting Competition in the Oil Industry

The Commission's responsibility is to prevent anticompetitive mergers and collusive or abusive activities from contributing to price increases in the oil industry. The Commission does this in several different ways. For analytical purposes, it is best to think of the Commission's antitrust enforcement authority as divided into merger and nonmerger sectors. Enforcing the law against anticompetitive mergers prevents the accumulation of unlawful market power. Enforcing the nonmerger provisions of the antitrust laws prevents anticompetitive collusive activities or the acquisition or abuse of market power.

A. Merger Enforcement

Much of the Commission's experience with enforcing the antitrust laws in energy industries has been in analyzing mergers. Merger enforcement is the first line of defense in protecting a competitive marketplace, because it preserves rivalry that brings lower prices and better services to consumers. The Commission blocks those mergers that increase the likelihood that the merged firm can unilaterally, or in concert with others, increase prices or reduce output or innovation. The Commission has an extensive history of carefully investigating mergers in the energy industries, particularly petroleum. The FTC has challenged mergers in those industries that would be likely to reduce competition, result in higher prices, and injure the economy of the nation or any of its regions.(7)

The Commission has been particularly active in the last two years in investigating petroleum mergers due to the ongoing trend of consolidation and concentration in this

industry. For example, on February 2, 2000 the Commission voted to challenge the proposed merger of BP/Amoco and ARCO.[8] In recent years, the Commission has investigated the mergers of Exxon and Mobil[9] and BP and Amoco[10]-the two largest oil mergers in history-and the combination of the refining and marketing businesses of Shell, Texaco and Star Enterprises to create what was, at the time, the largest refining and marketing company in the United States.[11]

Our merger review investigations revealed that these transactions threatened competition in local or regional markets. The Commission allowed these mergers to proceed only after demanding significant changes that would fully restore the competition lost as a result of the merger. For example, in the Exxon/Mobil merger review, the Commission ordered divestiture of all Mobil stations from Virginia to New Jersey, and all Exxon stations from New York to Maine, as well as additional retail divestiture in the Southwest, a refinery, and other pipeline and terminal assets. This was the largest divestiture in history.

In BP-Amoco, the Commission ordered divestiture in 30 local gasoline markets mostly in the Midwest, and in Shell-Texaco, the Commission preserved competition through divestiture in local gasoline markets and also in refining and pipeline markets.

B. Nonmerger Enforcement

Preventing anticompetitive mergers is not sufficient to protect competition in any industry. Merger enforcement must work in tandem with nonmerger enforcement against illegal monopolies and collusive practices. In the oil industry, monopoly cases are few. While there are certainly relevant antitrust markets where one firm may wield significant market power, most oil industry markets are served by multiple firms.[12] Thus, the focus of nonmerger investigation in this industry has been, and likely will remain, on concerted activities that have anticompetitive effects.

(1) Fundamental Problem: OPEC Activity Leading to Higher Prices for Crude Oil

The Committee has expressed interest in whether the Commission believes that OPEC and its members could be liable under U.S. antitrust laws. The oil industry is unique among commercially important global industries in that a large share of the reserves of the base commodity is owned and regulated by sovereign nation-states. These states regard crude oil as their primary (and perhaps only) natural resource and tightly control how that resource is exploited. This fact significantly complicates the application of competitive principles to the global oil industry. Sovereign nations typically enjoy several jurisdictional and substantive defenses to the antitrust laws that are not available to domestic or foreign private companies.[13]

A group of nations holding the largest oil reserves have formed OPEC for purposes of making joint output decisions. The efficiency of the cartel has varied over time. However, OPEC's members recently agreed among themselves to reduce output to a level far short of the amount that would be pumped in a freely competitive market. So far, this agreement has been maintained by those countries. The result is oil prices that substantially exceed the marginal cost of supplying oil. The same activity undertaken by a group of commercial firms would constitute a *per se* violation of the U.S. antitrust laws.

Is OPEC, because it is composed of sovereign nations, immune from liability under the U.S. antitrust laws? This question raises a number of complex issues related to

international jurisdiction, sovereignty, and diplomatic relations. While the Commission does have expertise in analyzing competition in the energy sector, it does not presume to have final authority to provide definitive answers or advice to this Committee about the appropriateness of U.S. antitrust enforcement against OPEC members. That expertise and authority reside in the executive branch, including the Department of Justice and other executive agencies. We strongly recommend that this Committee also confer with those authorities about the legal issues outlined below.

The most significant attempt to enforce the antitrust laws against OPEC occurred in the 1970s in the case of *International Association of Machinists (IAM) v. OPEC,*(14) a case in which a union brought suit against OPEC for allegedly violating section 1 of the Sherman Act(15) by fixing the price of gasoline. In *IAM*, both a federal District Court and the Court of Appeals for the Ninth Circuit declined to apply the antitrust laws against OPEC, but for different reasons.

(a) *Foreign Sovereign Immunity*

The District Court held that OPEC was protected by the sovereign immunity doctrine, which holds that each independent sovereign is equal in sovereignty to all other states.(16) Thus, the courts of one nation generally have no jurisdiction to entertain suits against another nation. This doctrine was codified by Congress in the Foreign Sovereign Immunities Act of 1976.(17) That Act, however, contains an exception for an "action based upon a commercial activity."(18) A foreign nation is deemed to have waived its immunity when it engages in "commercial activity." However, the District Court held that the OPEC agreement was not commercial activity under the statute because it related to the sovereign's choices about how the natural resources within its control are to be exploited. As the court stated, "it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource to wit, crude oil from its territory."(19) Other courts have agreed that a foreign nation's decisions concerning its natural resources are not subject to the jurisdiction of U.S. courts.(20)

(b) *Act of State Doctrine*

The Court of Appeals affirmed dismissal of the action but declined to reach the sovereign immunity question. Instead, the court relied on the act of state doctrine, which "declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state."(21) This doctrine is not jurisdictional, but rather prudential -- it deems a judicial remedy inappropriate for international comity reasons and due to domestic considerations of separation of powers of co-equal branches of government.(22) As the court noted:

> When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.(23)

Thus, the Ninth Circuit declined to adjudicate the supply-restricting actions of OPEC under the antitrust laws.

In the nearly twenty years since the *IAM* case was decided, there have been no additional

antitrust challenges that we know of, either to OPEC's activities or to any similar activities of foreign nations. That does not mean, of course, that the Ninth Circuit's decision is the final word on these issues. The Supreme Court has not directly addressed the issues raised by OPEC's conduct, and a number of these issues are open to dispute. Thus, any potential lawsuit against OPEC and its member nations would implicate a number of difficult legal and practical questions.

Among the complex legal questions presented would be the application of the doctrine of sovereign immunity. An important issue would be whether the conduct of OPEC and its member nations would be considered sovereign acts under the Foreign Sovereign Immunities Act, as they were in *IAM*, or commercial activities. The dividing line between "sovereign" and "commercial" activities can be elusive, particularly where, as here, a government's extraction and sale of natural resources from its own territory is concerned. Another issue would be the relevance, if any, of international law regarding sovereign immunities.

Interpreting the act of state doctrine could be equally difficult. A government challenge could well resolve the separation of powers concerns that underlie the doctrine. Any decision granting an injunction or other remedy would likely require a finding that certain decisions of OPEC member nations were invalid under U.S. law, however, which is the paradigm used for application of the doctrine.(24) Little guidance exists as to how to analyze the application of the doctrine under such circumstances.

In addition, it is possible that OPEC and its member nations might not be "persons" subject to the antitrust laws. A small number of decisions hold that a foreign state cannot be sued under the antitrust laws for actions taken in its sovereign capacity.(25) In *IAM*, the district court concluded that it was compelled to dismiss the action against the foreign sovereign members of OPEC because they could not be made defendants in an antitrust suit.

A possible enforcement action also raises practical questions as to whether jurisdiction can be obtained over OPEC and its member nations, how a factual investigation could be conducted with respect to documents and witnesses located outside the United States, and the nature and enforceability of any remedy.

Finally, and perhaps most importantly, any enforcement action would raise significant diplomatic considerations. A decision to bring an antitrust case against OPEC would involve not only, and perhaps not even primarily, competition policy, but also defense policy, energy policy, foreign policy, and natural resource issues. In particular, any action taken to weaken a sovereign nation's defenses against judicial oversight of competition lawsuits, for example, would have profound implications for the United States, which places buying and selling restrictions on myriad products. Consequently, any decision to undertake such a challenge ought to be made at the highest levels of the executive branch, based on careful consideration by the Department of Justice and other relevant agencies.

(2) Potential Collusion to Raise Prices for Refined Products

The fact that application of the U.S. antitrust laws to OPEC's decision to reduce output is problematic does not mean that there is no place for nonmerger antitrust enforcement in this industry. Continued antitrust oversight of these markets is important to ensure that private market participants do not, through anticompetitive conduct, exacerbate conditions caused by OPEC, cold weather, or other factors. For example, private firms' actions to fix prices, reduce supply, or tie products could all be antitrust violations. The potential is

always present for producers, refiners, or distributors to take advantage of sudden market imbalances to engage in anticompetitive conduct in the hope that their illegal activities will be lost in all the noise.

A number of State Attorneys General in the Northeast have opened an investigation of the increase in prices for heating oil and diesel fuel in their jurisdictions and have requested that the Federal Trade Commission assist them. We are providing such assistance but I cannot comment further on this law enforcement investigation. The Commission continues to monitor gasoline price increases and competition across the U.S., looking for any indications that the antitrust laws have been violated.

IV. Conclusion

The Commission thanks the Committee for holding this important hearing. The American public needs to know what forces are at work in this vital sector of the economy. Higher prices for products that are critical to our citizens' quality of life and for the efficient functioning of the national economy are a matter of serious concern. The Commission has devoted substantial resources to preserving competition in the oil industry during this period of consolidation through aggressive merger enforcement and nonmerger investigations. The Commission remains committed to taking all appropriate action to challenge private conduct that violates the antitrust laws. But, as we have noted above, antitrust enforcement against OPEC and its members involves considerably more complex questions than comparable actions against private companies - questions that ultimately would be resolved by other agencies in the executive branch.

Endnotes:

1. This written statement represents the views of the Federal Trade Commission. My oral presentation and response to questions are my own, and do not necessarily represent the views of the Commission or any individual Commissioner.

2. Energy Information Administration, Heating Fuels and Diesel Update, March 2, 2000, at www.eia.doe.gov *See also* Statement of John Cook, Petroleum Division Director, Energy Information Administration, Department of Energy, Before the Committee on Energy and Natural Resources, United States Senate (Feb. 24, 2000).

3. 15 U.S.C. § § 41-58.

4. 15 U.S.C. § § 12-27.

5. 15 U.S.C. § 18.

6. In recent years, the Commission has been active in supporting the deregulation of the electric power industry. *See* Commission Letter to the Honorable Thomas E. Bliley, Chairman, Committee on Commerce, United States House of Representatives, Concerning H.R. 2944, The Electric Competition and Reliability Act (Jan. 14, 2000); Comment of the Staff of the Bureau of Economics, Federal Trade Commission, "Inquiry Concerning Commission's Merger Policy Under the Federal Power Act," Dkt. Nos. RM95-8-000 and RM94-7-001 (May 7, 1996); "Revised Filing Requirements," Dkt. No. RM98-4-000 (Sept. 11, 1998); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission Before the Alabama Public Service Commission, Dkt. No. 26427, Restructuring in the Electricity Utility Industry (Jan. 8, 1999).

7. Section 7 of the Clayton Act specifically prohibits acquisitions where the anticompetitive acts affect "commerce in any section of the country." 15 U.S.C. § 18.

8. *Federal Trade Commission v. BP Amoco, p.l.c.,* Civ. No. C 000416 (SI) (N.D. Cal. Feb. 4, 2000) (complaint) On March 15, 2000, the Commission and all other parties obtained an order from the Court adjourning the preliminary injunction hearing while the Commission evaluates the parties' proposal to sell all of ARCO's Alaska operations to Phillips Petroleum Co.

9. *Exxon Corp.,* FTC File No. 991 0077 (Nov. 30, 1999) (proposed consent order).

10. *British Petroleum Company p.l.c.* , C-3868 (April 19, 1999) (consent order).

11. *Shell Oil Co.,* C-3803 (April 21, 1998) (consent order).

12. *Exxon Corp., supra,* Separate Statement of Chairman Pitofsky and Commissioners Anthony and Thompson.

13. *See* United States Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (April 5, 1995), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at § 3.31 (Foreign Sovereign Immunity) and § 3.33 (Acts of State).

14. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd,*649 F.2d 1354 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).

15. 15 U.S.C. § 1.

16. The District Court also held that foreign nations were not "persons" for purposes of a Sherman Act suit, although that determination was not necessary to the outcome of the case, given the court's holding on the jurisdictional issue. The U.S. Supreme Court has held that a foreign nation may be a plaintiff in a Sherman Act case. *See Pfizer Inc. v. India,* 434 U.S. 308 (1978). The Court has not spoken on the issue of a foreign nation as a defendant in an antitrust case.

17. 28 U.S.C. § 1330 *et seq.*

18. 28 U.S.C. § 1605(2).

19. *IAM,* 477 F. Supp. at 567. *See also* Restatement (Third) of International Law § 443, "[a]n official pronouncement by a foreign government describing a certain act as governmental, is ordinarily conclusive evidence of its official character."

20. *MOL, Inc. v. Peoples Republic of Bangladesh,* 736 F.2d 1326, 1329 (9th Cir. 1984) (abrogating a contract to export native fauna concerned "Bangladesh's right to regulate its natural resources, . . . a uniquely sovereign function"); *Rios v. Marshall,* 530 F. Supp. 351, 372 (S.D.N.Y. 1981) ("temporary removal of manpower resources" is not a commercial activity under the FSI Act).

21. *IAM,* 649 F.2d at 1358.

22. The Supreme Court described the act of state doctrine as "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,* 493 U.S. 400, 404 (1990), *quoting Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964).

23. *IAM,* 649 F.2d at 1358.

24. *Kirkpatrick,* 493 U.S. at 405.

25. *See, e.g., Hunt v. Mobil Oil Corp.,* 550 F.2d 68, 78 n.14 (2d Cir. 1977); *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.,* 307 F. Supp. 1291, 1298 (D. Del. 1970).

Attachment 14

Los Angeles Times

http://www.latimes.com/business/investing/la-fi-markets10-2008may10,0,1263773.story
From the Los Angeles Times

MARKETS

Oil prices breach $125 a barrel to new record high

Stock investors, who fear that rising gas costs will crimp economic growth, push the Dow lower.

By Martin Zimmerman and Walter Hamilton
Los Angeles Times Staff Writers

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Oil prices jumped to a new record Friday, rattling stock investors and raising the specter of another round of sticker shock at the gas pump.

Crude oil for June delivery gained $2.27 to close at $125.96 a barrel in New York trading. It reached as high as $126.20 during the day.

It was oil's sixth straight daily gain, and breaching the $125-a-barrel mark sets the stage for further gains, both in the futures pits and at the gas pump, analysts said.

"Consumers and end-users are clearly about to get hit by some of the stiffest increases in 2008 that are only now working their way through the distribution chain," Tom Kloza, chief oil analyst for the Oil Price Information Service, wrote in a report to clients, noting that crude prices have been rising much faster than gasoline prices.

Motorists are already paying record prices, AAA said in its latest report. The statewide average price for regular gasoline in California is now at $3.929 a gallon, up from $3.746 a month ago and $3.486 at this time last year, the group said.

Analysts said there were no dramatic developments behind the latest upward move in crude. But oil prices have climbed more than 30% this year and almost 12% since May 1, convincing many investors that the momentum play in crude futures shows no sign of slowing.

"We blew through 115, 120 and 125," said Andrew Lipow, a Houston energy consultant. "With that kind of price movement, people don't even want to sell anymore because they see it just keeps going up, and that kind of feeds on itself."

The speculative fever around crude has even given rise to talk on Wall Street of a new "super spike" that could push prices to $150 or even $200 a barrel.

That sort of talk is unnerving to stock investors. On Friday, the Dow Jones industrial average fell 120.90 points, or almost 1%, to 12,745.88. That brought the Dow's loss for the week to 2.4% and snapped a three-week winning streak.

The stock rally over the last few weeks was fed by generally good news, including better-than-expected jobless and earnings numbers, as well as the sense that the global financial crisis was nearing its latter

stages.

But the tone has shifted this week as investors wait to see how far oil will rise and how that will affect the economy.

"The big fly in the ointment has been oil," said Keith Wirtz, chief investment officer at Fifth Third Asset Management in Cincinnati. "No one thought a year ago that oil at $60 a barrel would double. That's the main factor as to why this market may lose some steam in the near term."

Stock investors fear that rising gas prices will crimp economic growth, both by diverting consumer spending away from retailers and by pushing up costs for a wide range of businesses, including farmers, plastics manufacturers and cruise ship companies.

Just this week, major U.S. airlines announced their 11th fare hike in the last five months -- a $20-per-ticket fuel surcharge. The fuel surcharge on some domestic round-trip tickets can now total $130, said Tom Parsons, chief executive of Bestfares.com.

The bad news is even spreading to energy stocks, which were broadly lower Friday in part on concerns that crude prices have gotten so high that some refiners may have trouble passing on all of their raw material costs to consumers.

Grim news from the financial sector also weighed on stocks Friday. **American International Group** lost $3.87 to $40.28 after it reported a massive loss linked to sub-prime mortgages, raising fears that the credit crisis is not over. And struggling **Citigroup** fell 67 cents to $23.63 after saying it planned to sell more than $400 billion in assets.

The Standard & Poor's 500 index ended the day off 9.40 points, or 0.7%, at 1,388.28, while the tech-heavy Nasdaq composite index slipped 5.72 points, or 0.2%, to 2,445.52.

Besides speculation, other factors behind oil's recent rise include rising demand in nations such as China and India, which are keeping worldwide supplies tight despite signs of slackening demand in the U.S.

The weakening dollar also has been a factor, in part because crude is priced in dollars, making it more attractive for many overseas investors. The European Central Bank said it was unlikely to cut interest rates, which would help strengthen the dollar against the euro.

On Friday, the dollar fell against the euro, which rose to $1.548 from $1.540. Bonds were little changed, with the yield on the 10-year U.S. Treasury note slipping to 3.77% from 3.78%.

Geopolitical factors also have played a role. Renewed concerns that the U.S. may impose sanctions against Venezuela, one of its biggest suppliers, added to the upward pressure on prices Friday.

Although gasoline supplies are stabilizing, the U.S. government reported this week that supplies of other crude by-products such as diesel fuel and heating oil are down. That's bad news for truck drivers, who are paying a record $4.521 for a gallon of diesel in California, according to AAA.

Absent a sharp rebound in the dollar or a significant buildup of supplies, it may take a painful economic slowdown in the U.S., Europe and Japan to put a serious dent in petroleum demand and significantly bring down crude prices, Lipow said.

"It's not a pretty picture," he said.

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