

[Footnotes omitted]

SUPREME COURT OF THE UNITED STATES

No. 99–474

STEPHEN P. CROSBY, SECRETARY OF ADMINISTRATION
AND FINANCE OF MASSACHUSETTS, ET AL.,
PETITIONERS v. NATIONAL FOREIGN TRADE
COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[June 19, 2000]

JUSTICE SOUTER delivered the opinion of the Court.

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma, is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.

I

In June 1996, Massachusetts adopted “An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar),” 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Laws §§7:22G–7:22M, 40 F½ (1997)). The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a “restricted purchase list” of those doing business with Burma. §§7:22H(a), 7:22J. Although the statute has no general provision for waiver or termination of its ban, it does exempt from boycott any entities present in Burma solely to report the news, §7:22H(e), or to provide international telecommunication goods or services, *ibid.*, or medical supplies, §7:22I.

...

In September 1996, three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, §570, 110 Stat. 3009–166 to 3009–167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, §101(c), 110 Stat. 3009–121 to 3009–172). The federal Act has five basic parts, three substantive and two procedural.

First, it imposes three sanctions directly on Burma. It bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. §570(a)(1). The statute instructs United States representatives to international financial institutions to vote against loans or other assistance to or for Burma, §570(a)(2), and it provides that no entry visa shall be issued to any Burmese government official unless required by treaty or to staff the Burmese mission to the United Nations, §570(a)(3). These restrictions are to remain in effect “[u]ntil such time as the President determines and certifies to Congress that

Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government.” §570(a).

Second, the federal Act authorizes the President to impose further sanctions subject to certain conditions. He may prohibit “United States persons” from “new investment” in Burma, and shall do so if he determines and certifies to Congress that the Burmese Government has physically harmed, rearrested, or exiled Daw Aung San Suu Kyi (the opposition leader selected to receive the Nobel Peace Prize), or has committed “large-scale repression of or violence against the Democratic opposition.” §570(b). “New investment” is defined as entry into a contract that would favor the “economical development of resources located in Burma,” or would provide ownership interests in or benefits from such development, §570(f)(2), but the term specifically excludes (and thus excludes from any Presidential prohibition) “entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology,” *ibid*.

Third, the statute directs the President to work to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.” §570(c). He is instructed to cooperate with members of the Association of Southeast Asian Nations (ASEAN) and with other countries having major trade and investment interests in Burma to devise such an approach, and to pursue the additional objective of fostering dialogue between the ruling State Law and Order Restoration Council (SLORC) and democratic opposition groups. *Ibid*.

As for the procedural provisions of the federal statute, the fourth section requires the President to report periodically to certain congressional committee chairmen on the progress toward democratization and better living conditions in Burma as well as on the development of the required strategy. §570(d). And the fifth part of the federal Act authorizes the President “to waive, temporarily or permanently, any sanction [under the federal Act] . . . if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.” §570(e).

On May 20, 1997, the President issued the Burma Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp.). He certified for purposes of §570(b) that the Government of Burma had “committed large-scale repression of the democratic opposition in Burma” and found that the Burmese Government’s actions and policies constituted “an unusual and extraordinary threat to the national security and foreign policy of the United States,” a threat characterized as a national emergency. The President then prohibited new investment in Burma “by United States persons,” Exec. Order No. 13047, §1, any approval or facilitation by a United States person of such new investment by foreign persons, §2(a), and any transaction meant to evade or avoid the ban, §2(b). The order generally incorporated the exceptions and exemptions addressed in the statute. §§3, 4. Finally, the President delegated to the Secretary of State the tasks of working with ASEAN and other countries to develop a strategy for democracy, human rights, and the quality of life in Burma, and of making the required congressional reports. §5.

II

Respondent National Foreign Trade Council (Council) is a nonprofit corporation representing companies engaged in foreign commerce; 34 of its members were on the Massachusetts

restricted purchase list in 1998. *National Foreign Trade Council v. Natsios*, 181 F. 3d 38, 48 (CA1 1999). Three withdrew from Burma after the passage of the state Act, and one member had its bid for a procurement contract increased by 10 percent under the provision of the state law allowing acceptance of a low bid from a listed bidder only if the next-to-lowest bid is more than 10 percent higher. *Ibid.*

In April 1998, the Council filed suit in the United States District Court for the District of Massachusetts, seeking declaratory and injunctive relief against the petitioner state officials charged with administering and enforcing the state Act (whom we will refer to simply as the State). The Council argued that the state law unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act. After detailed stipulations, briefing, and argument, the District Court permanently enjoined enforcement of the state Act, holding that it “unconstitutionally impinge[d] on the federal government’s exclusive authority to regulate foreign affairs.” *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (Mass. 1998).

The United States Court of Appeals for the First Circuit affirmed on three independent grounds. 181 F. 3d, at 45. It found the state Act unconstitutionally interfered with the foreign affairs power of the National Government under *Zschernig v. Miller*, 389 U. S. 429 (1968), see 181 F. 3d, at 52–55; violated the dormant Foreign Commerce Clause, U. S. Const. Art. I, §8, cl. 3, see 181 F. 3d, at 61–71; and was preempted by the congressional Burma Act, see *id.*, at 71–77.

The State’s petition for certiorari challenged the decision on all three grounds and asserted interests said to be shared by other state and local governments with similar measures. Though opposing certiorari, the Council acknowledged the significance of the issues and the need to settle the constitutionality of such laws and regulations. Brief in Opposition 18–19. We granted certiorari to resolve these important questions, 528 U. S. 1018 (1999), and now affirm.

III

A fundamental principle of the Constitution is that Congress has the power to preempt state law.

...

Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress’s full objectives under the federal Act.⁷ We find that the state law undermines the intended purpose and “natural effect” of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.

A

First, Congress clearly intended the federal act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions (prohibiting bilateral aid, §570(a)(1), support for international financial assistance, §570(a)(2), and entry by Burmese officials into the United States,

§570(a)(3)), it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma. §570(a). It invested the President with the further power to ban new investment by United States persons, dependent only on specific Presidential findings of repression in Burma. §570(b). And, most significantly, Congress empowered the President “to waive, temporarily or permanently, any sanction [under the federal act] . . . if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.” §570(e).

This express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the government of Burma, augmented by the flexibility to respond to change by suspending sanctions in the interest of national security, recalls Justice Jackson’s observation in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952): “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” See also *id.*, at 635–636, n. 2 (noting that the President’s power in the area of foreign relations is least restricted by Congress and citing *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936)). Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. As will be seen, the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate,¹¹ see 1996 Mass. Acts 239, ch. 130, §3 (restricting all contracts after law’s effective date); Mass. Gen Laws §7:22K (1997) (authorizing regulations for timely and effective implementation), and perpetual, there being no termination provision, see, e.g., §7:22J (restricted companies list to be updated at least every three months). This unyielding application undermines the President’s intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. In *Dames & Moore v. Regan*, 453 U. S. 654 (1981), we used the metaphor of the bargaining chip to describe the President’s control of funds valuable to a hostile country, *id.*, at 673; here, the state Act reduces the value of the chips created by the federal statute. It thus “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines*, 312 U. S., at 67.

B

Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The federal Act confines its reach to United States persons, §570(b), imposes limited immediate sanctions, §570(a), places only a conditional ban on a carefully defined area of “new investment,” §570(f)(2), and pointedly exempts contracts to sell or purchase goods, services, or technology, §570(f)(2). These detailed provisions show that Congress’s calibrated Burma policy is a deliberate effort “to steer a middle path,” *Hines, supra*, at 73.

The State has set a different course, and its statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.

...

C

Finally, the state Act is at odds with the President’s intended authority to speak for the United States among the world’s nations in developing a “comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.” §570(c). Congress called for Presidential cooperation with members of ASEAN and other countries in developing such a strategy, *ibid.*, directed the President to encourage a dialogue between the government of Burma and the democratic opposition, *ibid.*, and required him to report to the Congress on the progress of his diplomatic efforts, §570(d). As with Congress’s explicit delegation to the President of power over economic sanctions, Congress’s express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government, *cf. Youngstown Sheet & Tube Co.*, 343 U. S., at 635, in harmony with the President’s own constitutional powers, U. S. Const., Art. II, §2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties” and “shall appoint Ambassadors, other public Ministers and Consuls”); §3 (“[The President] shall receive Ambassadors and other public Ministers”). This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President’s effective voice to be obscured by state or local action.

Again, the state Act undermines the President’s capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics. When such exceptions do qualify his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with

the Burmese regime, but in working together with other nations in hopes of reaching common policy and “comprehensive” strategy.¹⁷ Cf. *Dames & Moore*, 453 U. S., at 673–674.

While the threat to the President’s power to speak and bargain effectively with other nations seems clear enough, the record is replete with evidence to answer any skeptics. First, in response to the passage of the state Act, a number of this country’s allies and trading partners filed formal protests with the National Government, see 181 F. 3d, at 47 (noting protests from Japan, the European Union (EU), and ASEAN), including an official *Note Verbale* from the EU to the Department of State protesting the state Act. EU officials have warned that the state Act “could have a damaging effect on bilateral EU-US relations.” Hugo Paemen, Ambassador, European Union, Delegation of the European Commission, to William F. Weld, Governor, State of Massachusetts, Jan. 23, 1997, App. 75.

Second, the EU and Japan have gone a step further in lodging formal complaints against the United States in the World Trade Organization (WTO), claiming that the state Act violates certain provisions of the Agreement on Government Procurement,¹⁹ H. R. Doc. No. 103–316, 1719 (1994) and the consequence has been to embroil the National Government for some time now in international dispute proceedings under the auspices of the WTO. In their brief before this Court, EU officials point to the WTO dispute as threatening relations with the United States, Brief for European Communities et al. as *Amici Curiae* 7, and n. 7, and note that the state Act has become the topic of “intensive discussions” with officials of the United States at the highest levels, those discussions including exchanges at the twice yearly EU-U. S. Summit.

Third, the Executive has consistently represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress. Assistant Secretary of State Larson, for example, has directly addressed the mandate of the federal Burma law in saying that the imposition of unilateral state sanctions under the state Act “complicates efforts to build coalitions with our allies” to promote democracy and human rights in Burma. A. Larson, *State and Local Sanctions: Remarks to the Council of State Governments* 5 (Dec. 8, 1998). “[T]he EU’s opposition to the Massachusetts law has meant that U. S. government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law.” *Id.*, at 3. This point has been consistently echoed in the State Department:

“While the [Massachusetts sanctions on Burma] were adopted in pursuit of a noble goal, the restoration of democracy in Burma, these measures also risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against the State Law and Order Restoration Council (SLORC) to a potential WTO dispute over its consistency with our international obligations. Let me be clear. We are working with Massachusetts in the WTO dispute settlement process. But we must be honest in saying that the threatened WTO case risks diverting United States’ and Europe’s attention from focusing where it should be— on Burma.” Eizenstat testimony, App. 115.

This evidence in combination is more than sufficient to show that the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy.

Our discussion in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U. S. 298, 327–329 (1994), of the limited weight of evidence of formal diplomatic protests, risk of foreign retaliation, and statements by the Executive does not undercut the point. In *Barclays*, we had the question of the preemptive effect of federal tax law on state tax law with discriminatory extraterritorial effects. We found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments, *id.*, at 324–328, and the Executive, *id.*, at 328–329. Here, however, Congress has done nothing to render such evidence beside the point. In consequence, statements of foreign powers necessarily involved in the President’s efforts to comply with the federal Act, indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act. Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act’s preemptive character, *id.*, at 328–329, we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement. We have, after all, not only recognized the limits of our own capacity to “determin[e] precisely when foreign nations will be offended by particular acts,” *Container Corp. of America v. Franchise Tax Bd.*, 463 U. S. 159, 194 (1983), but consistently acknowledged that the “nuances” of “the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court,” *id.*, at 196; *Barclays*, *supra*, at 327. In this case, repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress’s diplomatic objectives.

IV

[The Court rejects the State’s argument that the failure of Congress to preempt the state Act demonstrates implicit permission.]

V

Because the state Act’s provisions conflict with Congress’s specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.

The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.