

Y4
.F 76/2
T 17

96
14
F 76/2
T 17

THE TARAPUR NUCLEAR FUEL EXPORT ISSUE

GOVERNMENT
Storage

✓

JOINT HEARINGS
BEFORE THE
COMMITTEE ON FOREIGN RELATIONS
AND THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-SIXTH CONGRESS

SECOND SESSION

ON

THE ISSUE OF WHETHER TO SHIP NUCLEAR FUEL TO INDIA
FOR THE TARAPUR POWER REACTORS

JUNE 18, 19, 1980

Printed for the use of the Committee on Foreign Relations
and the Committee on Governmental Affairs

KSU LIBRARIES
E05426 006TTA
111900 924503 ✓

1039

DOCUMENTS

AUG 15 1980



FARRELL LIBRARY
KANSAS STATE UNIVERSITY

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

64-662 O

COMMITTEE ON FOREIGN RELATIONS

FRANK CHURCH, Idaho, *Chairman*

CLAIBORNE PELL, Rhode Island
GEORGE MCGOVERN, South Dakota
JOSEPH R. BIDEN, Jr., Delaware
JOHN GLENN, Ohio
RICHARD (DICK) STONE, Florida
PAUL S. SARBANES, Maryland
EDWARD ZORINSKY, Nebraska
PAUL E. TSONGAS, Massachusetts

JACOB K. JAVITS, New York
CHARLES H. PERCY, Illinois
HOWARD H. BAKER, Jr., Tennessee
JESSE HELMS, North Carolina
S. I. HAYAKAWA, California
RICHARD G. LUGAR, Indiana

WILLIAM B. BADER, *Staff Director*

ALBERT A. LAKE LAND, Jr., *Minority Staff Director*

COMMITTEE ON GOVERNMENTAL AFFAIRS

ABRAHAM A. RIBICOFF, Connecticut, *Chairman*

HENRY M. JACKSON, Washington
THOMAS F. EAGLETON, Missouri
LAWTON CHILES, Florida
SAM NUNN, Georgia
JOHN GLENN, Ohio
JIM SASSER, Tennessee
DAVID PRYOR, Arkansas
CARL LEVIN, Michigan

CHARLES H. PERCY, Illinois
JACOB K. JAVITS, New York
WILLIAM V. ROTH, Delaware
TED STEVENS, Alaska
CHARLES McC. MATHIAS, Maryland
JOHN C. DANFORTH, Missouri
WILLIAM S. COHEN, Maine
DAVID DURENBERGER, Minnesota

RICHARD A. WEGMAN, *Chief Counsel/Staff Director*

HANNAH S. SISTARE, *Chief Minority Counsel/Staff Director*

(II)

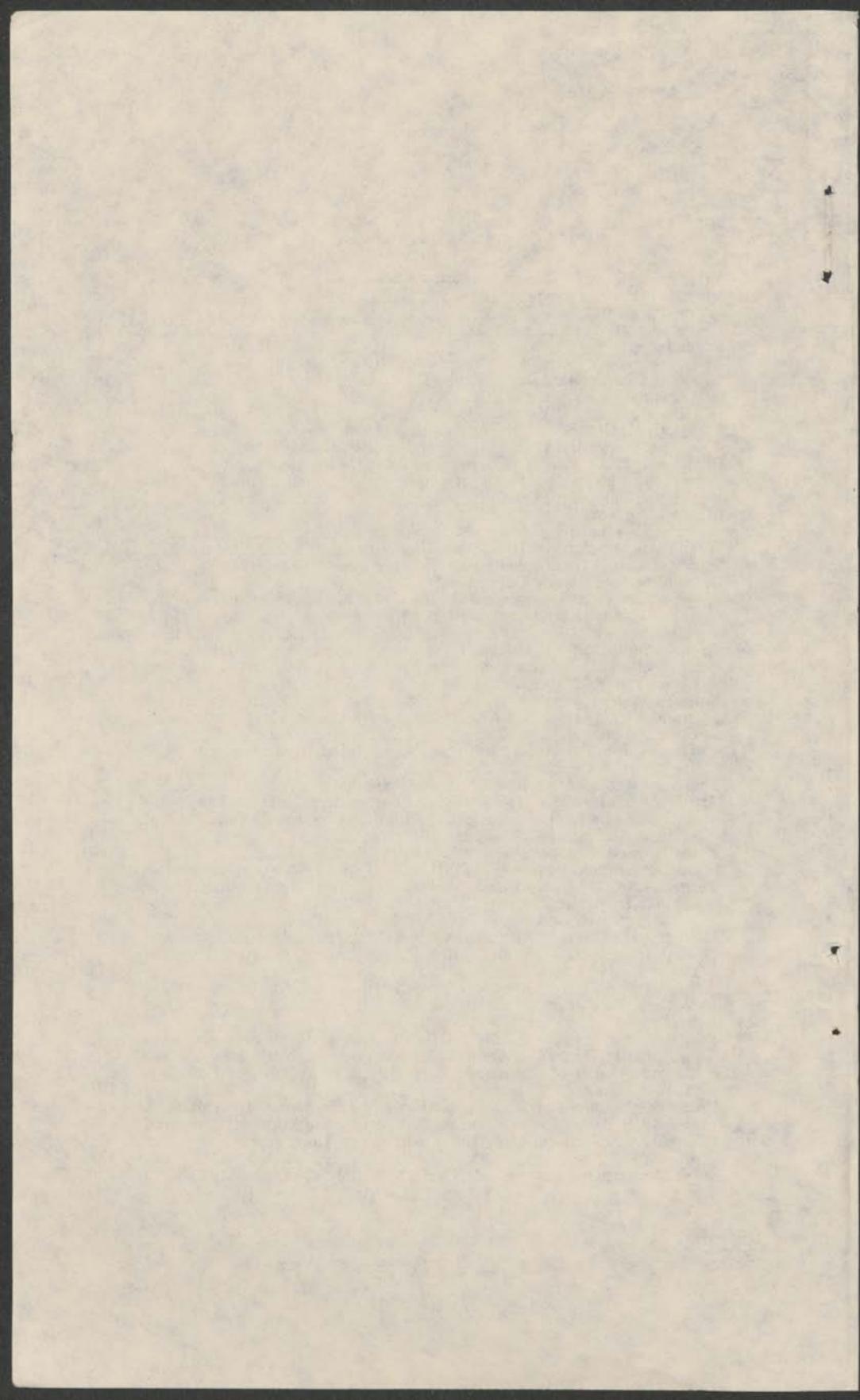
DOCUMENTS

AUG 15 1980

FARRELL LIBRARY
KANSAS STATE UNIVERSITY

CONTENTS

	Page
Hearing days:	
June 18, 1980-----	1
June 19, 1980-----	65
Statement of—	
Ahearne, Hon. John F., Chairman, Nuclear Regulatory Commission, accompanied by Joseph M. Hendrie and Victor Gilinsky, Commissioners-----	32
Christopher, Hon. Warren, Deputy Secretary of State, accompanied by Hon. Gerard G. Smith, Ambassador at Large and Special Representative of the President for nonproliferation matters-----	68
Cranston, Hon. Alan, a U.S. Senator from California-----	22
Rowen, Henry S., professor of public management, Stanford University, Palo Alto, Calif-----	5
Inserts for the record:	
Prepared statement of Henry S. Rowen-----	9
Prepared statement of Hon. Alan Cranston-----	25
Estimated fuel requirements for Tarapur reactors, submitted by the Nuclear Regulatory Commission-----	40
Comparison of fuel requirements for the Indian Fabrication Facility and Tarapur reactors, submitted by the Nuclear Regulatory Commission-----	43
Memorandum and order on applications to export special nuclear materials and components, submitted by the Nuclear Regulatory Commission-----	52
Applications of sections 127 and 128 of the Atomic Energy Act to proposed exports to India, submitted by the Nuclear Regulatory Commission-----	56
Carter to approve India's atom fuel—reprinted from the New York Times, June 19, 1980-----	66
Prepared statement of Hon. Warren Christopher-----	72
Application of section 128 of the Atomic Energy Act of 1954 with respect to fuel exports to India, submitted by the Department of State-----	74
State Department fact sheet on Tarapur-----	80
State Department response to NRC's analysis of Tarapur fuel needs-----	98
Termination of U.S.-Indian nuclear agreement urged—article reprinted from the Bombay Times of India, March 20, 1980, submitted by Senator Glenn-----	103
Review period for applications to NRC for fuel and equipment exports for use in Tarapur Atomic Power Station, submitted by the Department of State-----	114
Administration's responses to questions submitted for the record by Senator Gary Hart-----	117
Appendix:	
Prepared statement of James N. Barnes and S. Jacob Scherr, on behalf of the Natural Resources Defense Council, National Audubon Society, Union of Concerned Scientists, Sierra Club, and Friends of the Earth-----	121
Prepared statement of Richard K. Betts, the Brookings Institution-----	125
Letter to Senator Frank Church from the Federation of American Scientists, dated June 19, 1980, concerning Tarapur nuclear power plant-----	128
State Department analysis of NNPA's Section 128-----	130



THE TARAPUR NUCLEAR FUEL EXPORT ISSUE

WEDNESDAY, JUNE 18, 1980

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committees met, pursuant to notice, at 9:35 a.m., in room 4221, Dirksen Senate Office Building, Hon. John Glenn presiding.

Present: Senators Glenn, Ribicoff, Pell, Nunn, Percy, Cohen.
Senator GLENN. The hearing will be in order.

OPENING STATEMENT

This morning we begin 2 days of public hearings to examine a number of dimensions of foreign policy, national security, and nonproliferation on the issue of whether the United States should export nuclear fuel to India for the Tarapur power reactors.

Today we will hear from Senator Alan Cranston, Dr. Henry Rowen of Stanford University, and Chairman Ahearne and Commissioners Hendrie and Gilinsky of the Nuclear Regulatory Commission.

Tomorrow, Deputy Secretary of State Warren Christopher and Ambassador Gerard Smith will appear for the administration, followed by a panel of public witnesses.

At this point, the President has not yet issued an Executive order approving the two pending applications for the export of some 38 tons of low-enriched uranium to India for Tarapur. However, the administration's public position has been that the President would take that step. There is no indication at present that he will do otherwise.

Our purpose this morning and tomorrow is to explore the issues and to hear views of public witnesses.

Should the President issue an Executive order, the Foreign Relations Committee, together with the Governmental Affairs Committee, would have the responsibility to consider whether to recommend to the Senate that it approve or disapprove the order.

We are having ad hoc joint hearings so that we do not have to repeat work from one committee to another when there is some overlapping jurisdiction. Senator Ribicoff, chairman of the Governmental Affairs Committee is with us this morning, and I call on him for any statement.

Senator RIBICOFF. Thank you very much, Mr. Chairman.

First, I do not think there is anyone in the Congress more qualified to address this issue than Senator Glenn. When this issue came before the Governmental Affairs Committee, it was a privilege to designate Senator Glenn to chair and to take the lead position on this important issue. In his training and scientific knowledge he is second to none. All of us have gained because of his leadership.

These hearings have been called to examine the policy of continued U.S. nuclear fuel shipments to India. It seems to me that we must look at this proposed shipment in the light of its overall effect on our nonproliferation policy.

The Nuclear Nonproliferation Act of 1978, on which these two committees worked so hard and long, sets forth this Nation's policy and intention to end the spread of nuclear weapons capability. The act sets forth criteria which recipient states must meet in order to receive U.S. material and technology. The act provided a 24-month grace period before requiring imposition of these criteria.

The pending shipment of fuel to India falls after the expiration of this grace period. We must look at this issue very, very carefully. Our Nation and the world had a rude awakening in 1974 when India exploded a so-called peaceful nuclear device. This single event jolted the world into a picture of a world weighted with nuclear weapons.

The nonproliferation situation for the world today is bleak. The prospect of other nations obtaining and using nuclear weapons is very real. Other supplier nations continue selling equipment, material, and technology to countries which have not renounced a nuclear explosives capability, which have refused to sign a nonproliferation pledge, and which have refused to accept fullscope safeguards on their nuclear facilities.

We must consider what other nations will do as they examine U.S. response to this first test of the Nuclear Nonproliferation Act. If this shipment is made to India, do not other nations have the right to ask for exemptions to our policy? We must consider the message our decision would give to the world community.

India's past policies with respect to its nuclear activities have been contrary to the United States and world nonproliferation efforts. India has steadfastly refused to accept and apply fullscope safeguards. Indeed, they have broken off negotiations on this subject. India has not fully cooperated on safeguard inspections under international auspices. India has not signed the Nonproliferation Treaty.

The United States has previously made two major concessions to the Indians as part of our efforts to gain their compliance with basic international safeguard norms. Neither of these concessions—not protesting Indian use of U.S.-supplied heavy water and the 1974 explosion, nor continuing our fuel shipments in March of 1979—resulted in any progress in discussions with the Indians.

The State Department has provided no evidence that further waiver of fundamental nonproliferation standards would advance U.S. security interests. Since the India 1974 nuclear test, U.S. efforts to gain worldwide adherence to fullscope safeguards and to avert the danger of a nuclear arms race have proceeded with India usually being the test case. United States failure to comply with its own basic law on fuel shipments would critically weaken our carrot-and-stick

approach to nonproliferation. Continuing fuel shipments to India opens the Pandora's box we thought we closed by passing the Nuclear Nonproliferation Act.

The primary question before us, the Congress and the American people, is the effect of this shipment on United States nonproliferation policy. It is a policy in which we in the Congress have a major role. It is a policy to which this administration has a serious and deep commitment. It is a policy which has ramifications for the future of all mankind. There is a grave responsibility on us in Congress and the President to act wisely under all these circumstances.

Senator GLENN. Thank you very much, Senator Ribicoff. No one in the Congress has put in more time and hours of committee work than you when this issue was before us in the Governmental Affairs Committee, of which I am also a member. We appreciate very much your being here with us today.

On March 10, 1978, President Carter signed into law the Nuclear Nonproliferation Act, which has provided the legal foundation for U.S. policy on nuclear exports for the past 2 years.

The key provision of the law was the mandatory rejection by the NRC of any export license for nuclear fuel to any nation which by March 10, 1980 had not put all its nuclear facilities under safeguards. The act also provided that the President be able to waive the full-scope safeguards criteria prior to the NRC's deliberations on a particular license where there were overriding national considerations. The President also has the ability to issue an Executive order overturning a rejection by the NRC of a license. In that case, the Congress then has 60 days of continuous session to review and possibly overturn the President's action.

The world today has one documented case of a nation using materials intended for a civilian nuclear power program, to fashion a nuclear bomb. In May of 1974 India exploded a nuclear device, using materials obtained from an unsafeguarded Canadian research reactor in which U.S. heavy water was involved. In so doing, India ignored an aide memoire delivered to her by the United States 4 years earlier that noted unequivocally that U.S. materials were not to be used in any nuclear explosives program.

This action by the Indians was a prime motivation for the Nonproliferation Act. The 2-year grace period provided by the act for negotiations to produce a result that would allow continued U.S. trade with India in nuclear matters has produced no discernible progress.

The issue before us is the licenses for the shipment of low enriched nuclear fuel to the Tarapur Power Station in India. These licenses, which were applied for after the passage of the Nonproliferation Act provide a test for U.S. nonproliferation policy. The NRC has correctly—I believe—rejected these licenses as not meeting the requirements of the Nonproliferation Act. The President is reported to favor granting these licenses by Executive order, though that decision has apparently not yet been finalized.

In light of the Indian refusal to accept full-scope safeguards, or to give assurances that further nuclear explosions will not take place, the President, in deciding whether to continue nuclear trade with India under these conditions, is faced with a dilemma that is similar

to that of the previous administration with respect to the balance between U.S. nonproliferation policy and geopolitical situations in South Asia.

I am not insensitive to the problems which a deferral of a decision on these licenses would cause for the President over the next few months. These difficulties must be balanced, however, against the difficulties created by dismantling U.S. nonproliferation policy as a result of a decision at this time to issue the fuel licenses for Tarapur in the absence of substantive Indian assurances regarding its nuclear program.

If the President does indeed decide to issue the Executive order within the next few days, I hope that these two committees will examine very thoroughly all of the issues and implications involved, and will take as much time as is necessary to do that within the allotted 45-day period for the Foreign Relations Committee and the Governmental Affairs Committee to produce a resolution of disapproval of the President's Executive order.

The hearings today and tomorrow represent a start toward examination of such issues and will therefore lay the foundation for further deliberations by these committees. The fact that this is a joint hearing is an indication not only of the fact that there is a shared jurisdiction between the two committees in the area of nonproliferation, but that when an issue is of such transcending importance as this one is, cooperation in carrying out the responsibilities thrust upon us should be sought to the greatest degree possible.

I would add that I think it is too bad this comes right at this time because we have the Nonproliferation Treaty coming up for discussion with all the nations meeting in Geneva in August of this year. There is also a GAO study we commissioned when the Nuclear Nonproliferation Act was passed, a study that was to give us a view as to how the NNPA has worked during this interim period. That report is due in March. I am sure we could hurry it up some. I think it is too bad that we do not have the benefit of the NPT Review Conference and the GAO study before we deal with a situation such as this.

If the President does submit this to us, and if it is decided that for overriding geopolitical reasons we must go ahead with this shipment, then I think at the very least we must very seriously consider changing NNPA to reflect the fact that we are now making decisions on a case-by-case basis and not on a general policy basis that applies in all cases. That would be the very least that should be done in this situation. I am afraid that it would leave us in the situation of having changed course once again in our nuclear nonproliferation policy. It is a very difficult decision. All of us are sympathetic with the aim of trying to keep the best relations possible with India.

We are also trying to look at the long-term problems of our country, as the world's nuclear leader, in trying to prevent as best we can the spread of nuclear weapons. As we see it, it would be extremely difficult to refuse a nuclear shipment to any other country once we go ahead with this shipment to India.

Senator Percy, do you have any opening remarks?

Senator PERCY. Nothing other than the fact that I look forward to these hearings. I think it is very important that the Governmental

Affairs Committee, where this legislation originated, meet with the Foreign Relations Committee which now has the problem of making recommendations to the Senate on a question of implementation. I think it is helpful that several members of the Governmental Affairs Committee also serve on this committee. Having authored a piece of legislation, we now have the problem of trying to carry it out, which is a rather unusual situation. Usually, we pass the legislation and "pass the buck." This time the "buck" comes right back on our desk and we have to figure out how to implement it. It is a complex problem.

So, I look forward to the expert guidance we can gain from our witnesses. Our goal and objective—and I do not find that India disagrees with this—is to find a way to lessen the danger of the spread of nuclear weapons in the world. The question is, if we do not honor the agreement with India, if we do not agree to the release that India feels they are entitled to, whether we would further or lessen the chances of proliferation. That is the perplexing problem that we hope some of the experts will help us think through so that we can make a final recommendation to the Senate if the President decides in favor of the shipments. I come to the hearing with some impressions, but not having made a firm conclusion, and I want to hear the facts.

Thank you, Mr. Chairman.

Senator GLENN. Thank you, Senator Percy. Senator Nunn, do you have any statement?

Senator NUNN. No statement. Thank you.

Senator GLENN. Our first witness this morning is Dr. Henry Rowen, of Stanford University. Dr. Rowen, we will be glad to have any statement you wish to make, or a summarized version thereof.

STATEMENT OF HENRY S. ROWEN, PROFESSOR OF PUBLIC MANAGEMENT, STANFORD UNIVERSITY, PALO ALTO, CALIF.

Mr. ROWEN. Thank you, Senator Glenn. I do have a statement prepared. I would like to have it entered into the record and make a few points from it.

Senator GLENN. The entire statement will be included in the record.

Mr. ROWEN. It seems to me that there are two principal criteria that Congress should use in considering whether or not to continue to supply nuclear fuel to India.

First, what will be its effect on the behavior of the Indian Government with regard to its nuclear explosives program, its nuclear activities more generally, including exports, and to United States-Indian relations; and second, what will be its effect in South Asia and more widely.

With regard to the effect on India, I think we should have no illusions on that score. There is really a long record which you and Senator Ribicoff have alluded to in your statement. The Indians have been quite consistent in asserting their right to make nuclear explosives, really, from beginning the "Atoms for Peace" program. Americans are inclined to fool themselves about this, and it is really quite a fascinating and sorry tale, as our officials hoped or wished that the Indians would come around and renounce nuclear explosives, accept

full-scope safeguards, and perhaps even sign the NPT. That has never been in the cards. Most recently, Prime Minister Gandhi's affirmation of the Indian's rights and interests in this regard has asserted it more forcefully than other Indian administrations have, but it is in the historical tradition of Indian Governments.

Of paramount importance to us, as to our expectations with regard to the behavior of the Indian Government, is the past. In the past we have had, as previous witnesses pointed out, a very, very bad experience when the Indian Government took plutonium from a reactor provided by Canada with heavy water provided by the United States and made an explosive out of it. The Indian Government claimed that the bomb was 100-percent Indian material, technology, and personnel, to cite Ambassador Kaul. He lied, and Indian officials have similarly lied on that subject.

I note that the State Department first tried to back up that Indian position, as this committee is aware, and had to back off later on. It is not an encouraging precedent for our transactions with the Indian Government on nuclear matters.

In effect, in my view, the plutonium that is contained in the fuel, the spent fuel of the Tarapur reactor, is a kind of hostage; there are over 1,000 kilograms of it. I say it is a kind of hostage in the sense that the position of the Indian Government is that if we do not continue to provide them with more fuel, they are free to do anything they want with it.

Now that, I think, is a threat; and I do not think it is too strong to use the word "blackmail." In other words, we keep supplying fuel, or else they are free from any obligation with regard to that plutonium.

Moreover, we apparently are expected to continue supplying the fuel until the end of the agreement which was signed in 1963 and runs out in 1993. So, we provide more fuel until 1993, at which time they are free to do anything they want with it anyway because the agreement runs out and, we have no residual rights, at that point.

So, we have a hostage situation—not an unfamiliar situation for us to be in.

Now, sometimes it pays to pay a blackmailer. As a general rule it is not a good idea. At least we should recognize that we are in a sort of blackmail situation with regard to India now. This is not the way the State Department prefers to present it, but I think we really should face it.

That suggests a possible course of action for the Congress to consider, and that is the return of the "hostage." There has been some exploration in the past of the return of spent fuel from Tarapur—a couple of years ago, as I recall—and it was not pursued further at the time because there was a logistics problem, a shortage of shipping casks; I suppose also because there has been the issue of storage of spent fuel in the United States. But nonetheless, if there is a case for the return of spent fuel from abroad—and I think this has been seriously contemplated in the nonproliferation efforts—this is about as good an occasion as there is. The negotiation, I suspect, might not be an easy one. The Indians might put a high price on that plutonium, or try to. But nonetheless, it is an important option for the Congress to contemplate.

What objection could the Indian Government reasonably have to removing the hostage aspect of our relationship? Why should they not be in favor of the return? Or, to turn it around, why is the Indian Government unwilling to pledge that U.S.-supplied material will not end up in Indian bombs?

It is often said—and it has been said recently, for example, by McGeorge Bundy in an article in the *Washington Post* last week—that if we do not supply the fuel the Indians will turn to other suppliers, which means the Soviet Union. That is an argument for our continuing.

You know, it might not be such a bad idea from our standpoint if the Indians were to turn to the Soviet Union because the Soviet Union, as I understand it, has a policy of insisting on the return of spent fuel. The Soviet Union nuclear policy has not been extremely coherent—but perhaps more so than ours, however, in one of its features; and that is that they, by and large and perhaps completely, insist on the return of spent fuel.

The Indians really do not have good options. It is important for us to recognize that we are in a bargaining relationship with them. They are well aware of this. An Indian journalist recently put it this way: That other suppliers “are almost certain to insist on unacceptable safeguards and assurances.”

While the implications are wider than just our bilateral relations with India, it is remarkable how in many of the statements in favor of our continuing to supply India there is no mention of Pakistan, for example, and other countries that might be affected. Pakistan is engaged in a nuclear explosives program also, a program which clearly has been motivated by the fact that India helped to dismember Pakistan in 1971, splitting off its eastern half, and shows continuing hostility; besides which India has tested a nuclear explosive.

Now, we put off aid to Pakistan as required by the Symington amendment, and we have viewed with considerable alarm—and properly so—the Pakistani arms program. We now have powerful reasons for wanting to help Pakistan, given the threat from the Soviet Union and Afghanistan. It appears we have been willing to put aside, at least for awhile, our concern over the Pakistani bomb program given what we believe to be overriding concerns with regard to the future security of Pakistan vis-a-vis the Soviet Union. The Pakistanis are at least as concerned about the threat from India as they are about the threat from the Soviet Union. Moreover, they perhaps do not see those two threats as independent; the Soviet Union and India might conspire—explicitly or implicitly—against them.

So, to many observers, including many Pakistani observers, if we continue to supply Tarapur under the circumstances that I described, we are supplying nuclear support to an India which appears more interested in weakening or dismembering Pakistan than it is in opposing Soviet expansionism. Prime Minister Gandhi's ambiguous position on the Soviet invasion of Afghanistan is certainly not comforting in that regard.

There are wider impacts, as Senator Glenn has alluded to. It is often said that we should try and restore our credibility as a reliable supplier of nuclear materials—that is often said to us by our Japanese

and European friends. I have noted in conversations over the years with the Japanese and Europeans that they make a distinction between their own situation and behavior and that of India. In fact, I have had it said to me on more than one occasion that our continued shipment of nuclear fuel to India under the circumstances—the Indian use of the CIRUS reactor and really blatant violation of the spirit of our agreement—reveals a lack of seriousness in our nonproliferation undertaking. They are willing to make a distinction between their situation and that of India, and we should, too. We do have to take very seriously the attitude and the positions of our principal allies, the Japanese and the Europeans in these nuclear matters. But that is not the same thing as saying we should go along with India which, after all, is the most flagrant violator.

In short, we are told we should go ahead and supply nuclear fuel to India, but it is really by no means clear what we are getting in return. The record does not suggest that our negotiators with India are so highly competent and effective that we are likely to get very much in return. In any case, I am not aware there is very much, specific, that we are likely to get in return.

So, what could we do? What could the Congress do? It seems to me that there are a couple of options; there are four options. The most obvious possibility is retrieving the hostage. I suggest that while there could be some difficulties on this, I think they are more under the heading of standard negotiating difficulties. The Congress made clear that a condition of the supply of nuclear fuel was the return—and I might say the eventual return since timing would be negotiable—of the spent fuel.

In connection with this negotiation it would be useful to keep in mind that we provided extremely generous concessional aid for the construction of Tarapur. That is some contract. A 40-year loan, 10-year grace period, an interest rate of three-quarters of 1 percent. Only \$11 million out of \$72 million, I understand, has been paid back. We might consider writing off part of the remaining debt against the value of the plutonium.

Another possibility is simply to defer a decision. I believe that India has enough fuel on hand for Tarapur for several more years, although I noted an item in the paper a few days ago that suggested that the lights were about to go out in India. The Indians for some time have been claiming that, and I think one should look carefully to see if they are as short as they say. I believe that they do have several years of supply. That suggests that there is no practical need for the export now.

If we have any obligations at all—and that is questionable—to India, it is merely to keep the reactor going, not to provide extra fuel on hand.

There is a lesson in all of this, and the lesson is one of need for congressional oversight. The record of our dealings with India is such a sorry tale, beginning with the "Atoms for Peace" program under which we provided the heavy water for the CIRUS reactor with, to put it mildly, very sloppy arrangements. In 1963, we entered into a thoroughly inadequate agreement of cooperation with India. In 1974, we failed to respond firmly to the Indian bomb test. And today, we have the current State Department position.

The Congress is not a sure-fire overseer of the executive branch, but it can help, as the improvements in the Panama Canal Treaty and its scrutiny of the SALT Treaty have shown. It is really important, whatever decision is made with regard to India, to establish even more firmly the principle of examining and constraining the behavior of the executive branch bureaucracy which, on the record in this instance, has really been very lax indeed. The nuclear specialists have been indiscriminate in their pushing of technology, and the country desk folks have been looking out for the interests of their clients much more than the interests of the United States.

In conclusion, it seems to me that there are four options open. One is to let the President's decision—if, in fact, it is a decision—stand, and provide the fuel.

The second is to overturn it.

The third is to refuse to send the fuel now on the grounds that there is no urgent need to act now. That is a question of fact that could be determined and that the administration can go back to in a year or so.

Finally, to approve the resupply, but conditioned on the return of spent fuel.

I think the least defensible of these decisions is the first one, simply to let it go. The Congress should give careful consideration to the others.

Finally, this is the most important test of the Nuclear Nonproliferation Act, as Senator Glenn has pointed out. After all, that act was triggered in part by the Indian bomb test of 1974. It would be ironic if the Congress were to let this really first important test of the act go by the board. It would leave the law in a rather sad state.

Thank you, Mr. Chairman. That concludes my statement.

[Mr. Rowen's prepared statement follows:]

PREPARED STATEMENT OF HENRY S. ROWEN

Two principal criteria should be used by the Congress in considering whether or not to continue to supply nuclear fuel to the Tarapur reactor of India: First, what will be the effect on the behavior of the Indian Government with respect to nuclear explosives, to other of its nuclear activities, and to Indian-U.S. relations; second, what will be the effect on other countries in South Asia and more widely?

THE EFFECT ON INDIA

We should have no illusions that our decision on Tarapur will significantly influence the Indian Government in its salient nuclear choices. A series of Indian government has consistently asserted the right to make nuclear explosives from the beginnings of the Atoms for Peace program in the mid-1950's. American officials, past and present, have often hoped, or wished that the Indians would come around, renounce nuclear explosives, accept full-scope safeguards, and perhaps sign the Non-Proliferation Treaty. This has never been in the cards. Prime Minister Gandhi's recent affirmation of India's right to go ahead with a nuclear explosives program is the traditional Indian position although asserted more bluntly than by the Desai regime.

Any forecast of the outcome of future nuclear transactions with India must take account of the record and especially the Indian violation of the agreement with us on the CIRUS reactor. This reactor, supplied by Canada and containing American heavy water as a moderator was used in the production of plutonium for the Indian nuclear explosive tested in 1974 despite the clear intent of the agreement under which the heavy water was supplied. Nevertheless, the Indian Government claimed (e.g. Ambassador Kaul) that the bomb was "one hundred

percent Indian material, technology, and personnel". Its officials simply lied. Moreover, at first the State Department backed up the Indian position. This is not an encouraging precedent.

To hold that the Indians, on form, will not be much influenced in their nuclear program by what we do on fuel for Tarapur does not mean that they are incapable of calculating prospective costs and benefits from their actions. But in order to influence them we need to have an objective in mind and a strategy. It is by no means clear what these are with respect to India.

PLUTONIUM FROM OUR FUEL AS HOSTAGE

Advocates of continuing to supply nuclear fuel to India point out that if we don't do so the Indians will then be free to extract the more than 1,000 kilograms of plutonium from spent Tarapur reactor fuel and do anything they want with it. Indian spokesmen have made such a position—i.e. threat—explicit. In short, plutonium from our fuel is a hostage and the Indian position amounts to blackmail.

Sometimes it is rational to pay a blackmailer, although it is not a good general rule to do so, but at least we should be clear on the nature of the relationship. Recognizing it for what it is suggests a possible course of action: recovering the hostage. There has been some exploration in the past of the possible return of spent fuel from Tarapur. This had not seemed worth doing partly for logistics reasons and partly because of controversy over the storage of spent fuel in this country. However, now is probably as good a time as there is for establishing a requirement for the return of spent fuel. If India is willing to act in good faith, what objection could it reasonably have to removing the hostage aspect of the relationship? Or, to turn it around: Why is the Indian Government unwilling to pledge that U.S.-supplied material will not end up in Indian bombs?

The State Department view on resupply simply accepts the Indian interpretation. Its position implies that we will have to continue paying blackmail, i.e. sending more fuel, until the end of the period covered in the Agreement for Cooperation, 1993. At that point they will have two tons of plutonium and no obligation to us or constraints.

In short, the State position is a kind of nuclear appeasement.

INDIAN OPTIONS IF WE STOP THE SUPPLY

Advocates of continued supply say that if we do not come through the Indians will turn to others, most likely the Soviet Union. This might be a better alternative from our standpoint. The Soviet Union record, although spotty, has been better than ours in controlling its nuclear exports. For instance, it requires the return of spent fuel from its customers (at least those within easy bombing range). Moreover, the Indians are well aware, as an Indian journalist, Inder Malhotra, in an article in the Times of India on March 20, 1980 put it, that other suppliers "are almost certain to insist on unacceptable safeguards and assurances".

SOME WIDER IMPLICATIONS

Continued American supply of nuclear fuel to India appears even less sensible when one considers our relations with Pakistan. Aid to the latter was cut off when compelling evidence became available that it was moving to acquire nuclear explosives, a program obviously triggered by Indian hostility to Pakistan together with the Indian nuclear explosive program. Since the Soviet invasion of Afghanistan we have been scrambling to find a way to strengthen Pakistan while putting aside, at least for a while, our previously overriding concern about the Pakistani bomb program.

We have powerful reasons for trying to help Pakistan, given the gravity of the threat from the Soviet Union. But the Pakistanis are at least as concerned about the threat from India. There we are being much less helpful. Moreover, the failure of the Gandhi Government to oppose clearly the Soviet invasion of Afghanistan is ominous. There is a possibility that India and the Soviet Union separately or in concert will manage to finish the dismemberment of Pakistan which began in 1971.

To many observers, certainly to many Pakistanis, if we continue to supply Tarapur we will be providing nuclear support to an India which appears more interested in further weakening or dismembering Pakistan than it is in opposing Soviet expansionism.

WIDER IMPACTS

The Administration's nonproliferation policy is in a state of near collapse. We have failed to persuade our European and Japanese allies of the wisdom of imposing full scope safeguards and of limiting the spread of nuclear systems which will give ready access to unirradiated plutonium. However, it is one thing not to win international agreement to what we believe would be a new and better set of international rules and it is another to virtually give up on efforts to affect the process.

Much of the pressure on the United States to abandon its nonproliferation policy has come from the Europeans and Japanese who have been worried about the impact for their own nuclear programs and, for some, their nuclear exports. We understandably give a good deal of deference to the positions taken by our closest allies. But they are, France excepted, signatories of the NPT and none has violated the spirit of its agreements with the United States in the flagrant way India has. This bears importantly on the issue of the United States being a "reliable exporter" of nuclear fuel. Many of the Europeans and Japanese with whom I have discussed our nuclear policies in the past several years have regarded our continuing shipment of nuclear fuel to India as revealing a lack of seriousness in our nonproliferation undertakings. They certainly perceive a difference between their own interests, rights, and behavior and those of India.

Moreover, supply to India under these circumstances will make it difficult in the extreme to deny fuel to anyone, whether or not signatories of the NPT and whether or not embarked on nuclear explosive programs.

WHAT IS THE U.S. GETTING IN RETURN?

It appears that the answer to this question is mainly more hostages and trouble. The choice is one among evils: On the one hand, denial faces the Indian threat to turn to other suppliers (a difficult choice for them) or to make off with the plutonium from Tarapur fuel (a move which, whatever the legalities, would be distinctly poisonous to future Indian-U.S. relations). On the other hand, supplying the fuel will make for further difficulties in relations with Pakistan and others. We should look for something in return.

The obvious possibility is retrieving the hostage. There would be difficulties: valuing the plutonium in the spent fuel (which should be negative given the current price of uranium and reprocessing costs), storage in the United States, logistic issues, and the like. In this connection it should be recalled that we provided extremely generous concessional aid in the construction of Tarapur, a forty-year loan with a ten-year grace period and an interest rate of .75 percent. Only \$11 million of \$72 million has been paid back. We might consider writing off part of the remaining debt against the value of the plutonium.

Another possibility is that we simply defer decision. The fact that India has enough fuel on hand for Tarapur for several more years suggests that there is no practical need to act now. Insofar as the United States has any obligation, it is merely to keep the reactor going, not to provide several years of extra fuel on hand.

SOME LESSONS LEARNED

The record of our nuclear transactions with India is a sorry tale, not only in the distant past when we carelessly supplied heavy water (in 1956 for the CIRUS reactor), in 1963 when we entered into a thoroughly inadequate Agreement for Cooperation, in 1974 in our failure to respond firmly to the explosive test, and today in the current State Department position.

One lesson is the importance of Congressional oversight. This is not a sure-fire corrective but it can help as illustrated recently by Congressional improvements to the Panama Canal Treaty and vigorous scrutiny of the SALT Treaty. The main need here is to limit and constrain the behavior of the executive branch bureaucracy which has been and is insufficiently prudent in its international nuclear transactions. These matters are too important to be left to the nuclear area specialists and to the country desk officers who have shown themselves all too willing to push nuclear technology indiscriminately and to accommodate their foreign clients.

CONGRESSIONAL OPTIONS

There seem to be at least four choices open, although perhaps others could be devised: (1) let the President's decision stand; (2) overturn it and forbid the sending of the fuel; (3) refuse to send the fuel now on the grounds that there

is no urgent need to act now but that the Administration can come back in a year or so; and (4) approve the resupply but conditioned on the return of spent fuel.

The least defensible position is the first, simple approval. Members of Congress should give careful consideration to the others.

Two years ago, by large majorities, Congress passed an act to try to limit access to nuclear explosive materials—an act partly triggered by the Indian violation in 1974. This is the first important test of this law. It happens to be about a case in which the offenses committed by the country in question are most flagrant. If the Congress lets this one go by it will have seriously undermined its law.

Senator GLENN. Thank you, Dr. Rowen.

What do you think the reaction of other nations that we are trying to negotiate with will be if we go ahead with this shipment?

Mr. ROWEN. Many of them, of course, have taken the position that the U.S. nonproliferation efforts are misguided and will fail. That was the general outcome, I believe, of the International Fuel Cycle Evaluation, and we have heard it through every conceivable channel in our dealings with the Europeans and the Japanese. Many of them would like to draw a line between the industrialized countries and the non-industrialized countries. In fact, that is the theory on which the European and Japanese position rests, that there should be virtually no constraints for the rich industrialized countries in terms of nuclear technology; but there should be constraints for the poor countries.

Senator GLENN. How about places like Argentina, Brazil, and South Korea? What would be our basis for refusing shipments to them in the future?

Mr. ROWEN. Just to wind up on the European and Japanese attitudes, they would like to draw that line. I do not think that is a line that can be drawn and be held for very long. Your mention of Argentina, Brazil, and Korea illustrates this. After all, Germany and Switzerland have just made a major sale to Argentina without requiring full-scope safeguards. That illustrates the process that is going on. I do not think the line can be held easily.

Many of these less developed countries have a long way to go in terms of technology, but it is really quite clear that if there is to be a chance of slowing and limiting the process, there will have to be some constraints.

Senator GLENN. Can you give us an idea of the position of Mrs. Gandhi as opposed to that of former Prime Minister Desai? Do they vary measurably, or are they basically the same policies?

Mr. ROWEN. I think the fundamental policy is not the same in the sense that Desai was unable—whatever his personal preferences were—to establish a firm position that India would not move ahead with a nuclear explosives program. As a matter of policy he did not support such a program under his administration. But India did not sign the Nonproliferation Treaty; did not adopt similar undertakings during his period in office. He clearly was not enthusiastic about nuclear explosives. But nonetheless, the position of India at the time Indira Gandhi came into office was to leave that option open. Of course, Indira Gandhi is obviously much more interested in the weapons business.

Senator GLENN. We know Mrs. Gandhi's attitude on this. When Prime Minister Desai was here at one time we had a luncheon. We discussed this matter with him then. He was very, very positive of

India's right to do whatever it wanted to do. In the same breath, he pledged that as long as he headed the Government in India there would never be another peaceful nuclear explosion, war explosion, or any other kind of explosion. It seems to me that is the big difference. Mrs. Gandhi has pledged just the opposite, to go ahead with "peaceful experiments" as they are now called, instead of "peaceful nuclear explosions."

Mr. ROWEN. A distinction without a difference.

Senator GLENN. Different words for exactly the same thing. Yet I think there is a difference in what each head of government had pledged to do or not to do. But the basic policy itself both of them adhered to, India's right to go ahead without any NPT, or without any renegotiation of our previous agreements, seems the same.

Mr. ROWEN. Agreed.

Senator GLENN. What do you see as the significance of India's refusing to accept safeguards on all her facilities? Do you think this is to preserve options to go ahead with weapons? Or is this just because they do not feel they should be bound by anything? Is it a matter of philosophy, or is it a matter of practical expediency in the development of weapons?

Mr. ROWEN. I suppose it is both. The Indian aspirations to big power status go back a long way. The tone was set by Nehru, who from the time of independence made clear that the aspirations for Indian status were very great indeed. Undertakings such as the Nonproliferation Treaty and similar ones were simply rejected out of hand on the grounds that they were discriminatory against India; that is a matter of principle.

But there are also practical considerations.

Senator GLENN. What is the scale of their reprocessing plants? Are they larger than necessary for any normal commercial purpose?

Mr. ROWEN. Any commercial purpose for reprocessing in India is absurd. Taking the word "commercially" seriously, it is not a paying proposition anywhere today or in the likely near future in the United States, Western Europe, or Japan, which has a rather large-scale nuclear sector. It is even more of a losing proposition in India.

It can be and is justified in terms of long-term goals. India, after all, has a breeder program. So, looking to the 21st century, it could be said to be justified on that ground. But if one takes "commercially" literally, it is obviously excessive.

Senator GLENN. Assuming we export this fuel on the grounds that if we do not the Indians will declare us to be in breach of our agreement and will then be free to use the fuel they already have in any manner they like, will not that same argument apply to all future licenses to the Indians?

Mr. ROWEN. I believe it would. The Indian position seems to have this blackmail character to it.

Senator GLENN. In approving this license now, we are not basically saying we are going to approve these future licenses, too? Will we be in the same bind until 13 years from now when our agreement expires?

Mr. ROWEN. It would appear so.

Senator GLENN. Looking down the road 13 years from now, do you think the Indians will want to renew their agreement with us at that time?

Mr. ROWEN. Thirteen years is a long time. I do not suppose they have enjoyed this relationship too much. But, who can say? A lot of things can happen.

Senator GLENN. When we put in the NNPA it was with hopes, and with fingers crossed, that other nations would follow our lead. I think for the first year and a half or so, they probably did. The nuclear suppliers were basically going along with our policy and we had great hopes. We now see, as you mentioned, such things as a press release entitled "Swiss, Germans Ignore U.S. Objections, Sell Nuclear Technology to Argentina." We see that going on in increasing numbers now.

Do you think we are at the point where we have to say NNPA is just not working, we should modify it and consider things on a case-by-case basis?

Mr. ROWEN. It may be that there are some modifications to NNPA that are appropriate. I am not really prepared to offer specifics on that. Experience is always a helpful guide, and we have been getting some experience.

However, the sense of the NNPA seems to me to be quite sound. After all, the core of it is to have a set of rules involving nuclear transactions that provide timely warning of moves to a bomb, and without warning we are all in very deep trouble, indeed.

Frankly, we have not made sales with the Europeans or the Japanese, or for that matter most other people in the world. That is an important fact, but on the other hand, the problem has not gone away as you pointed out yourself. If anything, the situation is getting worse. So, I think it is certainly premature to decide that the NNPA should be fundamentally altered.

It may be that in detail we need to change the nature of our transactions with some countries; the MB-10 process, for example, could probably be modified in some useful ways. With regard to India, it really is the clearest cut case. This is one where the modification or abandonment of the NNPA is hardly warranted.

Senator GLENN. We wrote a letter to the Secretary of State back on May 28. In it I reminded him that the NPT Review Conference is coming up this summer. Although India is not a member of that organization, all the other major nuclear suppliers are members and will be at the meeting. It seemed to me that was a good time to assess whether we are going to have general support from these nations or not.

Furthermore, I am sure we can perhaps speed up the GAO study that is due to be submitted to us by next March. This will give us an assessment of how NNPA has worked. If we delayed the shipment, pending talking this over with our nuclear supplier colleagues, and getting the benefit of the major GAO study, it seems to me we would be in a much better position to make a basic judgment as to whether NNPA should remain in its present form or whether we should stop shipments to India, or any other country in that category. If we then decide to go ahead with those shipments, then perhaps we should modify NNPA to reflect what the actual policy is.

As you indicated, India does not actually need this fuel for another couple of years. They have another plant that is working without enough material right now. We can make some arrangement, I am sure,

to keep their plant going on a more efficient basis so they do not have to shut it down.

But it still seems to me that before we change NNPA we should have all the facts at hand. So, I am suggesting that perhaps the best thing is to delay sending up any Executive order. That will give us a chance to have the NPT meeting in August and to receive the GAO study. Congress has 60 days anyway. If it is delayed very much longer, we are going to be in the next session of Congress anyhow, like it or not.

A little delay now would not hurt at all, as far as I am concerned. Would you agree with that approach, or do you think we ought to decide one way or another right now since we may not come up with any new information?

Mr. ROWEN. I think biting bullets prematurely is not to be recommended. I suggested delay as one of the options I mentioned. I think it makes a great deal of sense.

Senator GLENN. Thank you, Senator Percy?

Senator PERCY. I am sorry, would you go over the last part of that response—delay would do what?

Mr. ROWEN. A policy of delay makes a great deal of sense under the circumstances. The lights will not go out in India. Not only would there be further scope for internal review by the GAO, but I think it would be useful to press the executive branch on some of the regional implications of this move which they have not really—perhaps they have in private communications to the committee but certainly on the public record they have said very little about the impact on Pakistan; that is another consideration.

The return of the spent fuel could be explored further, too, as an option during this period. There is a great deal to be said for delay.

Senator PERCY. Dr. Rowen, over the last several years I have discussed this issue with probably most of our own State Department and arms control experts in the field, and also with the chairman of the Atomic Energy Commission in Bombay, with an old friend and former Indian Ambassador when he was here a few weeks ago, and with both Prime Minister Desai and Prime Minister Gandhi.

The questions I have for you and some of the other witnesses draw partly upon the comments of the people I just mentioned. One comment I heard in India was: "Well, you weapons states are all alike. You have an exclusive club and you want to keep it that way. We would be perfectly willing to safeguard all of our facilities if the present weapons states would put all their facilities under international safeguards." In a sense what they are saying is, "It is up to you; the ball is in your court."

Could you respond to the reasonableness of this position?

Mr. ROWEN. This, in my view, should not be regarded as a matter of fairness, viewed from an Olympian standpoint. What is fair in the world?

If fairness were an overriding consideration the whole concept of nonproliferation would never have arisen because, after all, it means drawing a distinction between weapons states and nonweapons states. Some people feel it is an invidious distinction, from the other side, as in the case of the Indians. That has to be taken as "given," otherwise

one has to give up the whole effort to try to limit the number of weapons states, that is, the number of states that have nuclear weapons.

I take as axiomatic that the whole purpose of this process is to try to keep the number of weapons states down—for good, practical reasons, not just as a matter of principle. The India-Pakistan relationship certainly looks like it is brewing a lot of trouble, you could have two nuclear-armed states who are quite hostile.

Taking that as given, then, there are going to be some states which have nuclear weapons. Some of them are going to have more nuclear weapons than others like the United States and the Soviet Union; others will have small numbers, and that is it. I mean, we take that as given and then we proceed to the more practical matter of what we can work out. We may not succeed as a practical matter, but it seems to me this notion that it is not fair, somehow, is no place to begin with it.

Senator PERCY. Well, their response to that might well be: We do not intend to have weapons. On the other hand, there is a body of information that we ought to know something about. If it is all right for the Communist country with the largest population on Earth to have it, and they are on our border and we have had some difficulties with them in the past, why should not we as the largest democracy on Earth at least develop the knowledge and have the capability in the event we ever need it?

How do you respond? I have been trying to respond to that for years.

Mr. ROWEN. I would respond to that by saying, that is their problem. We have our problems. They happen to have China as a neighbor and that is the way God made the Earth. They have China as a neighbor and China has nuclear weapons. Neither we nor the Indians can do very much about that.

They also have Pakistan as a neighbor and they dismembered it 9 years ago. The problem we face is, What about our policy? Do we want to assist India in an enterprise in which they have—to use language a little loosely—stolen some of our stuff, and go on with the relationship? It seems to me, we should let the Indians work on the Indian problem, while we should be working on the American problem.

Senator PERCY. Let me suggest another statement they might make. Suppose they say, "This is your problem. You have a 30-year binding contract to supply us. You keep saying you want to be looked upon as a reliable supplier. We have fulfilled every obligation we had under that contract, that is, to safeguard the Tarapur facility." They have adhered to the agreement on reprocessing. If we do not sell India fuel they might well take the position that the contract in their judgment is null and void and they will no longer consider themselves bound by those safeguards.

In that sense we would be giving up the safeguards we now have, albeit we do not have them on facilities other than Tarapur. By denying the shipment, don't we make ourselves vulnerable to their charge of breach of contract, thereby relieving them of any obligations under the contract?

I am trying to put forward the arguments that they may well have made or are going to make.

Mr. ROWEN. Well, they have. That is their blackmail threat that I referred to. One of the principal points in McGeorge Bundy's piece in the Washington Post last week, and one I agree with, is: This is not an issue of legalities on the two sides. We have our Nonproliferation Act. They have some arguments on their side. We can point to the violation, which was a flagrant one, of their misuse of the CIRUS reactor. They can point to the admittedly badly drafted agreement for cooperation in 1963 and say that we are violating if we do not comply. Let us take those arguments as a standoff, and then we decide what makes sense for us.

Of course they will and have used those arguments. As I say, the threat component in that is rather impressive. We have to decide whether or not we want to go along and yield to that form of blackmail for the next 13 years.

Senator PERCY. Putting ourselves in the position of a negotiator—and we are, we have been negotiating with them for years on these issues—when you are negotiating you always have to look at your own position. Are we dealing from strength or from weakness? Are we vulnerable at this particular time? There is no secret about the fact that we have new priorities now; Afghanistan has presented a whole new issue. You have mentioned the issue with respect to Pakistan.

Just as we are trying to urge the world community to stay united in condemnation of Soviet policy, the Soviet Union is doing everything they can to undermine our position, and India is crucial.

They have just concluded the largest arms sale package in their history with India, \$1.6 billion with concessional interest rates of 2.5 percent. It shows how far they are willing to go to attempt to influence India.

It has been suggested that our cancellation of the shipment would cast a long shadow over United States-Indian relations, not just today, but for a long time to come—at the very time when we know the Soviet Union is trying to increase its influence in that region.

Could you comment on that, or expand on any of the comments you have already made in your paper?

Mr. ROWEN. It is obviously a very important issue, and it is not surprising to see that the President would give it great weight in trying to decide what to do in regard with this particular transaction.

What I see missing—and as I said before, perhaps there has been some private communication with the committee that was reassuring on this score—is what it is we are trying to achieve with India, and what the strategy is with regard to India vis-a-vis Pakistan and the Soviet Union.

It is conceivable to me, on form, that there is no particular strategy; we are just trying to get Indira Gandhi not to line herself up so often. About every other day she has been deploring the Soviet invasion, but on the other, even-numbered days, she does not think it is all that much of a threat.

Well, perhaps we are trying to get her to increase the frequency of the statements deploring the Soviet invasion of Afghanistan.

If there is a strategy with regard to India, which makes sense in terms of countering the Soviet threat not only to Pakistan—obviously it is much broader than that—then it is conceivably that this transaction could properly fit into some larger strategy.

In the absence of that—it seems to me to be absent, perhaps I am not aware of some important factors—it seems to me there is not much of a case for it. What we are likely to get out of it is very, very little, from the Indian Government.

Senator PERCY. If we do deny the sale, what do you think would be the likely outcome? Would India begin reprocessing their spent fuel, in your judgment? What consequences would that have and what precedent would it establish? Would they purchase fuel from the Soviet Union? Do we know that the Soviet Union would sell it to them? If so, under what conditions? Would they require the same safeguard conditions that our contract now requires for the Tarapur plant?

Mr. ROWEN. Predicting Indian reaction in detail is certainly beyond my capacity, and perhaps beyond that of anyone.

From the Indian Government's side, to do that would, I believe just in political terms, be regarded widely in the United States as a very unwise and unfriendly thing to do. As to the legality, you could make all sorts of arguments on that. It would be rather poisonous, I think, to Indian-American relations for them to do that because, after all, we do have a case on our side, given the experience we have had with India.

I am fascinated by the editorials from newspapers around the country on this subject, all lined up on one side. It is amazing, the extent to which at least the people who write editorials for newspapers seem to regard this transaction as a very dubious one indeed.

If India wants to create a hostile reaction in the United States, it would go ahead and do what you suggested it might do. Probably, the Indian Government would not do that if it looked at its U.S. relations at all deeply.

As for the willingness of the Soviet Union to supply the fuel, I would really have to defer to experts on Soviet Union-Indian relations and the state of its nuclear policy. As I pointed out, the Soviet Union has been pretty tough in its negotiations with India and with other countries in its nuclear transactions. It would not surprise me at all if they insisted on the return of fuel if they were to provide it. That may not be the worst possible outcome, as I pointed out.

This would be a significant breach in Indian-United States relationship if it were to go ahead and do as you suggested it might do, take that fuel and extract plutonium and make off with it in some way. I am rather doubtful that the Indian Government would do that; everything taken into account, it does not seem the thing to do.

Senator PERCY. I will ask one more question in this round, Mr. Chairman. Mr. Rowen, you and Dr. Wohlstetter have written that, "The most likely countries to go for nuclear weapons appear to be those nonaligned by choice or those that are outcasts or fading members of alliances, especially U.S. alliances." Is this still your view today? Does that suggest that perceptions of insecurity may be the principal motive for countries to pursue nuclear options?

Mr. ROWEN. It certainly does. This is my view today, and all one has to do is run down the list of candidate countries, the ones we are most worried about, or have been most worried about and you will see why. India is a case. It was the first nonaligned country. Nehru made that a principle of foreign policy that it was nonaligned, and there are other examples.

There are worries about Taiwan, and we see what has happened to our ties to Taiwan. South Africa is an outcast. Argentina is a worry, and it has certainly disassociated itself very much. There are several other important examples.

The reason for the interest on the part of these countries in nuclear weapons is really quite clear, they worry about their security.

Now, if we recognize that, we should do what we can where it is in our interest, on the security front as well as the nonproliferation policy front, to be helpful. I think with regard to some countries, such as South Africa, it is hard to see how one gets there from here. With Taiwan we have a security relationship that remains. It is hard to see with regard to India, however, how under present circumstances there is very much that we can do on the security front that would really be very helpful. India's most pressing adversary relationship is with Pakistan, and it dominates Pakistan militarily. The problem is really, how do we help Pakistan, rather than, how do we help India.

But I think it is generally an important principle to pay a lot more attention to the security relationship here. If we view the problem much more explicitly on those grounds and not regard the transfer of arms to other countries in excessively moralistic terms, but realize that we can have in important effect in many cases—perhaps not with India—by recognizing the genuine security problems that people perceive and where we can be helpful on that score, this will, I think, do a lot more for nonproliferation than a lot of the other things that we do.

Senator PERCY. Thank you very much. I have a few more questions, but I will yield now.

Senator GLENN. Thank you, Senator Percy.

It is argued that if we cease nuclear cooperation with India we will lose any leverage we have over their nuclear plants. First, how would you characterize the amount of leverage we have in this sphere right now; and second, how adversely would this leverage be affected if we broke off nuclear trade with the Indians?

I see, for example, the President is planning to send the very sophisticated TOW antitank missiles to Mrs. Ghandi, if the Congress does not veto the sale. Now, surely, with major carrots like this and our general economic aid to India, we have many ways of influencing Indian behavior in the nuclear area, even if we are not trading in nuclear goods per se.

What are your views on this?

Mr. ROWEN. First on the nuclear sector, as I indicated in my remarks, the record of our influence on India is not very hopeful. It seems to me we have had very little leverage over India in that regard. If we have had it, we did not use it. So, there is not much to lose on that score.

More broadly, using other instruments, or using a variety of instruments of which selectively the supply of arms might be useful, might be more important—if TOW's are that important to India, and perhaps they are.

I think we have a problem in our relationship with Pakistan in any such transaction, that you have to pay a lot of attention to. But the principle, at any rate, is the correct principle, that we should look at a variety of instruments, trade, aid, military assistance, as well as nuclear

fuel, as means of getting influence. Just to repeat, I do not think that the nuclear sector, our nuclear relationship, has worked out in a way that suggests that we in fact have had much leverage over India.

Senator GLENN. As mentioned before, our agreement expires in 13 years. The agreement does not specifically require that safeguards be kept on our fuel, nor does the agreement specifically state that our controls over the reprocessing of our fuels will continue beyond that point.

How do you think the Indians will interpret these ambiguities? Are they going to take over our fuel as they are threatening to do now if we stop these licenses?

Mr. ROWEN. I think that should be our expectation.

Senator GLENN. I have very mixed emotions about this whole thing. I want the best possible relations with India. We are in a situation in the subcontinent of Asia where we need all the friends we can get, obviously. We are going to be dependent on oil from that area for some years to come certainly. The Soviets are moving down into that area. We have a dependency on that area that is not going to diminish for probably 10 to 15 years, until we get some alternate sources of energy in this country that can supplement the dwindling supplies of oil and gas.

At the same time, we do not want to do something in the short term that is going to jeopardize a slowed spread of nuclear weapons for generations to come. We are really in a difficult quandary here. This is a dilemma if there ever was one.

I appreciate the difficulty of the President's position, but I also do not want to see us keeping NNPA on the books if it is nothing but a charade before the rest of the world.

Senator Percy, do you have any other questions?

Senator PERCY. Thank you, just a few.

With specific reference to the March 10 date in the NNPA, some say it was a guideline, not a cutoff date. Both licenses were applied for by India before September 10, 1979, the date after which applications could not be granted to nations which have not accepted full-scope safeguards; but deliveries would be made after March 10 because of delays by the U.S. Government—by our own actions or lack of action. The argument is then made that we should not punish India for the slowness of our own decisionmaking process.

Could you comment on that?

Mr. ROWEN. With regard to our own decisionmaking process, I could not improve upon the position taken by the Nuclear Regulatory Commission. They decided that there was no merit in that argument.

As to the international aspects of it, I think these legalities are not nearly as important. Internationally, we are in the realm of real politik, not legal arguments.

Senator PERCY. Some have said that what we decide will influence Pakistan. There is another strong body of belief that it will have no effect whatsoever, that they will act in accordance with what they perceive to be their national interest, no matter what we do. Could you respond to that? Do you have any firsthand information that you can share with us as to what their intentions might be?

Mr. ROWEN. I am afraid not. There is a lot in the argument that, just taking this particular decision in isolation, it is likely to have

a small effect or perhaps no effect on Pakistan. Perhaps in my prepared statement I gave it more weight than in fact it would have, practically.

Put in the context, however, of a set of things that we do, a set of programs and policies we undertake vis-a-vis Pakistan, and perhaps India as well, then it could have a substantial effect. But the missing part is, where is that set of policies and programs of the administration into which this might fit? It really seems to be missing.

Senator PERCY. Do you believe that the imposition of full-scope safeguards on all nonnuclear weapons States should be a central U.S. nonproliferation objective? Do you think safeguards are the key to an effective nonproliferation regime, or are there other objectives which are equally important or perhaps even more important?

Mr. ROWEN. Full-scope safeguards are certainly important. There may be overriding foreign policy reasons for not insisting on it in some instances, and the law provided for the President to have an override; I think that was wise. It is an important component of any nonproliferation effort. There are other desirable attributes of a nonproliferation regime that would help support the timely warning criterion, including making it hard for people to get their hands quickly on plutonium or highly enriched uranium. But full-scope safeguards are really quite an important component.

Senator PERCY. Senator Glenn and I and our staffs collaborated very closely on the Nonproliferation Act which we reported out of the Governmental Affairs Committee. He is a wonderful colleague to work with. We both sit on this committee, which is now grappling with this problem of implementation. I would like to ask you what relationship you see between nonproliferation and our foreign policy objectives. We both are deeply concerned about nuclear proliferation. Should proliferation have priority over all foreign policy matters? If not, how would you characterize the relationship and under what circumstances would proliferation policy yield to foreign policy? And do we have any of these circumstances as you see it today?

Mr. Rowen. Well, our nonproliferation policy has obviously, in the short term, caused us some trouble with our close allies. We got into quite a wrangle with the Europeans and the Japanese over this in the last several years, and we have had to back off, in fact, quite a long ways, as you know. So, in the short run the positive aspects are not so evident.

The problem, however, remains a fundamental problem, that is the phenomenon of spread of nuclear weapons is a major factor in the world, and as time goes on, in my view, it is going to not recede in importance but very likely increase because, if you look over the next year at candidate countries to get nuclear explosives—Pakistan, for example; there may have been a test in the South Atlantic, some device recently, last September by someone. That was not a very hopeful sign. Iraq seems to be moving ahead. I mean, these are fairly scary propositions, scary prospects. The phenomenon of nuclear weapons coming into the hands of governments that are either hostile or unstable is going to be important in the next 10, 15 years; that seems to me very likely.

Now, that should not, I believe, lead one to conclude that concern about this phenomenon is an overriding goal. There are other goals in the world besides limiting the spread of nuclear weapons. It is a major

factor which should be given weight—probably more weight than it generally is, including, for example, in this transaction with India. That it is more important than all of our other international dealings, I think, one could hardly sustain. We have lots of international interests, bilateral dealings with many countries and an adversary relationship with the Soviet Union, which are obviously pretty important.

We may have to change tactically. I think strategically it is really wrong for us to change. We have to change in detail, we have to change our tactics; that is quite clear. Abandoning the basic purpose seems to me entirely unwarranted, and I think this will become increasingly clear as time goes on.

Senator PERCY. One last question. Why have we been so unsuccessful in convincing any other nuclear power that this is the right program, that they should support this policy? We do not get the support we would like to get, for instance, in the whole area of reprocessing. Some of them even think we are just out of our minds.

Mr. ROWEN. For several reasons, I would say. One is the wide perception in the world of the decline of the U.S. role in the world, the decline of American leadership. We proposed our nonproliferation policy during a period in which the United States was generally being downgraded in perceptions abroad. We have seen this in many arenas, not just in nonproliferation.

Second, there was an important missing component in our strategy which we discussed, and that is the failure to give enough weight to the security component in the nonproliferation policy. People could observe that. Simply saying "no" to a policy of denial without attempting to deal with the real problems that many countries face in security terms does not seem very credible to the observers.

Third, it has to be said, I think, that many of our allies, not so wise or farseeing, are wrong, many of them, on many issues. The conviction is that they will perceive this more and more as time goes on.

In any case, I do not think that we should necessarily feel terribly guilty on this one. We are not necessarily wrong; perhaps they are.

Senator PERCY. Thank you very much, I appreciate it. Thank you, Mr. Chairman.

Senator GLENN. Thank you, Senator Percy.

Mr. Rowen, I know you have another meeting at 11 o'clock; you have 11 minutes to get there. We appreciate your being here this morning and sharing this much time with us. We appreciate your comments. We may have additional followup questions from other members of the committee or from the staff after we have reviewed the transcript. If so, we would appreciate your reply so they could be inserted in the record. Thank you very much for being here.

Mr. ROWEN. Thank you, Senator.

Senator GLENN. Our next witness is Senator Alan Cranston. Senator Cranston, we welcome your comments.

STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM CALIFORNIA

Senator CRANSTON. Mr. Chairman, members of the committee, thank you very much for the opportunity to testify.

I am grateful for the opportunity to state my reasons for opposing the proposed export of nuclear fuel to India. I believe that export of this additional fuel without India's adherence to international safeguards on its nuclear program would do grave injury to the nuclear nonproliferation and foreign policy interests of the United States.

I oppose the export because I believe it would harm our interests in South Asia, including our desire to improve our relations with Pakistan, as well as our effort to discourage the Pakistanis from their pursuit of a nuclear weapons capability and our efforts to reduce the dangerous instability brought to South Asia and other tense areas of the globe by regional nuclear arms races.

I also oppose this sale because I believe that if permitted by the Senate—and I understand the full House is expected to block the sale—it would undermine the central pillar of our worldwide nonproliferation effort. This centerpiece of the Nuclear Nonproliferation Act, passed by the Senate 88 to 3, is the requirement that all non-nuclear-weapons states accept international safeguards on their nuclear programs—the functional equivalent of signing the Nonproliferation Treaty—as a condition of U.S. supply. Such safeguards are widely recognized as the sine qua non of an effective nonproliferation regime. Their achievement has been the primary goal of U.S. efforts in bilateral and multilateral nonproliferation discussions for many years now. Continued export of fuel to India—which persists in rejecting this essential norm of international nuclear commerce—will raise questions about our seriousness in all of these discussions.

I do not believe it is necessary for the United States to gut its nonproliferation policy in order to indicate our good will toward India. We have other, less harmful, means of achieving that goal.

I believe there must be limits to the length to which the United States will go to demonstrate our desire to have good relations with India. We must expect some cooperation and respect for our interests in return.

I will not go into all the arguments that I would like to make now because I will submit my full statement for the record. I would like to address orally one principal administration argument.

This is the administration argument in support of this export which holds that since the Indians believe the United States is legally bound to supply this fuel, the requirements of the 1978 act notwithstanding, the United States must send the fuel. This argument applies, of course, not just to the fuel at issue today but to all shipments until the end of our 30-year agreement.

While I am not an international legal scholar, I believe there are major weaknesses in this administration contention. I think that the State Department should confidently defend the position that the United States would be legally justified in blocking this export. For example, the current export license is applied for under a 1963 contract for sale of enriched uranium between the United States and India which, under a 1971 conforming amendment, states that India has agreed to, "comply with all applicable laws, regulations and ordinances of the United States" in connection with the material to be supplied under the contract—language which clearly encompasses the requirements of the 1978 act.

I also believe the United States has grounds for terminating supply based upon the Indian breach of the peaceful use assurance attendant our supply to heavy water to India, which began in 1956. This heavy water was used in fabricating the Indian nuclear explosive device detonated in May 1974, after India received a 1971 diplomatic note from the United States making it clear that such use of U.S.-supplied heavy water would violate the 1956 assurances.

India also turned aside a 1974 note seeking the pledge that no U.S.-supplied material would be used in nuclear explosives, and has persistently rejected the U.S. view that the 1963 agreement for cooperation and uranium contract require safeguards to be applied in perpetuity to fuels supplied by the United States for the Tarapur reactor, not just for the 30-year life of the agreement, as the Indians contend.

The United States has made concessions to India in the past to avoid interrupting fuel supplies for the Tarapur reactor. For example, in May 1978, when the NRC was unable to find that India had met minimum U.S. safeguards requirements of the new Nonproliferation Act, Congress permitted an export to go forward to India for three principal reasons: First, it was hoped that a 2-year grace period after adoption of the 1978 act would provide for meaningful negotiations with the Indians to gain their adherence to full-scope safeguards.

Second, because the authoritarian pro-Soviet regime of Mrs. Gandhi had been replaced by that of the more democratic Mr. Desai, the United States hoped for progress through negotiation.

And third, Desai foreswore any need for additional nuclear weapons testing by India.

Today, as you consider the Indians' latest export application, none of these conditions obtain.

Mr. Chairman, under the leadership of your committee and that of the Governmental Affairs Committee, Congress began, shortly after the Indian explosion of 1974, to head toward a cutoff of U.S. nuclear supplies to violators of essential nonproliferation standards. Your committee has found that one of the principal causes of proliferation is the fact that the U.S. Government has frequently given in to the temptation to use nuclear exports as "carrots" to improve specific bilateral relationships. It was to correct this problem and to insure that long-term national security concerns will take priority over transitory bilateral interests that Congress enacted comprehensive legislation establishing clear standards in licensing procedures for nuclear exports.

I think the Executive order which will soon come before you presents a critical test. I believe Congress should exercise its review authority to insure that the administration has the strength of the President's articulately expressed convictions on nonproliferation. We must hold the line on further nuclear exports to India until that nation indicates its willingness to join the community of over 100 nations in accepting the basic norm of international nuclear commerce—full-scope safeguards—which are implemented for the good of all mankind.

When the administration sends forward an export license by Executive order, I urge our colleagues to report a Resolution of Disapproval and to join together with the House in blocking this proposed export to India.

I thank you very much for the opportunity to testify this morning.
[Senator Cranston's prepared statement follows:]

PREPARED STATEMENT OF HON. ALAN CRANSTON

Mr. Chairman, I appreciate the opportunity to testify before your committee this morning to explain my reasons for opposing the proposed export of nuclear fuel to India.

I believe that export of this additional nuclear fuel to India without India's adherence to international safeguards on its nuclear program would do grave injury to the nuclear nonproliferation and foreign policy interests of the United States.

I oppose the export because I believe it would harm our interests in South Asia, including our desire to improve our relations with Pakistan, as well as our effort to discourage the Pakistanis from their pursuit of a nuclear weapons capability and our effort to reduce the dangerous instability brought to South Asia and other tense areas of the globe by regional nuclear arms races.

I also oppose this sale because I believe that if permitted by the Senate—and I understand the full House is expected to block the sale—it would undermine the central pillar of our worldwide nonproliferation effort. This centerpiece of the Nuclear Nonproliferation Act, passed by the Senate 88 to 3, is the requirement that all non-nuclear-weapons-states accept international safeguards on their nuclear programs—the functional equivalent of signing the Nonproliferation Treaty—as a condition of U.S. supply. Such safeguards are widely recognized as the sine qua non of an effective nonproliferation regime. Their achievement has been the primary goal of U.S. efforts in bilateral and multilateral nonproliferation discussions for many years now. Continued export of fuel to India—which persists in rejecting this essential norm of international nuclear commerce—will raise questions about our seriousness in all of these discussions.

There are several basic questions to be asked here which we must not lose sight of in our pursuit of the elusive prospect of improved U.S.-Indian relations.

Should the United States be routinely fueling the nuclear program of a nation which has violated its "peaceful use" assurances to us by using U.S.-supplied materials—heavy water—in its nuclear explosive program?

Should the United States continue to export nuclear fuel to a nation which rejects international safeguards, which refuses to foreclose further development of nuclear explosives, and which persistently threatens to breach our supply agreement by extracting nuclear explosive material—plutonium—from U.S.-supplied spent fuel?

If we do supply such a nation, what credibility will our non-proliferation policy have?

The principal Administration arguments put forward in support of this export derive from the crisis atmosphere created by the Soviet invasion of Afghanistan. The Administration's stated view is that we must aggressively court the Indians, that a breach of U.S. fuel supply could harm nonproliferation efforts, and that we may be obligated to send the fuel.

I believe each of these arguments can be refuted on the merits.

The Administration case on foreign policy grounds is weak. To permit this nuclear fuel export would likely harm our relations with Pakistan with no significant gains from the Indians in return. I do not believe that India will significantly alter its response to the Soviet invasion as a consequence of the U.S. decision on fuel supply. India will clearly make its strategic national security decisions on the basis of far broader concerns.

It isn't necessary for the United States to gut its nonproliferation policy in order to indicate our good will towards India. We have other, less harmful means of achieving this goal. For example, just last week, President Carter indicated his desire to sell 3,700 TOW anti-tank missiles to India.

And over the past three decades, the United States has provided over \$10 billion in development and food assistance for India. Since 1977, when the Carter Administration resumed AID assistance to India as a gesture of good will, the United States has made \$388 million in development grants and loans, as well as more than \$500 million in Food for Peace grants. These figures—which include an increase in the fiscal year 1981 Administration request to a total of

\$287 million in loans and grants for India—complement a strong bilateral trade relationship between the United States and India, and indicate the considerable interest the Indians have in maintaining a working relationship with the United States.

We will continue to seek the friendship of the people and the government of India although this task is made more difficult because of the fact that Indira Gandhi has this month signed a \$1.6 billion military supply agreement with the Soviet Union and a new, far-reaching trade pact with Iran. But I believe there must be limits to the lengths to which the United States will go to demonstrate our desire to have good relations with India. We must expect some cooperation and respect for our interests, in return.

The Administration's case on nonproliferation grounds is even weaker.

I believe that the harm done to our nonproliferation policy should we abandon the full-scope safeguards standard clearly would far outweigh any good which might be achieved by continuing to fuel the Indian's nuclear reactors at Tarapur. The requirement that full scope safeguards be a condition of U.S. export was the signal achievement of your committee in winning overwhelming Congressional adoption of the 1978 Act. The Carter Administration acknowledged this fact in its letter of endorsement contained in the 1978 Act's Senate report stating that:

"This provision represents the heart of the compromise between previous Senate bills and the Administration bill . . . in view of the crucial and pivotal importance of full-scope safeguards to an effective nonproliferation policy, the Executive Branch is ready to support (this provision)".

The House Foreign Affairs Committee underscored this view in its report on the 1978 Act, noting:

"(T)his requirement is an essential element of the bill, and in the committee's view, (is) indispensable to any comprehensive nonproliferation policy . . . the committee feels strongly that the currently unsafeguarded facilities in India must be brought within the framework of the International Atomic Energy Agency safeguards systems if American nuclear cooperation is to continue."

Indians—and Carter Administration policymakers—have been fully aware of this requirement, although the Act deferred its application for two years to permit bilateral negotiations. The Administration did not question the legality of the requirement when it was before the Senate, or thereafter.

Yet the third principal Administration argument in support of this export holds that since the Indians believe the United States is legally bound to supply this fuel, the requirements of the 1978 Act notwithstanding, the United States must send the fuel. This argument applies, of course, not just to the fuel at issue today, but to all shipments until the end of our 30-year agreement. While I am not a legal scholar, I believe there are major weaknesses in this Administration contention. I think that the State Department should confidently defend the position that the United States would be legally justified in blocking this export.

For example, the current export license is applied for under a 1963 Contract of Sale of Enriched Uranium between the United States and India which, under a 1971 conforming amendment, states that India has agreed to "comply with all applicable laws, regulations and ordinances of the United States" in connection with the material to be supplied under the contract—language which clearly encompasses the requirements of the 1978 Act.

I also believe the United States has grounds for terminating supply based upon the Indian breach of the peaceful use assurance attendant our supply of heavy water to India which began in 1956. This heavy water was used in fabricating the Indian nuclear explosive device detonated in May 1974 after India received a 1971 diplomatic note from the United States making it clear that such use of U.S.-supplied heavy water would violate the 1956 assurances. India also turned aside a 1974 note seeking a pledge that no U.S.-supplied material would be used in nuclear explosives and has persistently rejected the U.S. view that the 1963 Agreement for Cooperation and uranium contract require safeguards to be applied in perpetuity to fuel supplied by the United States for the Tarapur reactors, not just for the 30 year life of the Agreement, as the Indians contend.

The United States has made concessions to India in the past to avoid interrupting fuel supplies for the Tarapur reactors. For example, in May 1973, when the NRC was unable to find that India had met minimum U.S. safeguards requirements of the new Nonproliferation Act, Congress permitted an export to go forward to India for three principal reasons.

First, it was hoped that a two year "grace period" after adoption of the 1978 Act would provide for meaningful negotiations with the Indians to gain their adherence to fullscope safeguards. Second, because the authoritarian, pro-Soviet regime of Mrs. Gandhi had been replaced by that of the more democratic Mr. Desai, the United States hoped for progress through negotiation. And thirdly, Desai foreswore any need for additional nuclear weapons testing by India.

Today, as we meet to consider the Indians' latest export application, none of these conditions obtain. There are no negotiations under way with India. Gandhi is in power once again, tilting toward the Soviets, and under her leadership the Indians now won't rule out further nuclear tests.

The United States is left with the choice of standing by our principles and defending our nonproliferation policy designed to enhance our national security, or of submitting to Indian pressure and consenting to supply Tarapur through the life of the 1963 contract, fully aware that India may detonate new nuclear weapons and will continue to reject international safeguards.

It is widely recognized that in taking its present position, the Indian government is attempting to blackmail the U.S. with its threat to extract plutonium from supplies of U.S.-origin spent fuel if we do not capitulate and send them still more enriched uranium. We should assert our rights under the 1963 contract and require Indian adherence to U.S. export controls contained in the 1978 Act as a condition of continued U.S. supply.

Mr. Chairman, under the leadership of your committee and the Governmental Affairs Committee, Congress began shortly after the Indian explosion of 1974 to head toward a cut-off of U.S. nuclear supply to violators of essential nonproliferation standards. Congress acted in large part out of frustration over the Executive Branch's failure to protest strongly misuse of U.S. materials by the Indians. Finally, in 1978, after four years of work by Congress, the Carter Administration joined in support of the Nonproliferation Act which required a date certain cut-off to begin March 10, 1980. Thus the Administration's new sensitivity to India's distorted view of the 1963 contract's terms can be no excuse for delaying the cut-off of U.S. nuclear supply any further.

One of the principal causes of proliferation is the fact that the U.S. Government has frequently given in to the temptation to use nuclear exports as carrots to improve specific bilateral relationships. It was to correct this problem—and to ensure that long-term national security concerns will take priority over transitory bilateral interests—that Congress enacted comprehensive legislation establishing clear standards and licensing procedures for nuclear exports.

The Executive Branch has indicated its intention to come before your committee to argue once again that in the vain hope of advancing one bilateral relationship, the U.S. must severely weaken its global nonproliferation effort.

This request presents a critical test case. I believe that Congress should exercise its review authority to insure that the Administration has the strength of the President's articulately expressed convictions on nonproliferation. We must hold the line on further nuclear exports to India until that nation indicates a willingness to join the community of over 100 nations in accepting the basic norm of international nuclear commerce—full-scope safeguards—which are implemented for the good of all humankind.

Should the Administration send forward an export license by Executive Order, I urge my colleagues to report a resolution of disapproval and to join together with the House in blocking this proposed export to India.

Thank you.

Senator GLENN. Thank you, Senator Cranston.

When the NNPA was before us we had major arguments about the importance of keeping our business involvements in every country we could possibly sell to. Proponents felt an American presence would maximize our impact on the foreign policy of the host country.

On the other side, it was felt that by putting very strict Government regulations in the NNPA, other nations would follow our lead. The argument can be made now that while they might have been following our lead at one time, they are not now. If we are keeping ourselves out of the world markets we could wind up with less influence on nuclear matters around the world by the policies we are following.

How do you respond to that?

Senator CRANSTON. Well, I think we will have more influence abroad by adhering to a sound policy based upon fundamental principle, which we will not compromise because of transitory diplomatic-political considerations.

Senator GLENN. Before you came in, I indicated that in a letter to our new Secretary of State, I proposed a delay. Emotions are high on this matter right at the moment on both sides of the world. There is an NPT conference coming up in August, where all the nuclear supplier nations will be gathered. We will have an opportunity to discuss policy matters and whether other countries intend to follow our lead. We may also arrive at a general consensus as to direction. In addition, GAO now has some 20 people working on a study of the effect of NNPA. That report was to be to us by next March. I think we probably could get that speeded up somewhat so that we could have it by the end of the year.

It seems to me at that point we will be in a better position to make decisions about changes, if any. Meanwhile, we would not be going ahead with the shipment. The actual shipment delay would not really hurt them, since there are a couple of years yet to go before they actually must have the fuel that we would be sending. I know they want the commitment made well before that.

But it seems to me that a little time, while we get all our information together, would be well advised. Do you support a delay, or do you think we should turn down this shipment out of hand right now?

Senator CRANSTON. I would support that. I think that approach, giving time for more deliberate contemplation of the very important issues involved and giving time to negotiate and talk with others, could be very usefully spent.

Senator GLENN. Senator Percy?

Senator PERCY. Senator Cranston, when I first introduced the legislation in 1977, that original version called for an absolute cutoff—no ifs, ands, or buts about it. We negotiated with the executive branch, and the end product came from that negotiating process.

The legislation on the books now stipulates that applications received after September 10, 1979, from nations which do not accept full-scope safeguards cannot be approved. The shipments to India clearly will be made after that date. But they would only be made after that date because of our own delay. The applications were filed by India in sufficient time. So they take the position that the delay is our fault, not theirs. If we make this exception in India's case, will it then set a pattern for all other countries? In my judgment it would not, if no other country falls into this particular category of having made application for a shipment which we then failed to make in time. How would you respond to that?

Senator CRANSTON. Technically, you are correct in that these licenses were applied for before September 10, 1979. But they would be exported after the 24-month deadline. This would inevitably leave the impression that the United States was relaxing its nonproliferation policy.

Senator PERCY. But if you technically meet the standards on agreement or law, that is concurrence.

Senator CRANSTON. Yes. But clearly the 1978 act said that there would be a date certain cutoff, and that no exports would go to India after March 10, 1980.

The NRC has also rejected by a unanimous 5-to-0 vote the view that these shipments fall within the grace period. So, while there is a technical question involved, I think that the case for not sending this fuel is very strong.

Senator PERCY. But a strong case can be made that the September 10 date was really the binding deadline, and that India technically did meet that deadline. Is that not true? Can they not be differentiated from other countries in that respect?

Senator CRANSTON. In a strictly technical sense, it is true that those applications were filed before September 10. But I feel that to proceed now with India, in view of their behavior in the use of the American-provided material for weaponry purposes and their refusal to accept full scope safeguards would be a signal to the world that our non-proliferation commitment—a commitment which I know we both share—had been abandoned.

Senator PERCY. You indicated in your testimony that you oppose the export because you think it would harm our relations in Southeast Asia, including our desire to improve our relations with Pakistan. Have you talked with anyone in the Government of Pakistan who led you to believe that they would look upon the fulfillment of these applications as anti-Pakistan, as a tilt toward India which would injure our relationship with Pakistan?

Senator CRANSTON. I have not talked to officials of the Pakistan Government, but that is the clear impression I have of what the reaction would be to approval of this. It certainly would be difficult to curb the Pak's nuclear weapons program if we cave in on India.

Senator PERCY. I have not been made aware of that reaction. The case has been made by some that if we deny this application, it would influence the Pakistan Government with respect to its nuclear program. Do you have any firsthand information to this effect?

Senator CRANSTON. I think that all nations, Pakistan and others, would get the impression that we are less serious about our nonproliferation approach than we have been in the past, if we were to approve this export license.

Senator PERCY. We very much appreciate your appearance here today and we certainly share with you the deep concern that you have expressed. That was the spirit that motivated our 3 years' work to bring this act into reality.

In your testimony, you say, "I do not believe that India will significantly alter its response to the Soviet invasion as a consequence of the U.S. decision on fuel supply."

We do know, however, that India has significantly altered its response to the Afghanistan situation from the original statement made by Mrs. Gandhi. That first statement really shocked me because I just could not understand how it could possibly be their response to such an action.

According to statements that I have seen since then, India has moved from an uncritical view of recent events, where it almost excused those events, to a position now where India actually opposes the

Soviet invasion of Afghanistan and calls for prompt Soviet withdrawal.

In the light of that change, is there not the possibility that if we rebuff India at this particular time, it might adversely affect their whole relationship with us at a particularly important time?

Senator CRANSTON. Like you, I was shocked by the original statement by Indira Gandhi. I have been somewhat encouraged by the new approach taken by her government.

I think India will base its policies and relationship to the Soviet Union on other factors in the world, on their broad assessment of what is in their national interest, and not upon a fuel contract. I would therefore downplay the effect denial of this export would have on United States-Indian relations.

Senator PERCY. One other point. The whole objective of the legislation is to establish a national policy to do everything possible to stop proliferation of nuclear weapons. I do commend the State Department not only for placing absolutely top-level people on this problem and putting a tremendous amount of time into the negotiations in foreign countries and keeping us advised, but also for coming up with a contract in which we guarantee to India that we will be its source of supply of enriched uranium for a period of 30 years and we get a commitment that India will safeguard the Tarapur plant, that they will not reprocess any of the spent fuel.

The argument is made that if we refuse this shipment, India may interpret this as a unilateral breach of our 30-year contract, and that they thereby are relieved of all responsibility for safeguarding the Tarapur plant and for reprocessing. They may well go into a reprocessing program to create plutonium out of which nuclear weapons are made. Some would even argue that we pushed them into it. Could you comment on that?

Senator CRANSTON. I think it is clear that India has already breached peaceful-use assurances that we were given when we supplied them heavy water back in 1956. That heavy water was used in the fabrication of the Indian nuclear explosive device detonated in May 1974. That was after India received messages from us stating that such use of U.S.-supplied heavy water would violate the 1956 assurances.

So, they have already breached understandings with us. I think in view of that, we should draw the line at this point.

Senator PERCY. Thank you, Mr. Chairman, we are very pleased that Senator Cohen has joined us. He is a valuable member of the Governmental Affairs Committee, a member of the Armed Services Committee, and I hope some day a member of the Foreign Relations Committee.

Senator GLENN. Put him on everything. Senator Cohen?

Senator COHEN. Just a couple of questions, Mr. Chairman. I apologize for not being here to hear Senator Cranston's full testimony.

Senator Cranston, present criticism is directed at this administration by our allies because of a lack of constancy, or at least a rather persistent inconsistency, that we fail to match our deeds with our words. This is just perhaps another example where the administration has adopted a policy of nonproliferation and yet, on a matter such as you describe, for a transitory bilateral interest is prepared to almost undercut or reverse that policy.

Is that your judgment in this case?

Senator CRANSTON. I would be concerned by a decision by the administration to proceed because I think it would appear to be inconsistent with our basic long-term nonproliferation policy.

Senator COHEN. When you say transitory bilateral relations, what are you referring to?

Senator CRANSTON. I am referring to the state of our relations with India. We are currently having difficulties with them. I expect that in the future these relations will continue to fluctuate. And I do not think in a matter as fundamental as nuclear nonproliferation policies we should compromise that policy because of our desire to get along with India a little bit better at this particular moment.

Senator COHEN. So, your reference then of "transitory" is to the current difficulties with India?

Senator CRANSTON. Yes.

Senator COHEN. And that those transitory difficulties should not be given paramount concern over and above a fundamental U.S. policy?

Senator CRANSTON. Exactly.

Senator COHEN. Is there any connection, in your judgment, between the type of action taken by Congress to cut off shipments of arms to Turkey because of a technical violation of U.S. policy, and the consequences that followed from that embargo in terms of NATO's cohesion? Is there a danger in this particular action as well, that we might see similar consequences?

Senator CRANSTON. There are always these dangers whenever you apply a policy: You cannot be sure what the consequences will be. You can have an interest in a basic policy and feel that you should adhere to that to the maximum extent possible. You also have to consider circumstances of bilateral relationships that can be damaged by our actions. But I think consistency in following certain fundamental principles that apply to the Turkish situation, apply to the Indian situation lead, I think, if wisdom is applied adequately, to adhering to the basic policy.

Senator COHEN. Do you agree with the original decision to impose that embargo in view of the technical violation?

Senator CRANSTON. Are you now talking about the Turkish situation?

Senator COHEN. Yes, the Turkish situation. I notice McGeorge Bundy had a piece in the Washington Post saying that if the United States does not allow the sale, then India will feel free to totally disregard any restraints and will then convert the uranium they currently have for explosive purposes. This is simply a signal to disregard any restraint.

Again, there are some parallels. The Soviet Union is important here because of its invasion into Afghanistan. Here again, the administration prepared to reverse a policy which has been adopted by this Congress.

Another aspect of the debate is the shipment of technology to the Soviet Union. Should we continue to transfer certain technology, for example, to allow them to develop their own oil and coal capacity? The argument is made that unless we ship them the technology, they will be forced to move into the Persian Gulf.

That, to me, ignores the fundamental question as to why they are 30 years behind in the drilling of oil. They have been putting all of their capability into SS-18's. But, that is another matter.

But there are some parallels that come to mind, at least in terms of the arguments for the shipment of fuel to India, that unless we go along with this and support the President, there will be no restraint.

Similar arguments are also being made that, unless we continue to ship certain technology to the Soviet Union, there will be no restraint. I just wanted to get your own view on this that, for us to support the President would be, in your judgment, to perpetuate this current perception by our allies, and perhaps even by our adversaries, that the United States has no policy whatsoever, that it is rather inconsistent and certainly lacking in constancy as far as its fundamental policies.

Senator CRANSTON. I am afraid that would be a consequence. I recognize that following a fundamental policy collides constantly with the day-to-day exigencies of relationships between various nations. I think a nation is wise to try to follow as best it can certain fundamental principles. In relationship to the Soviet matter, for example, I think we should continue to deny that technology to the Soviets. And in relation to India, we should adhere to the nonproliferation policy which is so clearly in our national security interest.

Senator COHEN. I have read just recently where they have approved the sale of certain technology to allow them to drill for oil.

Senator CRANSTON. I am not familiar with that particular incident, but I think we should continue to examine such licenses very closely, especially in view of the way they are behaving in Afghanistan.

Senator COHEN. Thank you.

Senator GLENN. Thank you very much, Senator Cranston. We may have additional questions to submit to you. We hope you can respond to those for the record.

Senator CRANSTON. Thank you. I am pleased that your committee is taking this matter so very seriously, as I know each of you are.

Senator GLENN. It is taken seriously by both committees. This is a joint meeting because both committees have jurisdiction in this area. Thank you very much.

Senator CRANSTON. Thank you very much.

Senator GLENN. The next witnesses are the members of the Nuclear Regulatory Commission, Mr. John Ahearne, Chairman, and Commissioners Hendrie and Gilinsky. If you gentlemen would come to the table we would appreciate it.

Chairman Ahearne, any statement you wish to make and explanation thereof will be welcome.

STATEMENT OF HON. JOHN F. AHEARNE, CHAIRMAN, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY JOSEPH M. HENDRIE AND VICTOR GILINSKY, COMMISSIONERS

Mr. AHEARNE. Thank you, Senator. I have a relatively short statement that I would like to make.

The Commission is pleased to have this opportunity to discuss with you the opinion the Commission issued on May 16, 1980 which referred to the President's seven license applications covering proposed exports

of nuclear fuel and components for use in the Tarapur Atomic Power Station. I request that the Commission's opinion and the four separate concurring statements of myself, Commissioner Gilinsky, Commissioner Kennedy, and Commissioner Hendrie be made part of the record of this proceeding.¹

Based on a reasonable judgment of the assurances provided by the Government of India and other information available, the Commission could not find that these applications met the criteria set forth in sections 109, 127, and 128 of the Atomic Energy Act. The Commission reached this conclusion after reviewing the legislative history of section 128 of the Atomic Energy Act, and determining that Congress contemplated that no exports to India should be authorized to India after March 10, 1980, unless India had accepted full-scope safeguards. As you are undoubtedly aware, India has several nuclear facilities which are not subject to International Atomic Energy Agency safeguards, and the Commission has no indication that the Government of India presently intends to place all of these facilities under IAEA safeguards in the foreseeable future. Because of India's failure to accept full-scope safeguards, the Commission determined that it was legally required to refer two applications seeking authorization to export nuclear fuel to the President for decision.

The Commission was also unable to find that the two fuel applications satisfy the requirements of section 127 of the Atomic Energy Act or that the five component applications satisfy the requirements of section 109 of the Atomic Energy Act. The Commission reached this conclusion after determining that unique features in the Agreement for Cooperation with India coupled with India's failure to accept full-scope safeguards led the Commission to find that it did not have adequate assurances that the requirements of those sections were satisfied.

The Commission wishes to emphasize that in referring the licenses to the President, it did not take a position on whether the President should authorize issuance of the licenses by Executive order. The only Commissioner who has spoken directly on this issue is Commissioner Kennedy who stated in his separate opinion that he would support a decision by the President to authorize the exports.

Commissioner Kennedy has asked that I convey his sincere regrets that he was unable to be with us this morning, but unfortunately he had a commitment which could not be changed at this late date. He has asked, however, that I indicate for him that his views in this matter were expressed fully in the Tarapur opinion of March 23, 1979, and his opinion in the instant cases which are the subject of this hearing dated May 16, 1980.

Commissioner Bradford is also not here because he is out of town.

I would like to mention that the Indian fuel cases do have a history in NRC. Just before I arrived at the Commission, the Commission had voted in 1978 on a 2-to-2 tie. In the end, that issue went to the President and the Congress, and that was a very contentious case. Last year, just before the Three Mile Island accident, the Commission came down 3 to 2 in favor of sending another set of fuel to India. It was a very close decision. For example, for myself, I had to spend a con-

¹ See p. 52.

siderable length of time thinking through the issues and ended up with what I think is a carefully written and prepared 30-page decision in favor of issuing the fuel. This time it was 5 to 0. There was little debate, it was very straightforward. It was a regulatory decision. The law was clear to us this time.

Now, foreign policies may be addressed in other forums. I have argued that I believe making foreign policy is an inappropriate role for the NRC. However, I think the 5-to-0 vote indicates that in this particular case we did not need to reach that decision; it was a very clear issue.

That ends my remarks. My colleagues may have some.

Senator GLENN. Would you care to give a separate statement?

Mr. GILINSKY. I have a brief statement, Mr. Chairman, that I would like to present. My name is Victor Gilinsky.

Mr. Chairman, members of the committee, I appreciate the opportunity to participate in this hearing on the proposed fuel exports for Tarapur which have been referred to the President by the Nuclear Regulatory Commission on May 16, as Chairman Ahearne just pointed out.

The Commission's May 16 memorandum and order, together with an earlier memorandum from our General Counsel, deal with the legal aspects of the case. The Commission found unanimously that full-scope safeguard requirements of the Nuclear Nonproliferation Act of 1978 apply to these exports since the exports would take place more than 2 years after the effective date of the act.

That means the exports can take place only upon a Presidential waiver of the full-scope safeguards provision, with the consent of Congress.

I would like here to expand on only one point.

Senator GLENN. Let me ask a question right there. Would the President's waiver have to be before or after it went to the NRC, or could it be either? If he made an official waiver before it went to NRC, would it have then come to Congress?

Mr. GILINSKY. We would not have dealt with that issue, in that case. That would not have been a criterion for us to apply.

Senator GLENN. Would you probably, in that case, have approved the shipment, if the President had made a waiver?

Mr. GILINSKY. We also found that the section 127 requirements were not met. That was also unanimous. So, in that case, the Commission would not have approved it.

Mr. AHEARNE. I will have to say, I do not think that is necessarily obvious in the sense that each of these cases we have gone through required us to go through deliberations, matching what was in existence at that time. We did not address the hypothetical case you raised, and I would have to say, therefore, I could not conclude where the Commission vote would lie.

Senator GLENN. I was curious as to why it was done the way it was done or if it was an oversight. It could be subject to interpretation. I do not know whether it would be challenged or not on the basis that if he had done the waiver process prior to submitting it to NRC, then you would have been under a different set of guidelines in your considerations and you would probably have approved it. It would in

that case probably not have even come back to Congress. Is it your opinion that it would come to Congress in any event?

Mr. GILINSKY. The whole case may have looked different if the President had acted before the application came to us. The fact remains, we applied section 127 criteria and section 128 criteria and found that the criteria of both sections were not met.

Senator GLENN. Thank you; please continue.

Mr. GILINSKY. Let me say again that I would like to expand on only one point of that decision, and that is that this case is, as has been pointed out earlier here today, a critical test of the Nonproliferation Act. The essential requirement of that act, the basic minimum requirement, involves its acceptance by our nuclear trading partners—except for Britain and France—of comprehensive safeguards over all nuclear activities.

It is this requirement which would be waived, and probably waived permanently in the case of India, if these exports are permitted. If the decision is made to continue to ship fuel to a country which has consistently resisted the application of full-scope safeguards, we will have pulled the teeth of the Nonproliferation Act. We will be left with a severely damaged law, if not a totally ineffective one.

Let me explain why this is so. What principally motivates proponents of the export is their concern over what India might do if we fail to ship the fuel. This has been most clearly stated in a recent article by Mr. Bundy, which has been referred to here today. Given the Indian interpretation of the Agreement for Cooperation, in the event of a U.S. failure to ship the fuel, India is expected to claim that the United States has breached the agreement and may then consider itself free to reprocess the existing stock of U.S.-origin spent fuel at Tarapur, and to make such use as it wishes of the plutonium extracted from that fuel. India has not excluded making explosive use of the U.S.-supplied material in these circumstances. The argument, in short, is that possession is nine-tenths of the law. The Indians have the spent fuel and we cannot risk giving them a pretext for claiming that they are free of their obligations. We have no choice, it is argued, but to accept the Indian interpretation of our agreements.

The trouble with this logic is that it argues for the continued export of fuel until the expiration of the United States-Indian agreement in 1993, no matter what. We should therefore be clear that we are not talking here about two shipments, we are probably talking about a permanent exemption.

We would thus not be stretching the law a bit, but putting a large hole in it through which many other countries will undoubtedly want to pass. But if we accept the Indian interpretation, any perceived U.S. failure to perform promptly under the agreement may be seen to free India of its safeguard obligations over an ever-increasing stockpile of U.S.-origin spent fuel, and the plutonium it contains. Moreover, the farther down the road we get, the larger will be the Indian stockpile of U.S.-origin spent fuel—the smaller the amount that remains to be shipped under the agreement—and the stronger will be the inclination to avoid risking Indian displeasure.

If we are now worried about 100 bombs' worth of plutonium, we are going to be twice as worried about 200 bombs' worth.

So, what it all comes down to is whether our present fear of what India might do will cause us to stay our hand in implementing the Nonproliferation Act, just as its key provision is to go into effect. The act, of course, allows for exemptions. But in considering whether the new law can survive a waiver in this most symbolic case, it may be well to remember—as has been pointed out here several times—that the origin of the act lay in large part with the 1974 Indian explosion.

I would add that if we are not going to act in this case, can we really be confident that we would act if India were to set off a second nuclear explosion, or, for that matter, any other country were to do so? Will not the same arguments we are hearing today and have heard before reappear, that a fuel cutoff would result in a loss of safeguards, and so on? Will not the arguments have even more force because the threat to employ the U.S.-origin material in bombs will seem even greater?

My own conclusion is that we should stick with the act. An accommodation was made for a 2-year grace period before the full-scope safeguards provision applied. That grace period is now over. Thank you, Mr. Chairman.

Senator GLENN. Thank you very much.

Mr. GILINSKY. I should also add that Mr. Bradford has asked me to say that he concurs in that statement.

Senator GLENN. Fine. Thank you very much. Commissioner Hendrie, do you have a statement?

Mr. HENDRIE. I would like to note for the committee's benefit, Mr. Chairman, that my own judgment on the issues before us in the seven license cases hung on the provisions of section 128, that is the cutoff as of March 10, 1980, to nations that had not executed full-scope safeguards agreements or signed the Nonproliferation Treaty.

In turn, agreeing with the general counsel that it was the intent of the law that the March 10, 1980 date was in fact a cutoff and discarding the argument that the applications had been filed early meant that they would not come under it. I found that I was unable to approve the fuel licenses on the basis of section 128.

My subsequent determination with regard to the criteria, then, for fuel under section 127 and for components under 109—they are the same criteria, essentially, as adjusted for equipment rather than fuel—flowed from the fact that with 128 operative and the circumstance, then, that the Commission was unable to find that the law was met for the exports, then it did indeed raise the questions which my colleagues have raised over the past several cases for Tarapur before us, that the linkage between 128 and the assurances required under section 127 made it difficult for us to find that those assurances indeed would hold up over the long term. It is on that basis, then, that I concluded that on the 127 criteria and the 109 criteria also, I could not find that they were met.

Now, what that means is, if the proposition you posed to us had been in fact the case, that the President had waived the 128 provisions before we gathered to decision on the issue, if that had been the case, then I think the outcome is not at all clear that the majority of the

Commission would have found the remaining criteria, that is, the 127 and 109 criteria, would not have been met. I think the issue would have been very much up in the air and a different result may well have followed, in which case the exports would have gone and you would not find yourself needing this set of hearings.

Senator GLENN. Thank you. Yes, Mr. Ahearne?

Mr. AHEARNE. Senator, I would like to come down closer to Mr. Hendrie on your question of the 128 having been waived. I think if it had been waived, we would then be back to a position not completely dissimilar to a year ago when we had the Commission address a license, in which case we were looking prospectively to the March 10 cutoff. There are obviously differences, as you pointed out earlier. There is a difference between Mr. Desai and Mrs. Gandhi on a number of fundamental positions. But if there had been a waiver it could have been on the basis of other information. That other information might have given us some reason to come down in the same position we came down a year ago.

Senator GLENN. Can you give me a rundown on the amount of fuel the Indians now have on hand, approximately? In other words, how quickly do they need the fuel that is covered by these export licenses?

Mr. AHEARNE. We had one staff member earlier this year, and at the end of last year, look at that issue. I think it depends upon, whatever you mean when you say "when they need it," based upon our staff analysis, which is not something which we have then asked the Indians for concurrence on and their agreement.

If you look at it from the standpoint of fueling the reactors per se, then it appears that they would not need the fuel for from anywhere from 18 months to 2 years. If, on the other hand, you look at it from where I think the Indians might look at it, delivering fuel to the nuclear fuel complex which then manufactures the fuel to go into the reactor, if it were sea shipped, it would be needed to be shipped now; it could be air shipped by August of this year.

Senator GLENN. The question is, can we make a split on the necessity for the two applications, one necessary and the other not?

Mr. AHEARNE. I think definitely there would be stages, the first one is needed prior to the second one.

Senator GLENN. But you would agree, if we want to make sure the Indians do not run out of fuel, not only at the Tarapur Reactor but also at their fuel fabrication plant which has been brought into this equation also, that the second license would not really be necessary for some time?

Mr. AHEARNE. That is where our staff analysis has come out. The second license would not have to be shipped until something like September of 1981. The first license would have to be air shipped in August of this year.

Senator GLENN. How about the view that the two applications come under absolutely different legal interpretations as far as whether or not we would be breaching our contract with the Indians?

Mr. AHEARNE. That had been an issue which we had looked at, at some length, 1 year ago, to try to reach a conclusion as to how much weight we could give to that contract and the ties that the Indian

Government would have to that contract. This time it did not end up turning out to us to be a major issue under our responsibility. So, our legal analysis does not really go very far into that.

Senator GLENN. Mr. Gilinsky commented on the philosophical approach to this, the general view of it. I was questioning just the absolute legality of it as far as an international contract goes. Is there a substantial legal difference between the two?

Mr. HENDRIE. Senator, the way you put the question, it seems to me if the first of the proposed exports were authorized and their fuel-processing center stayed in more or less normal operation, I think whether or not the second batch of fuel arrived at the same time, it would be pretty hard to say that we were not supplying them the fuel. I would think that would fulfill all the terms, even as viewed from the Indian side.

Senator GLENN. Article 2(c) of our agreement with the Indians says that the amount of enriched uranium held by the Government of India—

Shall not at any time be in excess of the quantity necessary for the full loading of the Tarapur Atomic Power Station, plus such additional quantity as in the opinion of the parties is necessary to permit the efficient and continuous operation of the station.

There are two questions about this.

First, if I understand correctly, the second of the fuel licenses that the Commission ruled on is not needed at the present time, either to fuel the reactor in question, or at the fuel fabrication plant. Does not that mean that even by the most liberal interpretation the second license is not necessary to permit the, "efficient and continuous operation" of the Tarapur reactors, and if so, is not this second export in violation of the agreement?

Second, this section of the agreement states that just what is needed "to permit the efficient and continuous operation of Tarapur" is something to be determined by the "opinion of the parties." This seems to say that the United States has to agree as to just what is needed to run those reactors and, if in our judgment there is an excess we may withhold that material and still be in full compliance with the agreement. Do you agree with this interpretation?

Mr. AHEARNE. I would think—this is more my own personal view—I would agree with the interpretation up to the point where you said where it could be implied that we were the sole determinant of what is needed for the efficient operation. I think it is a joint agreement.

I certainly would agree, personally, that the second fuel load does not seem to be needed.

Senator GLENN. "To be determined by the parties," that is the quote. That is plural and means the opinion of both parties.

Mr. AHEARNE. I would think that would be a joint agreement of the parties.

Senator GLENN. Of which we are one.

Mr. AHEARNE. Yes.

Senator GLENN. So, it would be up to us to decide, then.

Mr. AHEARNE. It would be up to some segment of the Government to decide.

Senator GLENN. Well, what segment would that be?

Mr. AHEARNE. Senator, I am not really sure on that one. At least, that was not one of the issues that I thought the NRC was being asked to address, negotiating with the Indian Government on whether or not that second fuel load was required.

Senator GLENN. Well, I think we have several responsible "parties" of Government making that decision. I think in the first instance the President, if he wants to carry out the law, has to make that decision. He then gives it to NRC. When it goes over for your review, you are one of the "parties," too. You are part of the Government. The question is whether this fuel is needed to permit the efficient and continuous operation of the plant. So, certainly, you would be in a position to make a judgment on that. Subsequent to your decision, if it gets kicked to the Congress, as in this case, we have to exercise our opinion, also.

Mr. AHEARNE. I think the trademark of a legal operating organization, that is one that tends to look at regulations, and that kind of judgment is, it reaches the minimum set of decisions that need to be reached. In this particular case it was very clear to us that the March 10 cutoff date was effective and therefore the 127 criteria also could not be met, and therefore we rejected. To go further, to find other reasons why it partially should be rejected was not an issue we examined in any depth. We had previously, as I said, a year ago, looked at whether fuel was needed at that time. At that time it did look like that was an issue.

Senator GLENN. Let me ask one more question. Section 128 of the NNPA exempts from the full-scope safeguard export criteria all export licenses filed before September 10, 1979, but only if the first export under any such license would occur before March 10, 1980.

Both NRC and the State Department would apparently agree that some licenses filed prior to September 10, 1979 are exempt, but not others. The real question seems to be how to tell when an export is one which would occur before March 10, 1980. State apparently believes that we should look at whether the license applicant expected it to occur before that date. I am not clear as to what NRC's view is on that exactly.

Specifically, which licenses filed before September 10, 1979, do you consider to be exempt because their exports would occur before March 10, 1980?

Mr. AHEARNE. We examined that issue in this particular case and reached the conclusion that it would occur, and therefore the question is, when would the NRC be licensing the act. In this particular case it was clear, since we were addressing it after March 10, it would not meet that criterion.

Senator GLENN. Mr. Gilinsky?

Mr. GILINSKY. Senator, could I return to the question of when the fuel is needed, and comment on our staff report?

Senator GLENN. Sure.

Mr. GILINSKY. I assume it has been submitted to you.

Senator GLENN. Is that the January 22, 1980 report?

Mr. GILINSKY. That is the one I am referring to.

Senator GLENN. I have a copy of it here, and I would like to ask if there is any objection to including that as part of our record. We will not enter it into the record unless you tell us it is OK.

Mr. AHEARNE. Could we review that? That was based, to some extent, on information from the State Department.

Senator GLENN. Well, it is stamped, "Limited Official Use." I do not want to put it in a public document without your permission.

Mr. AHEARNE. If we could review that and provide for you either the entire document, or tell you which parts and why.

Senator GLENN. Fine. Go ahead.

Mr. GILINSKY. I hope this does not violate any of these restrictions. The report has the next required fuel shipment dated December 1982, which is 2½ years from now. Now, of course, to fabricate that fuel takes some time, and usually something like a year has been counted into the process. So, if the Indians are to fabricate it themselves as they have done in the past, they would need to have it perhaps 1 year or at least more than 6 months before that. But the time period is rather longer, I think, that has been mentioned here earlier, at least on the basis of this staff report.

[The information referred to above follows:]

U.S. NUCLEAR REGULATORY COMMISSION,
Washington, D.C., June 5, 1979.

MEMORANDUM

For: Chairman Hendrie, Commissioners Gilinsky, Kennedy, Bradford, and Ahearne.

From: B. J. Snyder, Acting Director, OPE.

Subject: Estimated fuel requirements for Tarapur reactors.

I am providing for your information a revised analysis of the fuel requirements and schedule for the Tarapur reactors. This updates information given to you in my previous memorandum dated January 16, 1979 and factors in the current application, XSNM-1379.

CONCLUSIONS

1. With the receipt of XSNM-1222 (approved by the Commission on March 23, 1979) and considering the fuel already on hand, the Indians have adequate material for operation of TAPS I until May 1983 and TAPS II until December 1982.

2. If approved, XSNM-1379 permits another refueling and year of operation for both plants: TAPS I probably can operate until August 1984 and TAPS II until March 1984.

3. Shipment of XSNM-1379 by sea could occur as late as December 1981 without any apparent impact on the reactor schedules. Air shipment could extend this date by up to two months, at considerably greater cost.

4. The above schedules of fuel supply and usage may not allow adequate operational contingency in case of a major problem (e.g., high leakage rate of fuel during reactor operations).

DISCUSSION

As discussed in my January 16 memorandum, the average usage during 1977 and 1978 has been 56 subassemblies (S/A) per refueling. Acknowledgement of this lower usage rate, as opposed to the optimum rate of 85 S/A per refueling, is given in the State Department's March 28 submission on XSNM-1379 (ref. SECY-79-233, March 30, 1979). An average usage rate of 60 S/A per refueling has been assumed, in this memorandum, consistent with the State Department's figure for "nonoptimum" operations.¹

¹ In the March 28 State Department submission, they state that annual refueling with 60-65 S/A is a non-optimum condition and has resulted in power reductions to about 70 percent of design level. They go on to state that this non-optimum operation has been chosen largely because of continuing uncertainties regarding the supply of fresh fuel. Not mentioned by State were the recent problems with adequate spent fuel storage capacity.

The total fuel available if XSNM-1379 is approved is :

[In kilograms]

	On hand ¹	XSNM-1222	XSNM-1379	Total
Enrichment:				
2.66 percent.....	13,165	9,120	12,160	34,445
2.1 percent.....	10,350	6,080	6,080	22,510
1.66 percent.....	3,625	1,520	1,520	6,665

¹ Includes scrap.

Assuming no losses in processing and fabricating, the 34,445 kg of the 2.66 percent enrichment limits the fuel production to 402 S/A. To this is added the number of completed S/A—97 (ref. State Department telegram of December 18, 1979) giving a total of 499 S/A available. The March 28, 1979 State Department submission states that 488 S/A would be available. The difference of 11 S/A can be accounted for by an assumed 2 percent material loss during processing and fabrication, which appears reasonable. Using the 488 S/A at the average rate of 60 per refueling allows for eight refuelings.

The figure on the next page shows the projected refueling and operations schedule, based on a 3-month refueling shutdown and 12-month operating cycle. This figure is basically the same as given in my earlier analysis (January 16), with corrections for a 1-month slip in the schedule for TAPS II as given by State in their March 28 submission. In a more recent State Department telegram from Bombay, on April 29, 1979, it was reported that delays were being experienced in the ongoing TAPS II refueling. The cause and duration of these delays were not specified, nor were the number of fuel S/A to be inserted.

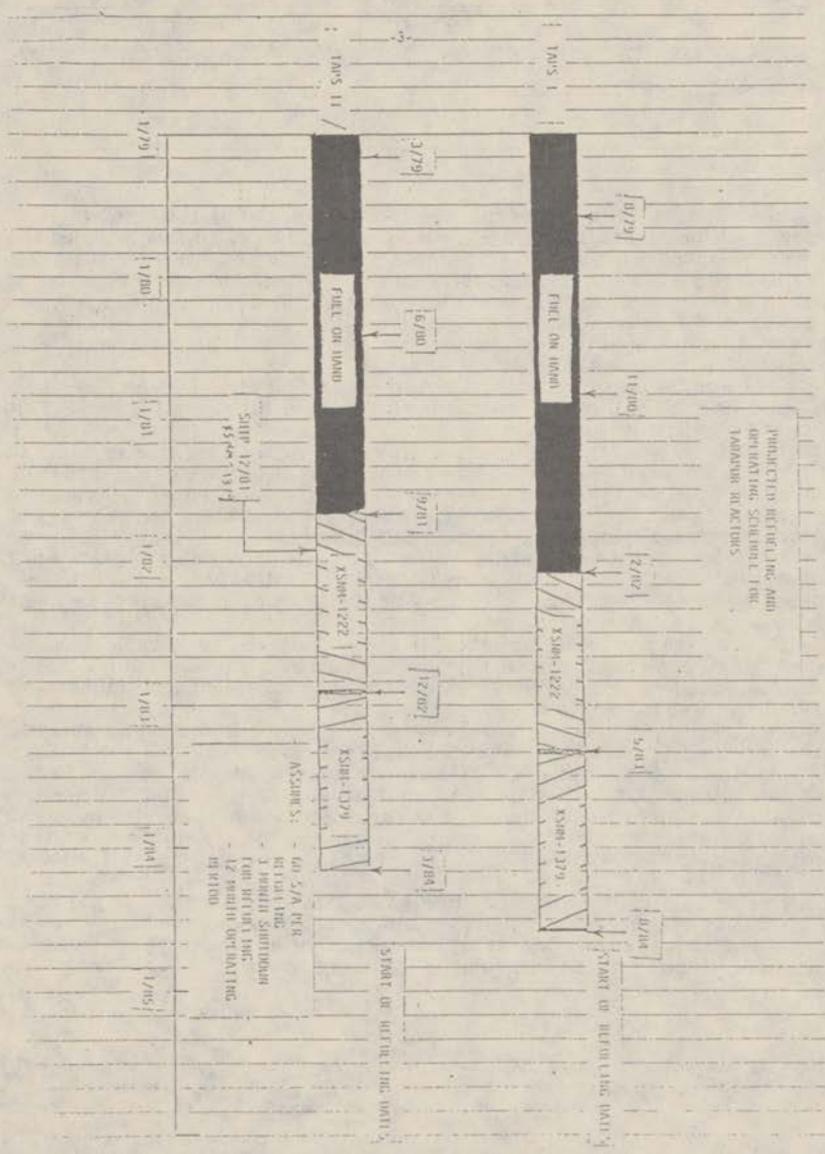
As may be seen in the following figure, TAPS I can probably operate until August 1984 and TAPS II until March 1984 if XSNM-1379 is shipped by sea no later than December 1981. This allows adequate time for transport, customs clearances and fuel fabrication.

Maintaining the most efficient operation of the Nuclear Fuel Complex (NFC) where the TAPS fuel is produced has not been factored into this analysis. This point was discussed in more detail in my previous memoranda of January 16 and January 18 on this subject.

In the attached Appendix, I have presented for your information an analysis of the anticipated unbalance among the three enrichments of fuel the Indians will have available, assuming XSNM-1379 is approved. As may be seen in the Appendix, this unbalance among quantities of fuel enrichment could be corrected by the Indians ordering a different mix of enrichments than they have in recent orders. This provides up to three more refuelings and 2½ years more operation (until September 1986) of TAPS II and 15 months more operation (until November 1985) of TAPS I.

I hope this information will be useful to you. Please let me know if you have any questions on the above, or if you want additional information.

Consistent with your decision on my January 16 memorandum, a copy of this memorandum is being placed in the Public Document Room.



APPENDIX—APPARENT UNBALANCE IN THE INDIAN FUEL SUPPLY

For some reason the Indian fuel supply has been consistently unbalanced among the three enrichments required for TAPS subassemblies.

Each subassembly requires:

U-enrichment:	<i>Kg U, total</i>
2.66 percent.....	85.6
2.1 percent.....	42.8
1.66 percent.....	11.6
Total.....	140.0

As tabulated earlier in this memorandum, the supply of each enrichment, assuming approval of XSNM-1379 is:

	Uranium available (kilograms)	"S/A" possible
Uranium enrichment:		
2.66 percent.....	34,445	34,445/85.6 = 402
2.1 percent.....	22,510	22,510/42.8 = 526
1.66 percent.....	6,665	6,665/11.6 = 575

Maximized fuel utilization could be accomplished by balancing the supply of the two higher enrichments to use the excess of 1.66 percent material and produce 575 S/A instead of only 402 S/A.

This would require an order of:

2.66 percent material

$$575 - 402 = 173 \times 85.6 = 14,808 \text{ kg}$$

$$\begin{aligned} &1520 \text{ kg per UF}_6 \text{ cylinder} \\ &= 9.74 \text{ cylinders} \end{aligned}$$

or 10 cylinders of UF₆ at 2.66 percent enrichment.

2.1 percent material

$$575 - 526 = 49 \times 42.8 = 2097 \text{ kg}$$

$$\begin{aligned} &1520 \text{ kg per UF}_6 \text{ cylinder} \\ &= 1.38 \text{ cylinders} \end{aligned}$$

or 2 cylinders of UF₆ at 2.1 percent enrichment.

Having a total of 672 S/A (575 added to the 97 completed S/A on hand in December 1978), with an average of 60 S/A per refueling provides 11 refuelings. This compares to 8 refuelings possible with XSNM-1379 combined with currently available material. These three additional refuelings would allow operation of TAPS I for about 15 months longer, to November 1985 and TAPS II for about 2½ years longer to September 1986.

U.S. NUCLEAR REGULATORY COMMISSION,
Washington, D.C., January 22, 1980.

MEMORANDUM

For: Chairman Ahearne, Commissioners Gilinsky, Kennedy, Hendrie and Bradford.

From: Edward J. Hanrahan.

Subject: Comparison of fuel requirements for the Indian fuel fabrication facility and Tarapur reactors.

At the request of Chairman Ahearne, the fuel requirements for optimum production of Tarapur (TAPS) subassemblies (S/A) at the Indian Nuclear Fuel Complex (NFC) have been analyzed and compared with the actual need for subassemblies at the reactors.

For the first time since OPE has been looking at fuel supply questions for India, we have now obtained a fairly complete picture of past production and current status of the NFC. At our request, the Department of State obtained from the Indians answers to a series of questions we raised (Ref. DOS Cable—Bombay 2297). We have been able to determine that these new data from the Indians are fairly consistent with other information we have.

The last OPE analysis of fuel S/A needed for TAPS was provided to you in our memorandum dated June 5, 1979 (copy attached for your convenience). The new data subsequently obtained from India does not change the conclusions reached in our June 5 memorandum. In fact, somewhat greater operational flexibility exists since the March 1979 refueling of TAPS II used only 49 new S/A,¹ as opposed to the average of 60 which was assumed for our last analysis.

CONCLUSIONS ON FUEL REQUIREMENTS FOR NFC AND TAPS

1. The schedules for exports of U.S. supplied fuel feed material (XSNM-1379 and 1569) requested by the Indians appear to be based on maintaining optimum NFC fuel S/A manufacturing operations; i.e., not keyed to meeting TAPS operational requirements.

2. Based on fuel currently available in India, air shipment of XSNM-1379 probably can be made as late as August 1980 without jeopardizing continued normal operations at the NFC.

3. Considering recent requirements for subassemblies for TAPS reactor operations, there is an apparent 18-month stockpile of fuel in India (i.e., XSNM-1379 could be shipped 18 months later than NFC operations require, and still meet TAPS needs).

DISCUSSION

The discussion of NFC fuel requirements which follows is based on analysis of: (a) new data from India (DOS Cable—Bombay 2297), (b) the September 1976 report by G. Last and W. Kieffer (SECY-78-105A), and (c) TAPS fuel usage since the previous OPE analysis (June 5, 1979 memorandum).

In discussion of NFC requirements, the implicit assumption made here is that fuel is available as needed for optimum operation of NFC, independent of the completed S/A already on hand and projected usage rate for TAPS operations.

Fuel material that was in process or available at NFC in July 1979, including XSNM-1222, is tabulated below:

Enrichment:	<i>Kg uranium</i>
2.66 percent.....	13, 228
2.10 percent.....	11, 739
1.60 percent.....	3, 849

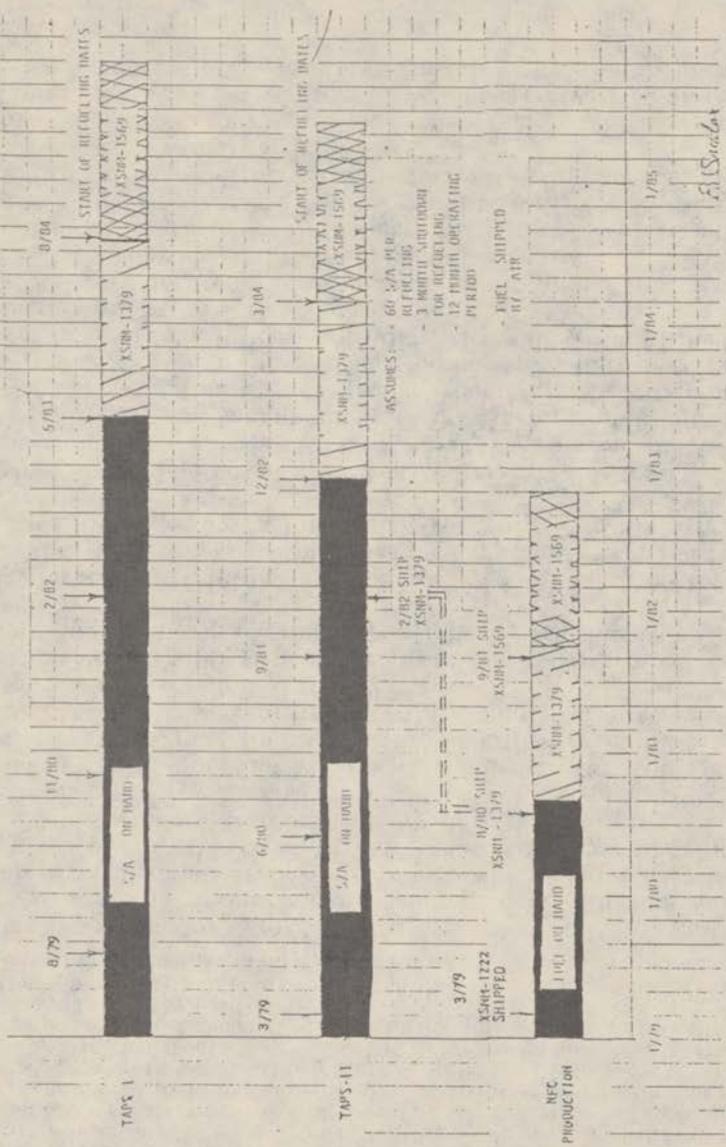
Based on the normal NFC production rate given in the Last-Kieffer report, this amount of fuel material should keep the NFC running for at least 14 months, until September 1980. Allowing one month for air transport, customs clearances, and road shipment results in a shipment date of August 1980 for XSNM-1379. Modifying the analysis of TAPS requirements given in our June 5 memorandum to account for air, instead of sea transport, XSNM-1379 could be shipped as late as February 1982, and still meet the reactor needs. Consequently, depending on whether TAPS or NFC needs are to be met, there is an 18-month difference in required shipping dates for XSNM-1379.

The following figure, which is a modification of that given in our June 5 memorandum, shows the scheduler relationship of fuel requirements between NFC and TAPS. Although not currently before the Commission for export license consideration, XSNM-1569 has been included to give a more complete picture. Optimum operation of NFC would dictate an air shipment date of September 1981 for XSNM-1569, if XSNM-1379 were shipped by August 1980.

As a point of information, the current requests in XSNM-1379 and 1569 do not correct the apparent imbalance among the three enrichments currently available in India. As discussed in our June 5 memorandum, maximum fuel utilization could be realized if this imbalance were corrected and up to three more refuelings of the TAPS reactors could be achieved. This could extend TAPS I operations for about 2½ years and TAPS II for about 15 months beyond the time possible with current fuel inventories and the present makeup of XSNM-1379 and 1569.

¹ The response from India stated that around 70 new S/A would have been required, but less were used due to uncertain and delayed shipments. According to the Indians, this resulted in a shorter operating cycle with reduced power level capability.

PRODUCTION REFUELING AND
 RELOADING SCHEDULE FOR
 TWO-PHASE REACTORS & HYDROGEN
 IN CORE FUEL ELEMENTS



AS Schedules

The question remains whether the U.S. obligation for fuel supply encompasses an obligation to ensure optimum operation of the entire fuel cycle (NFC and TAPS) or whether the obligation is only for the reactors. The U.S.-Indian Agreement for Cooperation covers the "... efficient and continuous operation of the Tarapur Atomic Power Station." (Article I.C.)

As you are aware, the State Department has taken the position that efficient operation of NFC (apart from efficient operation of TAPS) is an important factor to be considered. DOS has stated that "... We interpret the amount of material needed for operation to be the amount required to sustain normal operation of the Nuclear Fuel Complex at Hyderabad or the production of TAPS fuel, consistent with the usual method of operating this facility." (June 15, 1978 letter from Joseph Nye to Senator John Glenn.)

I hope this information will be useful to you. Please let us know if you have any questions, or if you want additional information.

Senator GLENN. Senator Percy?

Senator PERCY. Thank you. I regret Commissioner Kennedy could not be here. In his statement, he says, "Thus, while I agree with the conclusion reached by this Commission"—that is to deny the shipment—"I would support a subsequent decision by the President to authorize these exports by Executive order."

He seems to base that on, first, what he calls "the narrow albeit complex set of criteria designed to insure that to the fullest extent possible all exports of source material comport with the nonproliferation objectives set forth in section 2 of the act."

Then he comments subsequently that a decision must involve balancing, intricate balancing of seemingly conflicting considerations of foreign policy.

Finally, he states: "Caution must be exercised to avoid measures which could drive recipient nations to other suppliers, or toward the development of indigenous facilities, that is, facilities to meet their nuclear fuel needs."

Just a hypothetical question which you may not be able to answer. We have a tier system that was set up in the act: the State Department, the Nuclear Regulatory Commission, the President, and Congress, most of them knowing that they can decide from their own standpoint but that they do not have the ultimate responsibility and therefore they do not have to take full responsibility. If the final and ultimate decision had been left with the Nuclear Regulatory Commission and you knew that your decision was absolutely binding, would your decision have been, in your judgment, a unanimous decision?

Mr. AHEARNE. Senator, I would assume that you are also carrying on with the hypothesis that the NNPA would be—at least appropriately modified to make our decision the final one—the document on which we would have to make that decision.

I would assume that the entreaties that some of us would have made for the Congress to change that would have not been received and so therefore we would be in the position of making that sort of major foreign policy judgment.

I think, given the way the law is written—I cannot speak for the other Commissioners—I think I would have still had to come out with the decision of turning down the application, based upon the criteria that are established in the law.

Senator PERCY. Do you have any idea whether Commissioner Kennedy, based on the statement we have here, would have been with you on that?

Mr. AHEARNE. Senator Percy, one thing that I have learned in my short time on the Commission is, I do not speak for the other Commissioners, trying to indicate what they would do in a hypothetical situation.

Senator PERCY. Let the other Commissioners speak for themselves, then, if they care to answer the question: If you had to make the ultimate decision, and had to take all national interests into account—from the situation in Afghanistan to our ongoing relationship with India, to the possible impact on Pakistan, et cetera—if you had the final decision, would your decision still have been the same?

Mr. GILINSKY. If you are asking me what I think we ought to do, Senator, I think I would support Senator Glenn's suggestion that we sit on that one and not send the exports forward.

Senator PERCY. Commissioner Hendrie?

Mr. HENDRIE. Senator, if we had to operate under the strictures of the Nonproliferation Act as it is now written, then my vote would have had to be the same. It would have had to have been the same since section 128 is, in my view, flat and unequivocal and dictates a certain outcome.

If the Nonproliferation Act, on the other hand, had been written to direct the NRC to take into its consideration the full range of national and foreign policy interests that the President and in turn the Congress are expected to take into account, then I expect I would have come out the other way.

Senator PERCY. I thank you.

Senator GLENN. Could I interrupt for a minute?

Senator PERCY. Certainly.

Senator GLENN. I am not quite sure I understood. That is, if you were making the State Department decision, you would take into consideration geopolitical concerns in addition to what was in the law, and could reach different conclusions.

Mr. HENDRIE. I think I would have voted for the export, although I must say in telling you that, that I make absolutely no claim of any special expertise on United States-Indian relations and an assortment of other things which I assume the President and the Congress will have to take into account.

Senator GLENN. Did the other two Commissioners express themselves in that regard at all? You expressed yourself in the opposite direction, I believe.

Mr. GILINSKY. Yes, sir.

Senator GLENN. I realize we are putting you on the spot here in an area you are not responsible for.

Mr. AHEARNE. Senator Glenn, I carry with me some intellectual baggage that makes it difficult. I have been in a number of jobs where either I knew a great deal about it, or my staff knew a great deal about it. Foreign policy is not the Nuclear Regulatory Commission's bag.

Senator GLENN. Everybody feels they are an expert in foreign policy.

Mr. AHEARNE. I do not.

Senator GLENN. You are the exception. Thank you, Senator Percy.

Senator PERCY. That is obviously the position we are in. We have to weigh everything, including the President's judgment, the State Department's judgments, NRC's judgment, and our judgment.

Mr. AHEARNE. Absolutely, Senator, but you helped write the bill. [Laughter.]

Senator PERCY. The buck stops with us on this one. Senator Cohen, I would like to yield to you.

Senator COHEN. I would just like to follow up, Commissioner Hendrie, on your comments that you profess no expertise in foreign affairs. Why then have you come to the same conclusion as the State Department? In other words, if you were required to take into account things other than the narrow interpretation of this law, then what would lead you to the conclusion that you would have come down on the other side?

Mr. HENDRIE. Well, Senator, while I offer no expertise in foreign relations, I feel as entitled to my opinions as a citizen of the United States as anyone present.

It is my opinion as a citizen that we are doing more damage than good to our national interest by some of the strictures imposed here in this field.

Senator COHEN. That is what I want to find out. What factors would you have taken into account that lead you to the conclusion that we are doing more damage than good by refusing the exports?

Mr. HENDRIE. I think, on the one hand, apart from the nuclear nonproliferation aspects of the matter, there are clear benefits for U.S. foreign policy in promoting good relations with a major democratic nation in the Far East.

With regard to nonproliferation objectives, I think there is a very fine balance to be drawn between harsher restrictions on supply, which then tend to create animosity and an unwillingness on the other party's part to listen to your arguments about nonproliferation objectives, and providing the supply and assuring that you do have a favorable place in his councils on that matter. I think it is a very difficult balance to strike. I have observed the process over the last 3 years. I have observed the administration trying very hard to get everything we can in a nonproliferation way toward our objectives by trying to trade on all our assets; principally our supply capacities. It is clear that it is not very easy to hit the optimum point in that.

So, I think there are foreign policy benefits in going forward, and I think on the nonproliferation side it is not so clear to me that we do much good for ourselves by turning it off.

Senator COHEN. I will follow it up later. Senator Percy?

Senator PERCY. I appreciate that very much, Senator Cohen. I have to leave in about 10 minutes.

Is there anything, in your judgment, that is unique about these two applications? Mr. Gilinsky has said that approving the licenses would mean we would have to approve all future licenses to India until 1993. But, as we previously discussed, on future license applications, India could not argue that they met our deadline and that it was only our delay in processing the applications that caused the March 10 deadline to pass before the shipments could be made. So that it is our fault, not theirs. They filed their applications in plenty of time and there is no other applicant who could make that statement.

Does that give you any reason to believe that in this case there are special circumstances that might warrant special considerations?

Mr. AHEARNE. Senator, I think South Africa could make the same case.

Senator PERCY. Pardon?

Mr. AHEARNE. I think South Africa could make the same case. I think they have an application that has been with the U.S. Government even longer.

Senator PERCY. Anyone else? Go ahead.

Mr. GILINSKY. My comment, when I said that probably approval here would imply further approvals, dealt with the argument that is presented, the central argument that is presented for approving these exports, and that has to do with the whole question of what India might do with the existing stockpile of U.S.-origin fuel. That situation is not going to change, be ameliorated by our supplying two further shipments; my comment referred to that.

You are speaking more to the legal situation and the circumstances that attach to these two licenses. All I can say is that I am strongly persuaded by our General Counsel's memorandum. He referred to the opposite view as not defensible. I think I agree with him.

Senator PERCY. Thank you very much. Dr. Hendrie?

Mr. HENDRIE. I think these licenses are distinguishable from the broad range of licenses for export that we deal with, not so much in my view from the standpoint of the time of their filing which, I think, is a matter of making an interpretation of what we thought you intended in section 128—and I continue to think that is a fair interpretation from our standpoint—but the proposition that ultimately granting one or both of these fuel licenses then says that you are going to grant everything else down the line in my view will not wash. The only reason one would grant either or both of those licenses would be that it is considered that, at this particular time, the best interests of the United States, in the broadest sense, are served better by granting one or both of these exports than by refusing.

When the next one comes down the line, as I assume it would if we ultimately granted these, it would have to be considered on its merits on precisely the same grounds at that future time. That might lead us to say yes or no; I cannot tell.

I point out one further aspect, and that is that exports to India are unique in the sense that only with India do we have an agreement for cooperation where we have this disputed, to be sure, but this linkage between continued supply of fuel for a specific facility and all of the terms and conditions of the agreement, and so on.

So, I do not regard an action on India as prejudicing our ability in any sense to deal with other exports.

Senator PERCY. Thank you. The final question I have is based on comments attributed to Alvin Weinberg, Director of the Energy Laboratory at Oak Ridge. He commented that within our own country we face a nuclear bargain—that is, a plutonium economy with its inexhaustible supply of energy available. But we have it only at the price of national vigilance—we are all potential terrorists—entailing a nearly unacceptable degree of surveillance, centralization, and Government intrusion.

The question is really what India does if we do not make this shipment. We previously discussed the fact that the argument may be

made that it relieves them of their obligations to us on safeguarding and on use of spent fuel. If we go ahead with the fuel sale to India for Tarapur, will we be forcing India into accepting such a nuclear bargain? In other words, will India then feel greater pressure to reprocess fuel for general use, thus creating the plutonium economy warned against by Alvin Weinberg?

Finally, even though India does not have IAEA safeguards on all its nuclear facilities, does India really have the institutional framework to provide the vigilance that Mr. Weinberg has described which he says would be necessary?

Senator GLENN. If I can interrupt for just 1 minute. There is a vote. I will be back.

Senator PERCY. All right.

Mr. AHEARNE. I guess I would have to say that in general the information that I have available to me would indicate that the pressure might increase on them. That they, however, have other methods of getting the fuel. The other methods might also end up requiring continued safeguards, although not full-scope safeguards.

Senator PELL. Could you talk a little louder, please?

Mr. AHEARNE. On the question of the institutional framework, I think they probably could adequately develop that.

Mr. GILINSKY. The Indian program, from its inception, was very much plutonium-oriented. One thing you can say for their policies in this area, they have been very consistent. They have planned for future use of breeders for many, many years and that has been a consistent and strongly advocated part of their program. Along with that, intermediate use of plutonium in other respects.

So, I do not think we would be "driving" them. It is a question of whether one permits them to move in one of these directions or the other.

Senator PERCY. Dr. Hendrie, do you have a response?

Mr. HENDRIE. I think if the exports do not go, that there are indeed substantially increased pressures for them to reprocess. I must say, I would expect them to use the reprocessed material and refabricated fuel either for Tarapur, or set some of the plutonium aside for their breeder program rather than seeing it go off in some sort of explosive exercise. But I think there clearly would be increased pressure for them to go ahead and reprocess. It might only be offset if they were able to get very favorable supply terms, for instance, from the Soviets, so that just as an economic matter they found it more desirable to let the spent fuel stay for a while.

Senator PERCY. Thank you very much, gentlemen.

Senator PELL. I think you are in the chair now.

Senator PELL. I have no questions. I am just getting the flavor of it. You go ahead, Senator Cohen.

Senator COHEN. Just one followup with Commissioner Hendrie. You raised the fundamental question, I think, that we have to deal with and that is the question of the rule of law. We have rules of law for purposes of allowing people to predict the consequences of their conduct. If they violate those rules, certain theoretically adverse consequences will follow.

I think that when laws go either unenforced or ignored, that tends to breed contempt for the rule of law itself. That is one thing that we have to wrestle with here that even though there is a technical violation of the law, that these other considerations should override that technical, narrow breach of the rule of law.

We have seen that in many other cases as well. In the Governmental Affairs Committee we are having an investigation on the question of transfer of technology, restricting the sale of potentially dangerous technology to our adversaries. And yet, there have always been arguments made, "Well, if we do not sell it, somebody else will." Data Control Corp., for example, could take great issue with this country in cutting off the sale of certain computers. They argue that if we do not sell this computer to the Soviets we have lost \$200 to \$300 million in sales, the profits of which we can reinvest to keeping ahead 5 years of the Soviet Union in that particular field. If we do not sell it to them, France, Germany, or Japan will sell it to them.

We have seen, over a period of time, almost a total erosion of the whole purpose of that restriction, the sale of technology. Now, suddenly, in the wake of the Soviet invasion of Afghanistan we are outraged to think that they used, for example, the plant at Kama River to build trucks and tanks instead of using it for commercial purposes.

Suddenly we are going through a whole reexamination of whether or not we have seen this erosion of the purpose of the rule. I think it comes back to a basic foreign policy question. We do not have a consistent, coherent foreign policy which serves as notice to either our adversaries that certain consequences will follow, and we do not have one for our allies. Our allies can consistently undercut whatever rule of law we impose upon ourselves and thereby deprive us of having a coherency to our foreign policy.

In my judgment, it goes well beyond this particular question to India. How we resolve this issue also will affect all the other issues that are coming before the Foreign Relations Committee and the Congress itself, as to whether we try to get back to some fundamental concepts about the primacy of rules of law that ought to be followed not only by us but by our allies as well.

It is a long subject which I could debate at some length. I think you have raised the issue in terms of your own preference for going ahead with the exports.

Mr. HENDRIE. You also have in this case the additional complication that you perhaps do not in technology transfer issues, that we do have an agreement with India that predates the current discussions, and which they choose to regard as a binding contract honestly made on both sides at the time.

Again, as part of those questions you have to judge for yourself what influence you want to allow that to have on how you view the present situation.

Mr. GLINSKY. You know, Senator, we had a very generous policy under the atoms for peace program, and the argument was that by spreading the technology around, keeping our hand and our involvement in the various nuclear programs we would influence them all for the good. President Eisenhower's idea was that by involving vari-

ous countries in the world in peaceful nuclear programs it would take their minds off possible military applications of nuclear energy.

Well, it has not turned out that way. What we have done is spread around capabilities that in many cases we are very much concerned about. The NNPA was in part a reaction to the fact that that policy did not seem to be working, specifically a reaction to an Indian explosion in which, it turned out, American material was involved—the heavy water which was alluded to here earlier which was supplied under a contract which had a “peaceful uses” clause in it. The clear understanding of that clause was that it excluded explosive uses. That did not prevent the heavy water’s use for the Indian explosive as we know.

We are now faced with a situation which involves the first serious application of that law and the question before all of us in some sense, but specifically before you, is whether to scuttle that law because there may be some risks involved in applying it.

Senator COHEN. I agree with that. Former Secretary of State Henry Kissinger has said that we have reached a point in our foreign policy where there are no rewards for being our friends and no penalties for being our enemies.

We now find ourselves in a situation in which we have to decide whether a country that we judge not to have complied with our particular law will misbehave even more if we take certain action or not.

Senator PELL. If the Senator would yield, are you aware there is a rollcall vote going on?

Senator COHEN. I was just finishing up.

Senator PELL. All right.

Senator COHEN. In fact, I was waiting to put a filibuster in until Senator Glenn got back.

Senator PELL. I think Senator Glenn is waiting for the meeting to recess.

Senator COHEN. I will terminate my questions.

Senator PELL. Thank you very much, indeed. I, myself—for the record—have not yet made up my mind how to vote on this issue. [The following material was referred to on p. 32.]

United States of America, Nuclear Regulatory Commission

[Revised June 9, 1980]

In the Matter of

EDLOW INTERNATIONAL COMPANY, ET AL. (Agents for the Government of India on Applications to Export Special Nuclear Materials and Components)

License Nos. XSNM—1379, XSNM—1569, XCOM—0240, XCOM—0250, XCOM—0376, XCOM—0381, XCOM—0395.

Memorandum and Order

CLI-80-18

Commissioners: John F. Ahearne, Chairman, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford.

Seven license applications were filed with the Commission¹ seeking authorization to export material and components for use in the Tarapur Atomic Power Station (Tarapur) located near Bombay, Indiana:

¹ A brief chronology of correspondence on these applications is attached.

- (1) XSNM-1379 on September 20, 1978 for export of 487.3 kilograms of U-235 contained in 19,858.8 kilograms of uranium enriched to a maximum of 2.7 percent ;
- (2) XCOM-0240 on April 25, 1979, as amended May 8, 1980, for export of replacement parts ;
- (3) XCOM-0250 on May 7, 1979 for export of replacement parts ;
- (4) XSNM-1569 on August 17, 1979 for export of 487.3 kilograms of U-235 contained in 19,858.8 kilograms of uranium enriched to a maximum of 2.71 percent ;
- (5) XCOM-0376 on March 6, 1980 for export of replacement parts ;
- (6) XCOM-0381 on March 14, 1980 for export of replacement parts ; and
- (7) XCOM-0395 on April 3, 1980 for export of replacement parts.

The lengthy history of United States-Indian cooperation in connection with the Tarapur reactors is fully chronicled in several formal Commission decisions.²

The Commission cannot find, based on a reasonable judgment of the assurances provided by the Government of India and other information available, that License Applications XSNM-1379, XSNM-1569, XCOM-0240, XCOM-0250, XCOM-0376, XCOM-0381 and XCOM-0395 meet the criteria for issuance set forth in Sections 109, 127, and 128 of the Atomic Energy Act. Accordingly, NRC is referring these license applications to the President, pursuant to procedures set forth in Section 126b. (2) of the Atomic Energy Act.

The basis for the Commission's decision is as follows. India has several nuclear facilities which have not been placed under International Atomic Energy Agency safeguards. After reviewing the legislative history of Section 128 of the Atomic Energy Act, the Commission has concluded that the full-scope safeguards criterion applies to the two fuel applications. The legislative history of the Nuclear Non-Proliferation Act is replete with references that the full-scope safeguards criterion would come into effect at a date certain³—that the application of the criterion would have a "guillotine" effect.⁴ The State Department's view that the criterion does not apply to license applications filed before September 10, 1979 where the applicant reasonably expected the license to issue prior to March 10, 1980 is, we believe, inconsistent with Congressional intent. As we understand the Department's view, if an application were filed with the Commission prior to September 10, 1979, an applicant expected the license before March 10, 1980, but the Executive Branch did not provide the Commission with its views until years later, the criterion would not apply. Such results do not comport with the "guillotine" approach which was contemplated.

Because of unique features in the Agreement for Cooperation between the United States and India, the Commission is also unable to find that the two fuel applications satisfy the requirements of Section 127 of the Atomic Energy Act or that the component applications satisfy the requirements of Section 109 of the Atomic Energy Act. This issue is thoroughly discussed in earlier Commission opinions.⁵

The Commission's inability to issue these licenses should not be read as a recommendation one way or the other on the proposed exports. Rather, we have found that the particular statutory findings with which the NRC is charged cannot be made. Congress provided that the President may in such a case authorize the export by executive order if he finds "that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security."⁶

It is so ordered.

² CLI-76-10, NRC 1 (1976); CLI-76-6, 3 NRC 563 (1976); CLI-77-20, 5 NRC 1358 (1977); CLI-78-8, 7 NRC 436 (1978); CLI-78-20, 8 NRC 675 (1978); CLI-79-4, 9 NRC 209 (1979).

³ E.g., H. Rep. No. 95-587, 95th Cong., 1st Sess. at 22, 25; S. Rep. No. 95-467, 95th Cong., 1st Sess. at 18; Statement of Senator Glenn, 123 Cong. Rec. S. 13139 (July 29, 1977).

⁴ Testimony of Joseph Nye, Deputy Under Secretary of State for Security Assistance, Science and Technology, before the Subcommittees on International Security and Scientific Affairs, and on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess., at 118 (May 19, 1977).

⁵ CLI-78-8, 7 NRC 436 (1978); CLI-79-4, 9 NRC 209 (1979).

⁶ Section 201 of the Energy Reorganization Act, 42 U.S.C. 5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Kennedy was not present at the meeting at which this Order was approved. Had he been present he would have voted to approve this Order. Accordingly, the formal vote of the Commission is 4-0.

By the Commission:

SAMUEL J. CHILK,
Secretary of the Commission.

Dated at Washington, D.C., this 16th day of May 1980.

CHRONOLOGY OF EVENTS

On March 28, 1979, Louis V. Nosenzo, Deputy Assistant Secretary of State sent a letter to James R. Shea, Director, Office of International Programs, U.S. Nuclear Regulatory Commission, which contained an Executive Branch analysis on XSNM-1379. The Executive Branch concluded that all applicable export licensing criteria were met and recommended issuance of XSNM-1379. Shortly after receiving this submission, the NRC passed additional questions to the Executive Branch regarding India's nuclear programs and policies. The Department of State forwarded its response to the NRC on July 5, 1979. On August 15, 1979, the Commission noted changes in the leadership of the Government of India and requested an Executive Branch assessment of the impact of these developments on the Executive Branch analysis of XSNM-1379. In its letter the NRC noted its intention to defer final consideration of XSNM-1379 and two component cases (XCOM-0240 and 0250) until receiving a response to this inquiry. On October 19, 1979, the Commission sent a letter to the Department of State noting that it had not received a response to the questions raised in the August letter and requesting that the Executive Branch include an assessment of the leadership changes in its views on License Application XSNM-1569, which was then pending in the Executive Branch. On May 7, 1980, the Executive Branch in a letter from Louis V. Nosenzo to James R. Shea provided responses to the Commission's August 15 questions and provided its views on XSNM-1569. The Executive Branch concluded that XSNM-1569 met all applicable criteria for issuance and recommended issuance of the license.

In a letter from Louis V. Nosenzo to James R. Shea, dated June 11, 1979, the Executive Branch concluded that XCOM-0240 met all applicable licensing criteria and recommended issuance of the license.

In a letter from Louis V. Nosenzo to James R. Shea, dated October 22, 1979, the Executive Branch concluded that XCOM-0250 met all applicable licensing criteria and recommended issuance of the license.

In three separate letters from Louis V. Nosenzo to James R. Shea, dated May 13, 1980, the Executive Branch concluded that XCOM-0376, 0381, and 0395 met all applicable licensing criteria and recommended issuance of these licenses.

CHAIRMAN AHEARNE'S CONCURRING VIEWS

In March 1979 I found that a license application for export of fuel to India for use in Tarapur met the Section 127 criteria and concurred in the Commission's decision to authorize that export.¹ In connection with that decision I made the following statements:

"If there had been no indications of progress towards U.S. non-proliferation goals, I would find that to weigh in favor of denial. The fact that some progress has been made weighs in the other direction.

"The current Government of India has taken truly significant steps to meet these proliferation goals. India is the only country that having exploded a nuclear device, has turned away from nuclear weapons, and has demonstrated the ability to make the difficult choice of not continuing down that path. Although the previous government was certainly not supportive of non-proliferation policy and acted in a manner which was inimical, the present government has done just the opposite—it has acted responsibly and courageously." (*Id.* at 250).

Since that decision, Mr. Desai has departed and Mrs. Gandhi has been elected Prime Minister. No progress has been made in achieving full scope safeguards and Prime Minister Gandhi "has not ruled out the option of so-called peaceful nuclear experiments, should this be considered to be in India's interest."²

¹ *Edlow International Company* (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-79-4, 9 NRC 209, 230-50 (1978) (separate views of Commissioner Ahearne).

² May 7, 1980 letter from Louis V. Nosenzo, Deputy Assistant Secretary of State, to James R. Shea, Director, Office of International Programs, U.S. Nuclear Regulatory Commission (providing the Executive Branch response to NRC's August 15, 1979 inquiry concerning the impact of the change in government on the prior Executive Branch analysis).

Consistent with my reasoning in the previous case, I can no longer find that the criteria in Section 127 are met. In addition, I do not agree with the Executive Branch's interpretation that the March 10, 1980 deadline for full-scope safeguards meant only that the applicant intended to ship the material prior to the deadline. Consequently, I cannot find that the Section 128 criterion has been met. Finally I cannot find that the criteria in Section 109 are met for the same reasons I cannot find that the corresponding criteria in Section 127 are met.

Consequently, I agree we should forward these applications to the President for his consideration.

SEPARATE OPINION OF COMMISSIONER GILINSKY

This decision involves, primarily, two export license applications for fuel shipments for the Tarapur Atomic Power Station.¹ These applications, on which the NRC is acting after the expiration of a two-year grace period provided by the Nuclear Nonproliferation Act, are subject to the requirement of Section 128 of the Atomic Energy Act that international safeguards apply to all nuclear facilities in the receiving country.² India has rejected such full-scope safeguards.

In recommending approval of these applications, the Department of State has informed the Nuclear Regulatory Commission that "[i]f the NRC does not act favorably, the President is prepared to authorize the export by Executive Order."³ There is reason to believe, on the basis of the Department of State's presentation to NRC, that the Department, prior to submitting these license applications to NRC, assured the President that Section 128's full-scope safeguard requirement is not applicable to these particular fuel exports, and that the President, in authorizing public comment on his intention, relied on that opinion.

The Nuclear Regulatory Commission disagrees with the Department of State's interpretation.⁴ The export can take place only if the President grants a waiver from this requirement of the law and if Congress allows that waiver to stand. The law requires the President, in granting the waiver, to find that failure to approve the export "would be seriously prejudicial to the achievement of the United States non-proliferation objectives, or would otherwise jeopardize the common defense and security..."⁵

It is an unfortunate accident of history that these license applications have come under consideration at a time when the international situation is thought to require a serious compromise of our long-term security objective of preventing the spread of nuclear weapons.⁶ It would be even more unfortunate, however, if the decision to exempt India from this central provision of the Nuclear Nonproliferation Act were made without a full understanding of the price we may be forced to pay.

¹ XSNM-1379 and XSNM-1569.

² 42 U.S.C. Section 2157 which provides that "[a]s a condition of continued United States export of . . . special nuclear material . . . to non-nuclear-weapon states, no such export shall be made unless IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of; or carried out under the control of such state at the time of the export. . . ."

³ Press correction issued on May 9, 1980 by Deputy Assistant Secretary of State, Louis V. Nosenzo.

The Nuclear Nonproliferation Act contemplates that the President can respond to the Commission's findings in one of two fashions: he can, after receiving the views of both the Executive Branch and the NRC, determine that a waiver of the Act's requirements is necessary or he can, prior to submitting the application to the NRC, announce that he is granting an exemption from the full-scope safeguards requirement and ask the NRC to consider only the other applicable provisions of law. In the present case, the Department of State has placed the Administration in the position of ignoring NRC's views on the applicability of Section 128 to these exports without regard to what these views might be.

⁴ The Commission has rejected the Department of State argument that the applicability of the full-scope safeguards requirement depends not on when an export occurs but on when the exporter would have liked it to take place for the reasons set forth in the attached opinion of the General Counsel. "Application of Sections 127 and 128 of the Atomic Energy Act to Proposed Exports to India," memorandum of the General Counsel to the Commission, May 12, 1980.

⁵ Section 125(b)(2) of the Atomic Energy Act, 42 U.S.C. Section 2155.

⁶ It should be noted that the present fuel shipments are not immediately necessary to the continued operation of the Tarapur reactors. I understand that India already has sufficient fuel on hand to continue operation of these reactors until the beginning of 1983. If the President grants a waiver from the full-scope safeguards requirement for these two shipments, India will have sufficient fuel to operate the Tarapur reactors until about 1985. In this connection, it should be noted that the Senate section-by-section analysis of Section 128 states that "[t]he NRC should also not permit any other highly unusual proposals which are intended to circumvent this statutory provision." (S. Rept. No. 95-467, 95th Congress, 1st session, at 18.)

Full scope safeguards are the sine qua non of the Nuclear Non-proliferation Act.⁷ If a waiver is in fact granted by the President, and if it is upheld by the Congress, the law will be gravely impaired. If India does not need to satisfy the full-scope safeguards requirement, other countries will be quick to seek similar exemptions, with the inevitable erosion of the law's effectiveness.

There are other difficulties with the export. For reasons which have been spelled out in prior opinions, and which apply with even greater force now, these fuel shipment applications also fail to satisfy the requirements of Section 127 of the Act.⁸ In relevant part, Section 127 requires a pledge that IAEA safeguards will be applied to any material or facilities proposed to be exported or previously exported, that no material or facility will be used for any nuclear explosive device or for research on or development of any such device, and that no material will be reprocessed without the prior approval of the United States. India has made it clear that if there is any halt, or perhaps even lapse, in the supply of fuel for the Tarapur reactors, it will consider itself free of the contractual obligations of the Agreement for Cooperation and at liberty to reprocess as it sees fit the 200 tons of fuel it already holds hostage.⁹ It has not excluded making explosive use of the more than one ton of plutonium that can be separated from the U.S.-supplied fuel.¹⁰

Commissioner Bradford is in basic agreement with the points made in this opinion.

U.S. NUCLEAR REGULATORY COMMISSION,
Washington, D.C., May 12, 1980.

MEMORANDUM

For: Chairman Ahearne, Commissioners Gilinsky, Kennedy, Hendrie, and Bradford.

From: Leonard Bickwit, Jr., General Counsel.

Subject: Application of sections 127 and 128 of the Atomic Energy Act to proposed exports to India.

On May 7, 1980, the Executive Branch submitted additional information on XSNM-1379 to the NRC as requested by the Commission in July and October of last year. The Executive Branch also provided its views recommending approval of the follow-on license application, XSNM-1569. Both of these license applications cover proposed exports of special nuclear material to be used at the Tarapur facility. The primary legal issue raised by these applications is whether the full-scope safeguards requirement set forth in Section 128 of the Atomic Energy Act is now applicable to either or both of these licenses.

APPLICABILITY OF SECTION 128

In its May 7 submission the Department of State did not provide an analysis in support of its legal position on the Section 128 issue. Instead, the Executive Branch views include a one sentence, conclusory assertion that Section 128 of the Atomic Energy Act does not apply because the two applications were filed with the Commission prior to September 10, 1979, and the initial shipment of the material was reasonably planned to occur prior to March 10, 1980. This legal view appears to represent a change from earlier positions taken by the Executive Branch. For example, in testimony delivered shortly after enactment of the NNPA, when NRC referred Tarapur application XSNM-1060 to the President, Joseph Nye (then Deputy Under Secretary of State for Security Assistance, Science, and Technology) took the position before two congressional committees that the "... Nuclear Non-Proliferation Act ... establishes that a recipient

⁷ In its Comments to the Senate Committee on Energy and Natural Resources, the Executive Branch stated that full-scope safeguards were of "... crucial and pivotal importance ... to an effective non-proliferation policy ..." (S. Rept. No. 95-467, 95th Congress, 1st session, at 49.). The House report termed the full-scope safeguards requirement "indispensable to any comprehensive nuclear antiproliferation policy." (H. Rept. No. 95-587, 95th Congress, 1st session at 25.).

⁸ 42 U.S.C. Section 2156. See the views I expressed in Edlow International Company, CLI-79-4, 9 NRC 209 (1979), at 250 (attached).

⁹ Letter of May 7, 1980, from Deputy Assistant Secretary of State, Louis V. Nosenzo to James R. Shea, Director of International Programs, United States Nuclear Regulatory Commission.

¹⁰ Letter of May 7, 1980 from Deputy Assistant Secretary of State, Louis V. Nosenzo to James R. Shea, Director of International Programs, United States Nuclear Regulatory Commission.

country must, within two years, have all its peaceful nuclear activities subject to IAEA safeguards as a condition for U.S. supply *after that time.*" (Emphasis supplied.)¹

The Executive Legal Director provided the Commission with a memorandum on March 6, 1980 which analyzed the legislative history of Section 128 of the Atomic Energy Act and concluded that

"... whether or not the March 10, 1980, date in section 128 of the Atomic Energy Act of 1954, as amended . . . , is in fact a deadline under the present circumstances, with respect to export of low-enriched uranium to Spain, is an extremely close question. Sound and reasonable arguments on each side of the issue can be made and the Commission is free from a legal standpoint to go either way—although, on balance, the better legal position is probably that there is a deadline."²

OGC has reviewed that memorandum, and a February 13, 1979 OGC memorandum to Chairman Ahearn entitled "Tarapur—Analysis of the Legislative History of the Prospective Application of Export Licensing Criteria", and believes that the State Department's legal position on the effective date of Section 128 is not defensible. For the reasons set forth below, OGC believes that the Commission must apply the full-scope safeguards requirement to both of the pending Tarapur licenses. In this memorandum we will not reiterate the thorough ELD analysis, but will instead focus on the major issues.

The Executive Legal Director's office informally discussed the State Department's position with the Department before drafting its March 6, 1980 memorandum. Apparently, the Department's argument relies upon a somewhat strained reading of the language of Section 128. That section provides that the full-scope safeguards criterion "shall be applied as an export criterion with respect to any application . . . which is filed after eighteen months from the date of enactment of this section [September 10, 1979], or for any such application under which the first export would occur at least twenty-four months after the date of enactment of this section [March 10, 1980]," in interpreting this provision the State Department believes that the term "would occur" refers to the shipping date planned by the applicant when submitting its export license application, rather than the actual shipping date which, at that time, would be unknown.

It is OGC's view that this interpretation is inconsistent with the Congressional intent underlying Section 128. As the ELD legal analysis indicates (pp. 3-9), the Congressional drafters of the NNPA insisted that a full-scope safeguards provision be included within the Act. The legislative history of the NNPA is replete with statements that on a date certain exports should be terminated to countries which had not accepted full-scope safeguards. The House Committee report, for example, states:

"Section 504(e)(2) adds an additional licensing criterion which becomes effective 18 months after the enactment of this bill. This criterion requires that a recipient State permit IAEA safeguards to be applied with respect to all peaceful nuclear activities carried out within that State. This requirement is an essential element of the bill, and in the committee's view, indispensable to any comprehensive nuclear antiproliferation policy.

"The committee has, in the interest of flexibility, permitted an 18 month period of grace before requiring the mandatory application of this criterion. In addition, the bill provides for further extension by Executive Order, subject to congressional disapproval by concurrent resolution.

"India and South Africa would be most significantly affected by this requirement. The committee feels strongly that the currently unsafeguarded facilities in those countries must be brought within the framework of the IAEA safeguards system if American nuclear cooperation is to continue . . ."³

On July 29, 1977, Senator Glenn, the NNPA's primary Senatorial sponsor, inserted into the Congressional Record a section-by-section analysis of S. 897. In pertinent part, that analysis stated:

¹ Hearings on Nuclear Fuel Export to India Before the Subcommittee on Arms Control, Oceans and International Environment of the Senate Committee on Foreign Relations, 95th Congress, 2nd session (May 24, 1978) at 339 and 343; Hearings and Markup on Export of Nuclear Fuel to India Before the House Committee on International Relations, 95th Congress 2d session (May 23, 1978) at 38.

² The ELD memo is entitled "Legal Analysis of Section 128 of the Atomic Energy Act with respect to approval of a proposed license to export Low-Enriched Uranium to Spain (License Application No. XSNM-1477, SECY-79-200B and SECY-80-114)."

³ H. Rept. No. 95-587, 95th Congress, 1st session at 22, 25.

"In addition to the phase I criteria, the bill prohibits exports to nations which refuse to place all of their nuclear facilities under safeguards . . . as of 18 months after the date of enactment. The 18 month delay is designed to allow time for negotiations, and the President may delay this requirement for any particular country in extra-ordinary circumstances, subject to Congressional veto."⁴

In fact it was precisely the inclusion of a date certain cut-off in the full-scope safeguards provision that the Executive Branch initially objected to. In Congressional testimony Joseph Nye asserted: "I should have mentioned the other concern which we have which is the 18-month guillotine—in other words, if you haven't achieved agreement by then, that a uranium embargo would begin."⁵

The Senate Committee report explained the final language of Section 128 as follows:

"In defining what exports will be covered by the additional criterion, the bill refers to any application which is filed after 18 months from enactment, and to any application filed prior to that date for an export which would occur at least 24 months after enactment. The reason for this provision is to ensure that a large number of applications covering future exports will not be filed in the 18th month to avoid this requirement. However, the 6-month lagtime is allowed for licenses legitimately filed prior to the 19th month where the actual shipping process is a lengthy one. The NRC should also not prevent any other highly unusual proposals which are intended to circumvent this statutory provision."⁶

We find no indication here or elsewhere in the legislative history of the NNPA that the applicant's intended shipping date is to be the controlling factor in determining whether the full-scope safeguards criterion is to be applied to a given application.

Use of the applicant's proposed shipping date could in fact lead to obviously unintended results. For example, in 1975 an application was filed with the NRC seeking authorization to export high-enriched uranium to South Africa. The Executive Branch has not yet provided the NRC with its views on that application. Suppose that five years from now the Executive Branch recommended issuance of that license. Under the State Department analysis full-scope safeguards would not be required because the application was filed prior to September 10, 1979, and the applicant expected to export the material prior to March 10, 1980. Certainly this is inconsistent with the Congressional intent that there be a "guillotine" approach in the implementation of the full-scope safeguards requirement.

Despite the establishment of such an approach, Congress recognized that in some cases the United States might wish to continue exports to a given country even though negotiations on full-scope safeguards had not been fruitful. Section 128(b)(1) of the NNPA specifically provides procedures to be followed in such cases. The Act provides that the Commission is not to apply the full-scope safeguards criterion if the President determines that "failure to approve an export to which this subsection applies because such criterion has not yet been met would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. . . ." Licenses issued pursuant to this waiver procedure would be subject to Congressional review procedures specified in the Act. The President has made no such determination with respect to the two pending exports to India, and it is therefore our view that the Commission cannot issue the licenses without making a determination that India has accepted full-scope safeguards.⁷

⁴ 123 Congress Record S. 13139 (July 29, 1977).

⁵ Hearings before the Subcommittees on International Security and Scientific Affairs, and on International Economic Policy and Trade of the House Committee on International Relations, 95th Congress, 1st session, at 118 (May 19, 1977).

⁶ S. Rept. No. 467, 95th Congress, 1st session, at 18.

⁷ Despite these provisions, one could conceivably argue that the failure of the Commission to act upon these applications resides with the Executive Branch for failing to respond to the Commission questions on XSNM-1379 and provide views on XSNM-1569 before March 10, 1980 and that under the doctrine of *nunc pro tunc* the licenses could be issued retroactively to March 9, 1980. It is our view that unlike the Argentina case, the doctrine may not be properly applied here. As set forth in the May 8, 1980 OGC memorandum, we believe the *nunc pro tunc* doctrine could be used in cases where bureaucratic error caused unjust results. Here, however, there is no bureaucratic error. The Executive Branch for months has been negotiating with India on full-scope safeguards, and has finally decided to provide its views to the NRC. We therefore do not believe the Commission could legally apply the *nunc pro tunc* doctrine.

ANALYSIS OF SECTION 127 CRITERIA

Even if the Commission adopts the State Department position that the full-scope safeguards requirement did not apply to the two pending fuel licenses, the Commission could reasonably take the position that issuance of these licenses—as well as the component licenses pending before the Commission—would be inconsistent with Congressional expectations. In OGC's February 13, 1979 memorandum analyzing Congressional intent with respect to Indian export licenses during the 24 month "grace period", we concluded that Congress intended that exports would continue during the period provided for negotiations. We stated, however, two qualifications to that conclusion. In sum, it was our advice that:

"Congress intended exports to continue throughout the grace period with the blessing of the Commission unless one of two kinds of determinations—reflecting the two caveats mentioned above—could be made. The first is that the recipient nation is not presently in compliance with the obligations reflected in the Phase I criteria or with other statutory requirements, or may not be in compliance later on during the grace period. The second is that circumstances have changed in a material way so that the likelihood of compliance with those obligations and requirements, either during or after the grace period, has decreased significantly since enactment.

Focusing on the second of these points, we believe that the Commission could plausibly argue that the likelihood of India's compliance has in fact decreased significantly. Two years of negotiations with India have produced no changes in India's policy with respect to full-scope safeguards, and no change is anticipated in the foreseeable future. If anything, the situation has worsened. Indira Gandhi has been returned to power and in recent months has made assertions that India will not renounce the possibility of developing "peaceful" nuclear explosive devices. Moreover, the Indian Government continues to condition its assurances of compliance with the U.S.-Indian Agreement for Cooperation on continued compliance by the United States with "its obligations under the agreement". (See letter of May 7, 1980 from Louis V. Nosenzo to James R. Shea.)

The likelihood that the sequence of events outlined in the previous Gilinsky-Bradford opinions will ultimately occur would thus appear to have increased with the passage of time.⁵ Whether it has increased to the degree necessary to constitute a "change of circumstances" under the test previously proposed to the Commission is the issue on which we believe the Commission should focus.

SEPARATE VIEWS OF COMMISSIONERS GILINSKY AND BRADFORD

We find the application before the Nuclear Regulatory Commission for the export of enriched uranium to the Tarapur Atomic Power Station in India¹ does not meet the standards for NRC approval set forth in the Atomic Energy Act. We believe it is unwise for the Commission to relax those standards in order to accommodate a favorable decision.

Under the terms of that Act as amended by the Nuclear Nonproliferation Act the Commission cannot deny an export. The Act sets forth several requirements, principally codified in the six safeguards-related criteria of Section 127.² If the Commission cannot find upon a "reasonable judgment" that an application meets these requirements, it must refer the application to the President, who has broad discretion under the law to balance overall U.S. nonproliferation and security interests.³ Congress intended to separate the function of the Commission in applying the licensing criteria from that of the President and the Congress in their consideration of broader questions of foreign policy. The Section 127 criteria do not apply to the President's decision or to any Congressional review of that decision.⁴

⁵ It will be further increased with respect to the component exports if the Commission sends the fuel exports to the President on the basis of their failure to satisfy the section 128 criterion. Our view is that the 128 criterion does not apply directly to the component exports. See OGC memorandum to Commissioner Bradford of February 1, 1980.

¹ The License Application is number XSNM-1222, filed by Edlow International, as agent for the Government of India, to export 404.51 kilograms of U-235 contained in 16503.6 kilograms of uranium enriched to a maximum of 2.71 percent.

² Section 127 of the Atomic Energy Act, 42 U.S.C. 2156.

³ Section 126 of the Atomic Energy Act, 42 U.S.C. 2154.

⁴ A close scrutiny of Presidential and Congressional actions on the Tarapur license makes clear that neither the President nor the Congress felt it incumbent on them in carrying out their respective roles under the Act to reexamine the question of whether the criteria were met in determining whether larger non-proliferation objectives required that the export should be authorized.

The Commission has not taken the Presidential referral provision of the law lightly. Out of more than one hundred major export applications considered by the Commission, only one, the first proposed export to India subject to the new law, has been referred to the President,⁵ who subsequently authorized the export.⁶ Congress did not override that action.⁷

At the heart of the circumstances leading to the prior NRC decision lay the unique character of the Indian-United States Agreement for Cooperation⁸ and the special interpretation India has put on it. Successive Indian governments have consistently tied that country's obligations under the Agreement to the continuing provision of U.S. fuel. The concerns we expressed last year on this point⁹ have deepened, since the situation today does not appear to have altered.

After September, 1979, U.S. nuclear trade with a country not party to the Nonproliferation Treaty (as India is not) will be conditioned on that country's acceptance of international safeguards on all of its peaceful nuclear facilities ("full-scope safeguards").¹⁰ In the case of India, this provision of the Act, which threatens a cut-off of U.S. fuel for India, poses special difficulties even before the end of the 18 month "grace period" for acceptance of full-scope safeguards. These obligations, which are critical for export approval, include the application of international safeguards to the exports,¹¹ an implied understanding not to use any of the exported fuel materials (or reactors) for nuclear explosive purposes,¹² and a requirement to obtain U.S. approval for any retransfer or reprocessing of U.S. supplied fuel.¹³

India has resolutely opposed full-scope international safeguards over Indian nuclear facilities. If India fails to accept such full-scope safeguards by the end of the statutory grace period, and if that period is not extended by the President (an action the Department of State has termed "highly unlikely"¹⁴), a cutoff of fuel shipments will follow. We are faced with the distinct possibility that India will interpret this result as freeing it of any reciprocal obligations under the United States-India Agreement.¹⁵ In that event the protection now afforded all U.S. nuclear exports to India under the Agreement may well cease to exist.

Had the Indian Government provided assurances that whatever the fate of the Agreement the necessary protections will continue to apply to current and past U.S. nuclear exports, the grace period would not have been disturbed by unresolved questions and disagreement within the NRC. But no such assurances have been received.

⁵ This was License Application XSNM-1060, referred to the President on April 24, 1978. CLI-78-8, 7 NRC 436 (1978).

⁶ E.O. 12055, April 27, 1978.

⁷ The United States Senate Committee on Foreign Relations and the United States House of Representatives Committee on International Relations held hearings on the President's decision at which the Commission, the Executive Branch and the petitioners testified. See Hearings before the Subcommittee on Arms Control, Oceans, International Operations and Environment of the Senate Committee on Foreign Relations, 95th Congress, 2d session (1978); Hearings before the House Committee on International Relations, 95th Congress, 2d session (1978). On July 12, 1978 the House defeated a motion to overturn the President's decision by a vote of 227-181. 124 Congressional Record H. 6530. No Senate vote was taken on the issue.

⁸ The Agreement provides for the exclusive use of U.S. fuel in the Tarapur reactors and, in a reciprocal provision, a U.S. guarantee to supply the necessary fuel. Article II A.

⁹ CLI-78-8, 7 NRC 436 (1978), at 437.

¹⁰ Section 128 of the Atomic Energy Act, 42 U.S.C. 2157, requires that non-nuclear weapons states accept international safeguards on all their peaceful nuclear activities as a condition of continued U.S. nuclear export.

¹¹ Trilateral Agreement signed by the United States, India and the IAEA on January 27, 1971.

¹² U.S.-Indian Agreement for Cooperation, Article VII.

¹³ U.S.-Indian Agreement for Cooperation, Article VII A (2), Article II F, Article II E.

¹⁴ Testimony of Joseph S. Nye, Deputy to the Under Secretary for Security Assistance, Science and Technology, U.S. Department of State, before the Subcommittee on Arms Control, Oceans, International Operations and Environment of the Senate Committee on Foreign Relations, 95th Congress, 2d session (May 24, 1978), at 352.

¹⁵ The Indian interpretation is at odds with a plain reading of the fuel supply contract implementing the Agreement for Cooperation. The contract provides that India shall comply with the laws of the United States and with any changes in the law or policies of the United States with respect to ownership and supply of special nuclear material. Contract of Sale, May 17, 1966. Article XI. A 1971 amendment to the sales contract provides that the "purchaser shall procure all necessary permits or licenses . . . and comply with all applicable laws, regulations and ordinances of the United States. . . ." Should India fail to comply with the requirements of Section 128 of the Atomic Energy Act, India would not be in compliance with applicable law and the United States would be relieved of its obligation to supply fuel until India complied.

The details of the special problems that attend the Indian Agreement and the arguments against NRC approval are presented at some length in our separate views on the previous Indian license application³⁶ and there is no need to repeat them here. Since that time the situation has not changed for the better. The grace period is shrinking rapidly. We are now some six months away from the time this agency can no longer approve applications for nuclear exports for Tarapur failing India's acceptance of international safeguards on all its nuclear facilities. We are less than a year away from the time, given these same circumstances, when all shipments to Tarapur will have to cease. This is relevant to the present application: Congress did not intend the NRC to turn a blind eye to the serious possibility that in less than a year the accumulated pile-up of U.S. fuel shipped to India over the years will be placed forever beyond the U.S. controls required by the statute. It is not just this but also all preceding shipments of fuel which are at risk.

The fact that assurances covering the eventual fate of U.S. supplied fuel apparently cannot be obtained during the grace period means that the Commission faces a choice: It can approve the export before it by stepping outside the boundary drawn by the Congress for uniform and consistent application of the criteria and into territory which has been explicitly reserved for the President. Or it can acknowledge the plain fact that the criteria are not met and refer the matter to the President's broader discretion.

ADDITIONAL VIEWS OF COMMISSIONER KENNEDY

I agree with the Commission's conclusion in this case that, based upon the information before us, we are unable to find that the proposed exports meet the criteria set forth in Sections 109, 127, and 128 of the Atomic Energy Act. That is not to say, however, that the pending applications should not ultimately be granted.

Our focus under the Atomic Energy Act and the Nuclear Non-Proliferation Act is upon a narrow, albeit complex, set of criteria designed to ensure that, to the fullest extent possible, all exports of source material, special nuclear material, production or utilization facilities, and sensitive nuclear technology comport with the non-proliferation objectives set forth in Section 2 of the Nuclear Non-Proliferation Act of 1978 (NNPA). That Act is the product of extensive discussion concerning the proper balance to be struck between the traditional role of the Executive Branch in conducting foreign affairs, on the one hand, and on the other, the relatively novel oversight function to be fulfilled by the Nuclear Regulatory Commission, an independent regulatory body. It is this synthesis of decision-making functions which has introduced substantial uncertainty both at home and abroad in the export process.

We must not lose sight of the fact that the NNPA is premised, in large part, upon the notion that decisions made by the NRC in the area of export licensing require substantial interaction with the Department of State. Indeed, effective implementation of the NNPA presupposes heavy reliance by the NRC on the recommendations of the Secretary of State and other agencies which are directly responsible to the President. To the extent that the NNPA imposes constraints, either implicit or explicit, on the Commission's ability to defer to the judgment of the Department of State, it is in fundamental conflict with the paramount principle upon which this country's conduct of foreign affairs is based—that decisions involving intricate and delicate matters of foreign policy are best made by, and properly vested in, the President, and those responsible to him, in consultation with the Congress.

We now find ourselves in an awkward position, faced with a recommendation by the Secretary of State that the Tarapur licenses issue, but unable to find that the proposed exports meet the criteria set forth in Sections 109, 127, and 128 of the Atomic Energy Act. The statute leaves us no choice and compels the decision reached by the Commission.

Lest this decision be seen by our trading partners as indicative of a posture of equivocation toward further nuclear exports, however, it should be made clear that the Commission's decision is not to be interpreted to mean that these export licenses should not be granted.

³⁶ CLI-78-8, 7 NRC 436 (1978), at 437.

The NNPA established a procedure whereby the ultimate decision in cases such as the one before us, involving intricate balancing of seemingly conflicting considerations of foreign policy, is to be made by the President with Congressional review.

But such a complex decision-making process must inevitably strain credibility. It is difficult even for serious and knowledgeable students of the American government to understand the unique and all but anomalous position of this Commission in that government—*independent of the President as head of the Executive Branch, though, in fact, a part of that Branch.* How can it be expected that those abroad, on whose good will and cooperative successful pursuit of U.S. non-proliferation policy depends so greatly, will understand that the conclusions and recommendations of the President's senior foreign policy advisors can be ignored in effect by an agency which, though technically a part of the Executive Branch, is wholly independent of the leadership and policy-making function of that Branch?

And if this might seem anomalous, is it easier to comprehend because the President, who cannot affect the NRC decision in the first instance, can then reverse that decision if it is in the negative (provided that Congress concurs)? It is customary for governments in important matters of policy and international relationships to speak with a single voice. Yet a cacophony is here illustrated. If it is reasonable thus to expect that this process be perceived as indicative of a commitment to the principle of reliable supply—a fundamental principle of the Nuclear Non-Proliferation Act—it must be assumed that our trading partners will ignore those inconsistent voices and listen only to one—but which one?

As we relinquish jurisdiction over these applications, unable to find that the criteria in Sections 109, 127, and 128 are met, it should be recalled that one of the fundamental cornerstones of the NNPA is that we avoid actions which would adversely affect those whose cooperation is essential to our ultimate non-proliferation objectives. Caution must be exercised to avoid measures which could drive recipient nations to other suppliers, or toward the development of indigenous facilities to meet their nuclear fuel needs. The immediate case calls for an analysis not only of the criteria set forth in Sections 109, 127, and 128, but also of the implications for U.S. non-proliferation goals and policy and for U.S. relations abroad more generally. Such an approach is entirely consistent with Congress' intent that the analysis called for by Sections 109, 127, and 128 not be undertaken in total disregard of the foreign policy implications of alternative courses of action.

It is clear that the implications of the decision here will be significant. Trading partners not parties to this matter will view the decision as inconsistent with the stated or implied national policy, whatever the decision may ultimately be. To some, it will be seen as a vindication of their own doubts as to U.S. constancy and to others as unfair and unbalanced toward them. Yet, in a more rational decision-making framework than that here required, devoid of the need for posturing and assertive determination by decision-makers who have no reasonable role in or responsibility for foreign affairs of this government, a sound and reasonable result consistent with our objectives might have been expected through the application of quiet diplomacy and a reasonable balancing of our interests and those of our friends abroad.

In short, the requirement that the Commission publicly note its inability to act favorably on this request despite the strong representations of the Secretary of State does not bode well for future efforts to negotiate a consensus on the issue of non-proliferation with the government of India. It seems a classic case of the proverbial "biting off one's own nose to spite his face." Although it is true that the existence of such a continuing cooperative relationship will not guarantee achievement of our non-proliferation goals, it is clear that the absence of such a basis for continued discussion and negotiation will likely bar any hope of achieving those goals. The power to persuade depends wholly on the ability to communicate. Thus, while I agree with the conclusion reached by this Commission, I would support a subsequent decision by the President to authorize these exports by Executive Order.

COMMISSIONER HENDRIE'S CONCURRING VIEWS

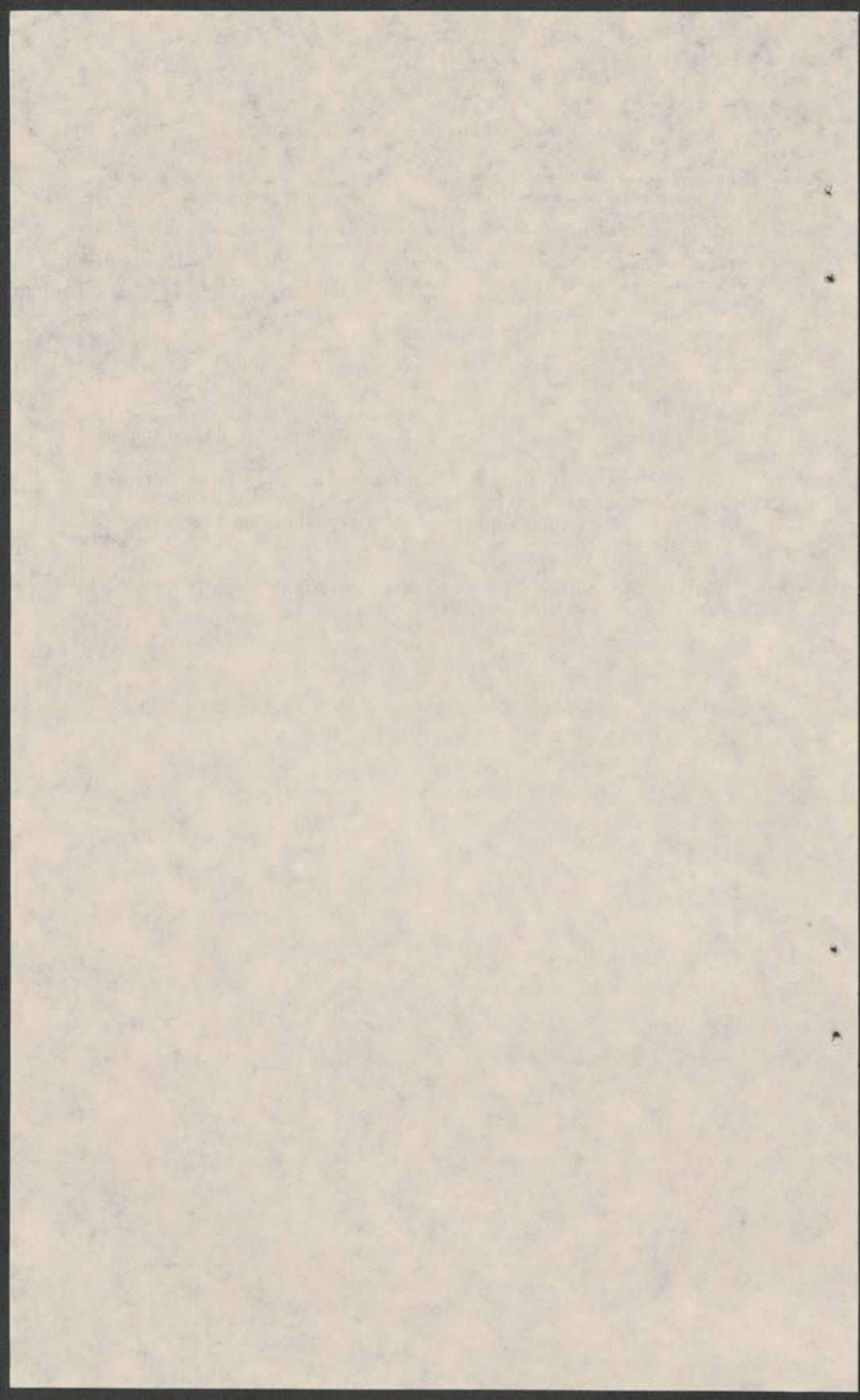
I concur in the Commission's conclusion that, based on a reasonable judgment of the information in hand, it cannot find that the seven license applications at issue here meet the criteria for license issuance. Therefore, these license applications should be referred to the President.

In an earlier opinion with Commissioner Kennedy, I expressed the view that Congress contemplated that exports to India would continue during the grace period provided in the Nuclear Nonproliferation Act of 1978 for implementation of full-scope safeguards. CLI-79-4, 9 NRC 209 (1979). That grace period expired on March 10, 1980. Because the Government of India has not accepted full-scope safeguards, I am unable, under the law, to find that the proposed fuel shipments meet the requirements of Section 128 of the Atomic Energy Act.

The unique provisions of the U.S.-India Agreement for Cooperation, coupled with the negative result compelled by Section 128 in the present circumstances, then raise, in my view, significant doubt as to whether the assurances of the Government of India satisfy the requirements of Section 109 and 127 of the Atomic Energy Act for the proposed component and fuel shipments. Consequently, I am unable to find that the proposed component and fuel shipments meet the criteria of those Sections for license issuance.

Senator PELL. The next meeting on this subject of the committee, the joint committee hearing, will occur at 10 o'clock tomorrow with Deputy Secretary Christopher as the witness. This meeting is herewith adjourned with the understanding that further questions may be asked of you in writing by Senator Glenn.

[Whereupon, at 12:10 p.m. the committee adjourned, to reconvene at 10 a.m., Thursday, June 19, 1980.]



THE TARAPUR NUCLEAR FUEL EXPORT ISSUE

THURSDAY, JUNE 19, 1980

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committees met, pursuant to notice, at 10:05 a.m., in room 4221, Dirksen Senate Office Building, Hon. Frank Church (chairman of the Foreign Relations Committee) presiding.

Present: Senators Church, Pell, Glenn, Tsongas, Percy, and Cohen.
Also Present: Representative Ed Markey.

The CHAIRMAN. The hearing will come to order.

OPENING STATEMENT

Mr. Secretary and Ambassador Smith, we are glad to have you back. You last met with the committee on June 11 in executive session to consult on the Tarapur nuclear fuel issue. Unfortunately, I could not be there, but I understand there was a frank and valuable exchange of views on the difficult issue of whether the United States should go ahead and ship the two pending nuclear fuel loads to India.

We have been anticipating submission to Congress an Executive order by the President approving these two licenses.

When the President does issue an order, it will lie before Congress for review for a period of 60 days of continuous session. Both Houses can veto the President's decision by concurrent resolution. Under the congressional review procedures of the 1978 Nuclear Non-Proliferation Act, his order will be referred to the Foreign Relations Committee of the Senate and to the Foreign Affairs Committee of the House for consideration.

At that time Mr. Secretary, the Foreign Relations Committee will have to decide whether it wants to recommend to the Senate that the President's order be overturned. This will not be a simple or easy decision to make. The committee will have to consider all of the inter-related dimensions of the issue, the foreign policy implications, U.S. national security interests, and the impact on U.S. non-proliferation policy and objectives.

In our deliberations we will, of course, draw on the President's own justification for his decision. We will also consider the findings and views of the Nuclear Regulatory Commission, testimony of administration witnesses, such as you, testimony of informed public witnesses, such as we heard yesterday and hope to hear again this morning, as well as the contribution of Senators, such as members of the Govern-

mental Affairs Committee, who have participated in these exploratory hearings with us, Senator Cranston, Senator Moynihan, Senator Cohen and others who have shared their views with us.

In the end, in my view, we will make our recommendation based on an overall assessment of the impact of a decision on U.S. interests at large, not simply on the basis of its consequences for one or another aspect of U.S. policy.

The New York Times this morning said that the President has decided to approve the shipments.

Without objection, I will include the article from the New York Times at this point in the record.

[The information referred to follows:]

[From the New York Times, June 19, 1980]

CARTER TO APPROVE INDIA'S ATOM FUEL—STATEMENT DUE TODAY—CONGRESS HAS 60 DAYS FOR A REVERSAL

(By Richard Burt)

WASHINGTON, June 18.—President Carter has decided to approve the shipment of 38 tons of nuclear fuel to India, reversing a ruling by the Nuclear Regulatory Commission, White House officials said today.

The officials said the decision would be announced tomorrow by Warren Christopher, the Deputy Secretary of State, in hearings before the Senate Foreign Relations Committee. Under the law, Congress has 60 days in which it can reverse Mr. Carter's action, and a strong Congressional effort to do so is expected.

There is strong opposition to the nuclear deal on Capitol Hill because India, which detonated what it called a "peaceful nuclear device" in May 1974, has refused to accept international safeguards on all its nuclear facilities and has not ruled out the possibility of future detonations. The Administration, however, contends that it cannot afford a potentially serious dispute with the Government of Prime Minister Indira Gandhi at a time when it is seeking to shore up United States ties with countries in the area.

While the Administration announced its intention to approve the shipments of enriched uranium May 7, the Nuclear Regulatory Commission turned down India's request for export licenses May 16. Mr. Carter was expected to sign an executive order tonight overturning the commission's ruling.

Anticipating Mr. Carter's action, 10 members of the House of Representatives, led by Representative Edward J. Markey, Democrat of Massachusetts, announced today that they would introduce a resolution of disapproval for the nuclear deal.

In hearings today before the Foreign Relations Committee, Senator Alan Cranston, Democrat of California, and Henry S. Rowen, a Stanford University professor, urged that Congress suspend the nuclear shipments.

State Department officials contend that two shipments of enriched uranium are permitted under a 1963 agreement with India in which Washington promised to provide fuel for the Tarapur power reactor outside of Bombay. While acknowledging that little progress has been made in recent talks in preventing India from acquiring a nuclear bomb stockpile, officials maintain that, in the wake of the Soviet thrust into Afghanistan, the United States cannot afford political strains with Mrs. Gandhi's Government.

ABROGATION OF 1963 PACT FEARED

Administration experts have also contended that, if the shipments are rejected, India would abrogate the 1963 cooperation accord and pursue an even more independent nuclear course.

However, the five-member Nuclear Regulatory Commission, acting unanimously, announced on May 16 that the shipments would violate the 1978 Nuclear Nonproliferation Act, which prohibits all nuclear sales to countries that refuse comprehensive nuclear safeguards after March 10 this year.

The commission's decision has been endorsed by Senator Cranston, Senator John Glenn, Democrat of Ohio, Representative Jonathan B. Bingham, Democrat of New York, and other supporters of efforts to curb a nuclear spread. Several

conservatives, such as Representative Jack Kemp, Republican of New York, oppose the deal because of India's military ties with the Soviet Union.

In the face of this opposition, officials disclosed earlier this month that the Administration was reviewing its decision on going ahead with the sales. But today officials said that Secretary of State Edmund S. Muskie and other aides had advised Mr. Carter to issue the executive order, mainly because the United States had already informed India that the fuel would be sent.

ADVERSE IMPACT ON PAKISTAN SEEN

In his testimony today, Senator Cranston said the fuel shipments "would do grave injury to the nuclear nonproliferation and foreign policy interests of the United States."

In particular, he said, the deal would harm "our effort to discourage the Pakistanis from their pursuit of a nuclear weapons capability and our effort to reduce the dangerous instability brought to South Asia and other tense areas of the globe by regional arms races."

Professor Rowen of Stanford University told the committee that "advocates of continuing to supply nuclear fuel to India point out that, if we don't do so, the Indians will then be free to extract the more than 1,000 kilograms of plutonium from spent Tarapur reactor fuel and do anything they want with it".

The CHAIRMAN. Senator Percy, do you have any opening remarks?

Senator PERCY. Mr. Chairman, in my judgment this issue cannot be totally divorced from the Afghanistan situation. We have just seen the largest arms sale in the history of the relationship between a Near Eastern country and the Soviet Union. It approaches \$2 billion and the parties agreed to 20-year terms at 2.5 percent interest. It involves hundreds of tanks, MIGs, aircraft, and other equipment.

Despite this, to the best of my knowledge, India has stood firm in its opposition to the action of the Soviet Union in Afghanistan.

Mr. Secretary, I think it would be very helpful if you would expand your comments to include and embrace that area and tell us what India's policy has been with respect to the very important action by the Soviet Union in Afghanistan.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Glenn.

Senator GLENN. Thank you, Mr. Chairman.

I want to point out that this is a joint meeting of the Governmental Affairs Committee and the Foreign Relations Committee of the Senate. Members and staff of both committees will be in and out of this meeting this morning. Both committees do have jurisdiction over this matter.

I do have a statement. But perhaps it would be best if I held up my statement until after Secretary Christopher makes formal what we have been advised in advance will be his statement.

At that time I will present my statement.

Thank you.

The CHAIRMAN. That is fine, Senator Glenn.

I think the question of jurisdiction is a matter that is determined by the rules of the Senate. That is something that we can determine on this committee and in consultation with the Parliamentarian. My understanding is that this committee does have the main jurisdiction in this matter. But the fact that this is a joint hearing is perfectly fine because the origins of the bill we are considering stem back to the Governmental Affairs Committee. I would note too, that you had a very important role to play in the original formulation of the bill, Senator.

Senator PELL. Mr. Chairman, would you yield at this point?

The CHAIRMAN. Yes.

Senator PELL. I hope I have not confused the issue, but I was talking with the Senator from Ohio the other day and said that I always liked the idea of joint subcommittee meetings, that, as far as I was concerned, on the subcommittee level I would be delighted to sit at any time in a joint meeting, whether or not there was any question of jurisdiction. But I realize this is a full committee matter, and as such it is not in my hands.

Senator PERCY. Mr. Chairman, as ranking Republican on the Governmental Affairs Committee, I did work intimately with Senator Glenn on this legislation. I think the idea of a joint hearing is a very good one. It is a rare opportunity when one drafts legislation to have a chance for oversight of its implementation as well. I think that this is a cooperative effort, and there is no problem in that. The Foreign Relations Committee, I think clearly has jurisdiction so far as this particular shipment is concerned.

I think we should want to be looking at the laws that we write on a continuing basis to see whether they should in any way be modified or whether we should stand with them.

Senator PELL. In that connection, I always have believed the more joint hearings we have, the better it is. In some areas, we even have joint meetings with the House. This saves the time of the witnesses and I think it also helps the process of legislation.

The CHAIRMAN. Are there any further comments before we hear from the Secretary?

[No response.]

The CHAIRMAN. Mr. Secretary and Ambassador Smith, we await your testimony.

STATEMENT OF HON. WARREN CHRISTOPHER, DEPUTY SECRETARY OF STATE, ACCOMPANIED BY HON. GERARD G. SMITH, AMBASSADOR AT LARGE AND SPECIAL REPRESENTATIVE OF THE PRESIDENT FOR NONPROLIFERATION MATTERS

Mr. CHRISTOPHER. Mr. Chairman and members of the committee, I have one or two preliminary comments.

I appreciate the opportunity to appear again on this difficult and complex subject. Let me say, Mr. Chairman, that I found the consultations that we had last week in executive session to be extremely helpful to me and to the administration in reaching our conclusion with respect to this matter.

I wish to inform you that the President has decided to authorize the exports and is transmitting to the Congress today an Executive order and a message explaining why he believes the exports should be made.

I would like to use the opportunity of this session today to explain the geopolitical and nonproliferation reasons that underlie the President's decision.

First, Mr. Chairman and members of the committee, let me give a brief précis of the history of this matter.

In 1963, the United States and India entered into an agreement for nuclear cooperation. Under this agreement, the United States agreed

to supply all of the enriched uranium needed to fuel the reactors at the Tarapur atomic power station during their estimated 30-year lifetime. In return, India agreed that it would use only U.S.-supplied fuel at Tarapur, that safeguards would be maintained on the fuel, that it would not be reprocessed without U.S. agreement, and that the supplied material and equipment would be used only for peaceful purposes and not for "atomic weapons or for any other military purpose."

In 1974, the United States obtained from India an explicit commitment that U.S. fuel supplied to Tarapur would be used at Tarapur for the needs of the power station and thus not used for any nuclear explosive device.

Thus far, under the agreement, the United States has supplied more than 200 tons of low enriched uranium to fuel these reactors. This fuel is under safeguards and has not been reprocessed, and India has met, so far as we know, all of its other obligations under the 1963 agreement.

As the committee knows, the Nuclear Non-Proliferation Act of 1978 provides that after a grace period, a recipient of U.S. nuclear exports must have all of its nuclear facilities' activities under international safeguards as a condition of continued export.

India has accepted safeguards on Tarapur and on other facilities that contain material supplied from outside of India; but it has a number of indigenously developed facilities that are not under international safeguards. With respect to these, India takes the position that it will accept safeguards on all of its nuclear facilities only when all other international states or countries do so, including the nuclear weapons states.

During the grace period provided in the 1978 act, two shipments of enriched uranium have been made to India. Two additional export licenses were filed during the grace period: one in September 1978, and one in August 1979, and those are the applications which are today in issue before the committee.

The new Indian Government under Mrs. Gandhi came into office early this year. Based upon a series of discussions with that Government, we have concluded that the Indian Government will not go beyond Mrs. Gandhi's statement that India intends to use nuclear energy only for peaceful purposes, a statement which does not exclude the possibility of a peaceful nuclear "experiment."

India has reiterated that only so long as the United States meets its supply obligations under the Tarapur agreement will India consider itself bound by the reciprocal obligations under the 1963 agreement.

Therefore, Mr. Chairman and members of the committee, we must decide the difficult question whether to terminate our nuclear supply relationship with India or to approve these exports for Tarapur. A number of considerations have led the President to conclude that the exports should be approved.

First, let us look at the negative side.

If we disapprove these shipments, India is very likely to consider itself free of its obligations under the 1963 agreement. In that event, India might reprocess the U.S.-origin fuel in India and use the plutonium in Tarapur reactors. This would be a very unfortunate precedent, because it would be seen by some as a demonstration that

thermal recycle is a practical alternative, at least as an interim measure, to avoid dependence upon external supply.

If we disapprove these shipments, India might also withdraw from the safeguards agreement and might decide to disregard our veto over any other use of the material already supplied beyond its use as fuel for Tarapur. It could also end the present U.S. veto over any retransfer to another country of this nuclear material.

On the other hand, turning to the positive side, if these shipments are approved, we will, at a minimum, have preserved India's obligations under the existing agreements for another year or two. I believe we can use that time to good advantage in continued discussions with the Indian Government.

Beyond our nonproliferation concerns, a refusal at this time to fulfill our obligations under the supply agreement would cast a long shadow over our overall relationship with India. India is the largest democracy in the world. Its Government, like ours, rests on the consent of the governed, expressed again in January in the most massive popular election the world has ever seen. We share with India a faith in human rights, a belief in the rule of law, and a pride in strong democratic institutions.

The turmoil in Iran and the Soviet invasion of Afghanistan have heightened U.S. security concerns in South Asia and Southwest Asia. We consider it vital to bolster our relations with this region, particularly with those countries, such as India, which can promote security and stability in South Asia.

United States-Indian relations have not always been smooth. Our policy perceptions and our interests do not always coincide. At the same time, we should recognize that in pursuing its independent course, Mrs. Gandhi's government has taken positions on several important matters which we welcome and which has signaled to us that it wants a constructive relationship.

First, India has moved from an uncritical view of recent events in Afghanistan to a view strongly opposing the Soviet invasion and calling for a prompt Soviet withdrawal.

Second, Mrs. Gandhi recently has spoken out against the critics of our Iran rescue mission.

Third, India has sought to improve relations with Pakistan and has sent two high-level emissaries to Islamabad to discuss regional problems with the Pakistan Government.

Fourth, India has continued to play a moderate role in the non-aligned movement, a role very much needed at this point in history.

Fifth, India has signaled it wants to develop a closer relationship with the United States. Clark Clifford and Averell Harriman have had candid and useful sessions with Mrs. Gandhi and, as you know, she has warmly welcomed several of your Congressional colleagues.

We believe that the best way to encourage India to pursue policies harmonious with U.S. interests is to build a framework of constructive bilateral relations which underscores U.S. constancy and U.S. reliability. The Tarapur issue is highly important in this connection. Many in India see it as an index of U.S. interest in maintaining good relations and an index of our recognition of the importance of constructive United States-India ties to our broader foreign policy concerns in South Asia and Southwest Asia.

A positive decision on Tarapur will, we believe, encourage India in the long term to act in ways consistent with our interests as it faces up to the new situation posed in South Asia by the prospect of a prolonged Soviet presence in Afghanistan. A positive decision also will help allay Indian apprehension about U.S. policies in areas sensitive to India.

On the other hand, Mr. Chairman, the Soviets undoubtedly would exploit a refusal by us to supply fuel to India and they may very well supplant us as the source of Tarapur fuel. We have just seen, as has been mentioned, in the generous terms of the \$1.6 billion arms deal between India and the Soviet Union the way the Soviet Union uses its resources to influence India. I do not believe that we can afford at this point in history to complicate our relations with India, just as the Soviets are demonstrating the importance they attach to this key South Asian nation.

Before concluding, Mr. Chairman, I would like briefly to address the concern some have expressed that approval of these exports would frustrate the intent of the Nuclear Nonproliferation Act to the effect that full-scope safeguards should be required as an export criterion. This concern I believe is unwarranted. The statute provides for a grace period before this additional export criterion—that is, the criterion of full-scope safeguards—becomes applicable.

The NRC has adopted a more restrictive interpretation of the grace period than we believe is warranted either by the text or by the legislative history.

The administration firmly believes that the two license applications in this case fall within the grace period. But, in any event, I can assure you that the administration will regard these two shipments as within the grace period and not as a precedent for decisions on applications filed after September 10, 1979.

Therefore, approval of these exports will not prejudice the future application of the full-scope safeguards requirement.

We, in fact, have made no decision about the future of United States-India nuclear cooperation beyond these two pending applications and do not expect to do so until next year or later. However, it is important not to rule out the possibility of additional supply. It is unnecessary now to make a firm decision on an issue that probably will not have to be faced for at least a year, when circumstances may have quite dramatically changed.

I would emphasize that this action should not be perceived as a weakening of U.S. pursuit of its nonproliferation objectives or of our intent to carry out the mandate and initiatives of the Nuclear Nonproliferation Act. These objectives are of paramount importance to U.S. national security and we will continue to try to achieve them in a manner that best supports U.S. interests.

It is for this reason that Congress built flexibility into the act, including provisions for a grace period and for Presidential action, when necessary, to handle difficult export decisions in furtherance of U.S. interests.

Mr. Chairman, as I conclude, let me say that I recognize that there are plausible arguments on both sides of this difficult issue. But we are convinced that the weight of these arguments lies decisively on the side of going forward.

If we do not proceed, we could close the door on any opportunity for influencing India's future nuclear activities.

We would risk losing our veto over India's use of spent fuel from the nuclear reactors, fuel that we have provided.

We would jeopardize the prospects for strengthening our relations with India, an influential democracy in a critical region at a crucial time.

If we do not go forward, it would benefit, not ourselves, but those who would move into the breach.

We hope that we will have the support of this committee and of the Congress on this matter of real importance to American interests.

Thank you, Mr. Chairman.

[Mr. Christopher's prepared statement follows:]

PREPARED STATEMENT OF HON. WARREN CHRISTOPHER

I appreciate the opportunity to appear before these committees on the proposed export of fuel to India for the Tarapur atomic power station. We have found most useful the consultations we have had with the Congress on this issue, and particularly the hearings that were held last week in executive session.

I wish to inform you that the President has decided to authorize the exports in question and is transmitting to the Congress today an Executive Order and a Message explaining why he believes the exports should be made. I would like to use this opportunity to explain the geopolitical and non-proliferation concerns that underlie the President's decision.

In 1963 the United States and India entered into an agreement for nuclear cooperation. Under this agreement the United States agreed to supply all of the enriched uranium needed to fuel the reactors at the Tarapur atomic power station during their estimated thirty-year lifetime. In return India agreed that it would use only U.S. supplied fuel at Tarapur, that safeguards would be maintained on the fuel, that it would not be reprocessed without U.S. agreement, and that the supplied material and equipment would be used only for peaceful purposes and not for "atomic weapons or for any other military purpose." In 1974 the United States obtained from India an explicit commitment that U.S. fuel supplied to Tarapur would be used at Tarapur for the needs of the power station, and thus not for any nuclear explosive device.

Thus far, the United States has supplied under the agreement more than 200 tons of low enriched uranium to fuel the Tarapur reactors. The fuel is under safeguards and has not been reprocessed; and India has met all of its other obligations under the 1963 agreement.

The Nuclear Non-Proliferation Act of 1978 provides that, after a grace period, a recipient of U.S. nuclear exports must have all of its nuclear activities under international safeguards as a condition of continued export. India has accepted safeguards on Tarapur and other facilities that contain material supplied from abroad, but it has a number of indigenously developed facilities that are not under international safeguards. India takes the position that it will accept safeguards on all of its nuclear facilities only when all other states, including the nuclear weapon states, do the same.

During the grace period provided in the 1978 Act, two shipments of enriched uranium have been made to India. Two additional export license applications were filed during the grace period: one in September 1978, and one in August 1979.

The new Indian Government under Mrs. Gandhi came into office early this year. Based on a series of discussions, we have concluded that the Indian Government will not go beyond Mrs. Gandhi's statement that India intends to use nuclear energy only for peaceful purposes, which does not exclude the possibility of peaceful nuclear "experiments." India has reiterated that only so long as the United States meets its supply obligations under the Tarapur agreement will India consider itself bound to the reciprocal obligations under the 1963 agreement.

We must now decide whether to terminate our nuclear supply relationship with India or to approve these exports for Tarapur. A number of policy con-

siderations have led the Administration to conclude that the exports should be approved.

If we disapprove these shipments, India is very likely to consider itself free of its obligations under the 1963 agreement. In that event, India might reprocess the U.S.-origin fuel in India and use the plutonium in the Tarapur reactors. This would be an unfortunate precedent, because it would be seen by some as a demonstration that thermal recycle is a practical alternative, at least as an interim measure, to avoid dependence on external supply.

If we disapprove these shipments, India might also withdraw from the safeguards agreement and might decide to disregard our veto over any other use of the material already supplied beyond its use as fuel for Tarapur. It also could end the present U.S. veto over any retransfer to another country of this material.

On the other hand, if these shipments are approved, we will at a minimum have preserved India's obligations under the existing agreements for another year or two. We can use that time to good advantage in continued discussions with the Indian Government.

Beyond our non-proliferation concerns, a refusal at this time to fulfill our obligations under the supply agreement would cast a long shadow on our overall relationship with India. India is the largest democracy in the world. Its government, like ours, rests on the consent of the governed, expressed again in January in the most massive popular election the world has ever seen. We share with India a faith in human rights, a belief in the rule of law, and a pride in strong democratic institutions.

The turmoil in Iran and the Soviet invasion of Afghanistan have heightened U.S. security concerns in South and Southwest Asia. We consider it vital to bolster our relations with this region, particularly with those countries, such as India, which can promote security and stability in South Asia.

U.S.-India relations have not always been smooth. Our policy perceptions and interests do not always coincide. At the same time, we should recognize that in pursuing its independent course, Mrs. Gandhi's government has taken positions on several important matters which we welcome and has signalled to us that it wants a constructive relationship.

India has moved from an uncritical view of recent events in Afghanistan to one opposing the Soviet invasion and calling for prompt Soviet withdrawal.

Mrs. Gandhi has personally spoken against critics of the Iran rescue mission.

India has sought to improve relations with Pakistan, and has sent two high level emissaries to Islamabad to discuss regional problems with the Pakistan Government.

It has continued to play a moderate role in the Non-Aligned Movement.

India has signalled that it wants to develop a closer relationship with the United States. Clark Clifford and Averell Harriman have had candid and useful sessions with Mrs. Gandhi, and, as you know, she has warmly welcomed several of our Congressional colleagues to India.

We believe that the best way to encourage India to pursue policies harmonious with U.S. interests is to build a framework of constructive bilateral relations which underscores U.S. constancy and reliability. The Tarapur issue is highly important in this regard. Many in India see it as an index of U.S. interest in maintaining good relations and of our recognition of the importance of constructive U.S.-India ties to our broader foreign policy concerns in South and Southwest Asia.

A positive decision on Tarapur will encourage India in the long term to act in ways consistent with our interests as it faces up to the new situation posed for South Asia by the prospect of a prolonged Soviet presence in Afghanistan. It will also help allay Indian apprehensions about U.S. policies in areas sensitive to India.

On the other hand, the Soviets would undoubtedly exploit a refusal by us to supply fuel to India and they may very well supplant us as the source of Tarapur fuel. We have just seen, in the generous terms of the \$1.6 billion arms deal, the use they make of their resources to influence India. I do not believe that we can afford to complicate our relations with India just as the Soviets are demonstrating the importance they attach to this key South Asian nation.

Before concluding, I would like briefly to address the concern some have expressed that approval of these exports would frustrate the intent of the Nuclear Non-Proliferation Act that full-scope safeguards be required as an export criterion. This concern is unwarranted. The statute provides a grace period before this additional export criterion—full-scope safeguards—becomes applicable. The

NRC has adopted a more restrictive interpretation of the grace period than we believe is warranted by either the text or the legislative history. The Administration believes the two license applications in this case fall within that grace period. In any event, I can assure you that the Administration will regard these two shipments as within the grace period and not as a precedent for decisions on applications filed after September 10, 1979. Therefore, approval of these exports will not prejudice the future application of the full-scope safeguards requirement.

We have, in fact, made no decision about the future of U.S.-Indian nuclear cooperation beyond these pending applications, and do not expect to do so until next year or later. However, it is important that we not rule out the possibility of additional supply. It is unnecessary to make a firm decision now on an issue that we will probably not face for at least a year when circumstances may have changed.

I would emphasize that this action should not be perceived as a weakening of U.S. pursuit of its non-proliferation objectives or of our intent to carry out the mandate and initiatives of the Nuclear Non-Proliferation Act. These objectives are of permanent importance to U.S. national security, and we will continue to try to achieve them in a manner that best supports U.S. interests. It is for this reason that the Congress built flexibility into the law, including provisions for a grace period and for Presidential action when necessary to handle difficult export decisions in furtherance of U.S. interests.

Certainly there are plausible arguments on both sides of this difficult issue. But we are convinced that the weight of these arguments lies decisively on the side of going forward.

If we do not proceed, we could close the door on any opportunity for influencing India's future nuclear activities.

We would risk losing our veto over India's use of spent fuel from the reactors we have provided.

We would jeopardize the prospects for strengthening our relations with India—an influential democracy in a critical region at a crucial time.

If we do not go forward, it would benefit, not ourselves, but those who would move into the breach.

We hope we will have your support on this matter of real importance to American interests.

DEPARTMENT OF STATE,
Washington, D.C., June 18, 1980.

MEMORANDUM OF LAW

Subject: Application of section 128 of the Atomic Energy Act of 1954 with respect to fuel exports to India.

SUMMARY

This memorandum examines the question of whether section 128a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2157(a), is applicable to two proposed exports of enriched uranium fuel for the reactors at India's Tarapur Atomic Power Station. This question is not directly relevant to the question of the President's authority to approve exports pursuant to section 126b.(2) of the Act, 42 U.S.C. 2155(b)(2), because the criteria for a decision by the President are those set forth in section 126b.(2) itself. These criteria are applicable irrespective of whether the criteria set forth in sections 127 and 128 of the Act, 42 U.S.C. 2156, 2157, which govern decisions by the Nuclear Regulatory Commission, have been found by the Commission to be satisfied in a given case. Nevertheless, the question addressed herein is important in assessing whether a decision by the President to authorize the two proposed exports would constitute a precedent for future nuclear exports to countries which do not have all of their peaceful nuclear facilities under the safeguards system of the International Atomic Energy Agency.

This memorandum describes the legislative history of the Nuclear Non-Proliferation Act of 1978. It finds that the intent of the drafters of the original bills, relied upon by the Nuclear Regulatory Commission in finding section 128a. to be applicable to the proposed exports, was substantially modified in the course of the legislative process in light of Administration objections to the original proposals. It concludes that the two proposed exports may properly be regarded as falling within the grace period provided by the statute as finally enacted and, therefore, are not subject to the safeguards requirement of section 128a.

BACKGROUND

Under a 1963 agreement,¹ the United States agreed to supply India with all the enriched uranium needed to operate two U.S.-supplied nuclear power reactors located at Tarapur during their thirty-year lifetime, and India agreed to use only U.S.-supplied fuel for those reactors.² The Tarapur facility is operated under international safeguards applied pursuant to a 1971 agreement among the United States, India and the International Atomic Energy Agency (IAEA).³

The Nuclear Non-Proliferation Act of 1978⁴ amended the Atomic Energy Act of 1954,⁵ inter alia, by adding new procedures and criteria for various nuclear exports, including exports of special nuclear material.⁶

In summary, section 126 of the Act, as amended,⁷ provides that the Nuclear Regulatory Commission, after receiving the views of the Executive branch that a proposed export will not be inimical to the common defense and security, determines whether applicable statutory requirements are met. If the Commission decides that the relevant statutory criteria are met it issues the export license; if it decides that it is unable to make the requisite statutory determinations it submits the license application to the President.

The President may authorize the proposed export by Executive order if he determines that to withhold it would be seriously prejudicial to the achievement of United States non-proliferation objectives or would otherwise jeopardize the common defense and security. In making such a determination the President is not bound by the criteria which must be considered by the Nuclear Regulatory Commission, although those criteria may provide relevant policy considerations. Finally, the statute provides that a decision by the President to authorize a proposed export may be overruled by a concurrent resolution adopted by the Congress within sixty days of continuous session after the President's decision is submitted to the Congress.

Section 127 of the Act⁸ sets forth six basic export criteria which the Nuclear Regulatory Commission must find are met before it can issue a license under the above-described procedures. These relate to such matters as safeguards, non-explosive use, physical security and retransfer. In addition, section 128a. of the Act⁹ specifies a further criterion for the export to any non-nuclear-weapon state of, inter alia, special nuclear material. With respect to such exports, section 128a. requires that "IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of the export."

At the time the Congress was considering the Nuclear Non-Proliferation Act, as at present, there were a number of non-nuclear-weapon states that were not parties to the Non-Proliferation Treaty¹⁰ and did not otherwise have all of their peaceful nuclear activities under IAEA safeguards. The United States had ongoing programs of cooperation with some of these countries, including India. In order to avoid an abrupt termination of nuclear cooperation with these countries Congress provided in the statute for a grace period, during which the application of section 128 would be deferred. Specifically, section 128b. provides in pertinent part as follows:

"The criterion set forth in subsection (a) of this section shall be applied as an export criterion with respect to any application . . . which is filed after eighteen months from [March 10, 1978], or for any such application under which the first export would occur at least twenty-four months after [March 10, 1978]. . . ."¹¹

On September 20, 1978, the Edlow International Company submitted an application for the export of enriched uranium fuel for the Tarapur Atomic Power Station in India. On August 17, 1979, Edlow submitted a second license application for a further export of fuel for the Tarapur reactors. The Executive branch

¹ Agreement for Cooperation in the Civil Uses of Atomic Energy between the United States and India, 14 U.S.T. 1484, TIAS 5446.

² *Id.*, Art. II.

³ 22 U.S.T. 200, TIAS, 7049.

⁴ Public Law 95-242, approved March 10, 1978, 92 Stat. 120).

⁵ Act of August 30, 1954, 68 Stat. 919, 42 U.S.C. 2011 et seq., (hereinafter "the Act").

⁶ "Special nuclear material" is defined by section 11aa of the Act, 42 U.S.C. 2014aa, to include uranium enriched in the isotope 235 (which is the fuel for the Tarapur facility).

⁷ 42 U.S.C. 2155.

⁸ 42 U.S.C. 2156.

⁹ 42 U.S.C. 2157(a).

¹⁰ 21 U.S.T. 483, TIAS 6839 (1970).

¹¹ 42 U.S.C. 2157(b). The remainder of the subsection prescribes procedures for Presidential waiver, subject to Congressional overrides.

recommended issuance of the first license on March 28, 1979, and recommended issuance of the second license on May 7, 1980. During 1979 the Nuclear Regulatory Commission requested answers from the Executive branch to a series of questions in connection with the first license application. These questions were also addressed by the Executive branch in its comments and recommendation with respect to the second application.

On May 16, 1980, the Nuclear Regulatory Commission decided that it was unable to find that the license applications met the applicable statutory criteria. In particular, the Commission concluded that section 128 of the Act was applicable to the two license applications. Since India has several nuclear facilities (other than Tarapur) which are not under IAEA safeguards the Commission found that the statutory criterion of full-scope safeguards was not met.

As noted above, the President, in reaching a decision under section 126b.(2) of the Act, is not bound by the criteria which must be applied by the Nuclear Regulatory Commission.¹² Nevertheless, every Presidential decision under section 126b.(2) can be characterized as representing a disagreement with the Commission. The President may disagree with the Commission in a given case on an issue of fact or law as to whether a statutory criterion is applicable or an applicable criterion is met. In another case, the President's decision may represent a policy judgment that export should be made even though it does not meet an applicable statutory criterion. Such an analysis of a decision by the President might not often serve any useful purpose, since the legal basis for the President's decision (section 126b.(2) of the Act) is entirely separate from the basis for action by the Commission (section 127 and 128 of the Act). In this case, however, if the President decides to approve the export of fuel for Tarapur it is important to know whether that decision represents a judgment that section 128 does not apply and should be waived.

The importance of this distinction to U.S. nonproliferation policy is evident. If these two shipments are not subject to section 128 then they are among the last shipments which can be made before the full scope safeguards criterion becomes fully applicable. On the other hand, if their approval constitutes a waiver of section 128 they could be a precedent for continued shipments to countries which do not have full-scope safeguards. In view of the central importance of full-scope safeguards to the comprehensive regime of export controls established by the Nuclear Non-Proliferation Act,¹³ a decision based upon the latter theory would have much greater significance to the Congress, to other countries, and to those charged with the implementation of U.S. non-proliferation policy.

The Department of State has expressed its opinion that section 128 is not applicable. The Nuclear Regulatory Commission has rejected this view.

ANALYSIS

An interpretation of section 128b. of the Act must begin with the language of the text.¹⁴ That language identifies two categories of export license applications to which the full scope safeguards criterion "shall be applied."

First, the criterion shall be applied to "any application . . . which is filed after eighteen months from the date of enactment of this section. . . ." If the provision ended there its meaning and intent would be perfectly clear. A license could in no event be issued by the Nuclear Regulatory Commission to a country where full scope safeguards were not in effect if the license application was filed later than September 10, 1979. However, the statute goes on to describe a second category of applications in language which raises a number of questions—"or for any such application under which the first export would occur at least twenty-four months after the date of enactment of this section. . . ."

The first question raised by this additional language is whether the category of license applications it describes is a subcategory of applications filed prior

¹² Section 126b.(2) of the Act specifies the sole criteria applicable to a Presidential decision to authorize an export, i.e., that to withhold it would be seriously prejudicial to the achievement of United States nonproliferation objectives or would otherwise jeopardize the common defense and security. In its decision of May 16, 1980, the Nuclear Regulatory Commission emphasized that the President had the authority to authorize the proposed exports to Tarapur notwithstanding the findings of the Commission under sections 127 and 128 of the Act.

¹³ See S. Rept. No. 95-467, p. 18 (1977); H.R. Rept. No. 95-587, p. 25, (1977)

¹⁴ *Caminetti v. United States*, 242 U.S. 470 (1917); see generally 2A Sands, Statutes and Statutory Construction 1 (1973).

to September 10, 1979, or is a separate category. This question is answered by the report of the Senate committees in which this provision was considered. The Senate report describes the bill as referring to "any application which is filed after 18 months from enactment, and to any application filed prior to that date for an export which would occur at least 24 months after enactment."¹⁵

This legislative history makes clear that the second category of applications referred to in the statute is a part of the category first described. Therefore, the statute unquestionably applies to all license applications filed after September 10, 1980. The second category describes certain applications to which the additional export criterion must also be applied by the Nuclear Regulatory Commission even though the applications were filed prior to September 10, 1979.

The question then arises as to which applications filed prior to September 10, 1979, are subject to the additional criterion. Again, the language of the statute is unclear. How are applications filed before September 10, 1979 under which the first export "would occur" after March 10, 1980, to be identified?

Some indication of legislative intent is revealed by the above-quoted Senate report, which explains the rationale for extending the application of the additional criterion to certain license applications filed prior to September 10, 1979:

"The reason for this provision is to ensure that a large number of applications covering future exports will not be filed in the eighteenth month to avoid this requirement. However, the 6-month lagtime is allowed for licenses legitimately filed prior to the 19th month where the actual shipping process is a lengthy one. The NRC should also not permit any other highly unusual proposals which are intended to circumvent this statutory provision."¹⁶

This passage from the Senate report reflects a concern that if the filing date of the application were the sole basis for determining the application of the full-scope safeguards export criterion that requirement could be evaded by the filing shortly before the deadline of license applications for exports which were not needed to meet bona fide current requirements of a foreign country. For example, an exporter might apply for a license covering foreseeable needs of a particular country for the next ten years. This would frustrate the evident intent of Congress that full scope safeguards be required as a condition of future exports after a reasonable initial grace period.

The guidance in the Senate report to apply the additional export criterion to otherwise timely filed license applications "which are intended to circumvent" the statute suggests that the statute should be applied by evaluating whether the application, at the time it was filed, contemplated an export which could reasonably be expected to occur before March 10, 1980. This was useful guidance for situations where the shipment actually could occur before that date. However, now that March 10, 1980 has passed, the intent of Congress regarding application of the noncircumvention clause is more difficult to ascertain. The Nuclear Regulatory Commission has interpreted the statute as requiring application of the full-scope safeguards criterion to all exports which have not in fact occurred by March 10, 1980. The rationale for this conclusion is set out in a memorandum from the NRC General Counsel dated May 12, 1980, a copy of which is attached to this memorandum.¹⁷

There are two problems with the NRC interpretation. First, the statute does not say that March 10, 1980, is a deadline for actual exports to countries which do not have full scope safeguards. In this regard, it should be noted that section 128 employs two different forms of verbs. The statute provides that the additional criterion shall be applied to any application which "is filed" after September 10, 1979, but speaks of exports which "would occur" after March 10, 1980. Such differences in the form of verbs used within a statutory provision have long been regarded by the courts as evidence of differences in intent.¹⁸

The textual suggestion that such a difference was intended in this particular statute is supported by the directly relevant legislative history. The above-quoted

¹⁵ S. Rept. No. 95-467, p. 18 (1979) (emphasis added).

¹⁶ *Ibid.*

¹⁷ The NRC General Counsel is responsible for providing legal advice to the Commission, 10 C.F.R. § 1.32; 1 CCH Nuclear Regulation Reports, para. 103. The Commission's reasoning on this issue, contained in footnotes 3-4 and the related text in its March 16 opinion, is demonstrable based on the General Counsel's memorandum. Moreover, Commissioner Gallinsky, in his separate opinion in which Commissioner Bradford joined, explicitly relied on that memorandum (see footnote 4 to the separate opinion).

¹⁸ Cf. *Minor v. Mechanics' Bank*, 26 U.S. (1 Pet.) 46 (1828); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353 (1894).

Senate report describes the March 10 date as providing no more than a guideline for determining whether a given application was intended to circumvent the statute. Moreover, as originally introduced, the bill had contained a firm, effective date certain by which exports would have to occur in order to avoid application of the full scope safeguards criterion.¹⁹ The departure from this formulation in the bill finally enacted is a further indication that Congress did not intend March 10, 1980, to be an absolute deadline.

Second, the NRC rationale is that it is giving effect to a perceived intention of "the Congressional drafters" of the statute to require full-scope safeguards as an export criterion. However, the NRC analysis oversimplifies the complex considerations that influenced the drafting of section 128b., and relies upon interpretations of earlier, quite different legislative proposals as evidence of the intent of the present law.

At the time the Nuclear Non-Proliferation Act was under consideration in the Congress, there was a broad consensus on the desirability of full-scope safeguards as an instrument for diminishing the risks of nuclear proliferation. However, there was strong disagreement as to how to pursue the goal of adherence to such safeguards by non-nuclear-weapons states. The legislation proposed by the Administration would have included full-scope safeguards for non-nuclear-weapons states in the enumeration of required (although waivable) provisions in new agreements for cooperation,²⁰ and contemplated a subsequent proposal by the President, following a program of renegotiation, for an amendment to the statute's export criteria.²¹ Legislation introduced in the House and Senate, however, would have unilaterally imposed the requirement of full-scope safeguards as a criterion for exports from the United States, to be effective "at the end of the eighteen [18]-month period beginning on the date of enactment of this Act [section]. . . ." ²²

The Administration expressed strong opposition to the Congressional effort to induce adherence to full-scope safeguards through unilateral constraints on U.S. exports, especially to countries which had relied upon assured availability of fuel from the United States in making substantial investments in nuclear power reactors.²³

A central focus of the debate between the Legislative and Executive branches in mid-1977 was on the issue of whether a unilateral requirement would promote broader adherence to full-scope safeguards, as urged by several key members of Congress, or would encourage a search for alternative sources of supply and the development of indigenous capabilities, as feared by the Administration. Ultimately, the differences over this issue were resolved by compromise. The administration accepted the basic principle of full-scope safeguards as a unilateral export criterion. The Congress accepted modifications to the original proposals on this subject in three respects:

(1) The standards for Presidential waiver were relaxed from significant increased risk of nuclear explosive capability or serious adverse impact on vital United States interests to the same criteria as apply to other Presidential decisions under the Act;

(2) The procedure for Congressional override was changed from simple resolution of either House to concurrent resolution of the Congress, and made applicable only to the first license issued each year under a waiver; and

¹⁹ See discussion accompanying notes 22-24, *infra*.

²⁰ S. 1432, H.R. 6910, § 401, 95th Congress, 1st session (1977).

²¹ *Id.*, § 503 (proposed new section 127d. of the 1954 Act).

²² S. 897, § 16(b), 95th Congress, 1st session, (1977); H.R. 4409, § 205(b)(1), 95th Congress, 1st session (1977). The bracketed text indicates language in the House bill which differed in nonsubstantive respects from that of the Senate proposal.

²³ See Hearings before the Subcommittees on International Security and Economic Affairs, and on International and Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st session, p. 118 (testimony of Joseph S. Nye, Deputy to the Under Secretary of State for Security Assistance, May 19, 1977); Hearings before the Subcommittee on Arms Control, Oceans, International Operations and Environment of the Senate Committee on Foreign Relations, 95th Congress, 1st session, pp. 39-40 (Executive Branch Comments appended to statement of Joseph Nye, May 23, 1977); Hearings before the Subcommittee on Governmental Affairs, 95th Congress, 1st session, p. 106 (statement of Paul Warnke, Director of ACDA, April 25, 1977); Hearings before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources, 95th Congress, 1st session, p. 62 (statement of Louis V. Nosenzo, Deputy Assistant Secretary of State, June 10, 1977).

(3) the automatic application of the criterion after 18 months was replaced by application to license applications filed after 18 months, subject to a limitation to guard against circumvention.²⁴

It is evident that in adopting the modifications enumerated above the Congress intended to change the effect of the original bill. It is also reasonable to infer that these changes were made in response to the objections which the Administration had expressed and in exchange for Administration acceptance of and support for the amended bill.

Viewed against this background, the original intent of the Congressional drafters relied upon by the NRC seems less significant. Certainly, legislative history concerning the bill prior to its amendment is not a reliable guide for ascertaining the meaning of the statute as finally enacted.²⁵ Viewed as a whole, the underlying intent of section 128 of the Act appears to have been the adoption of full-scope safeguards as a normal export criterion, with a grace period and waiver authority tailored to meet Administration concerns. There is no evidence in the post-amendment legislative history that Congress intended to apply the additional criterion to any exports for which license applications were filed prior to September 10, 1979 except those which were intended to circumvent the deadline.

The Senate Committee report, like the language of section 128b, is focused primarily upon the possibility of eleventh hour filings of applications for exports which were not needed to meet current requirements. It does not specifically address protracted delays in anticipated shipment attributable to other factors. However, the Committee report also contains a general admonition to the NRC not to permit other forms of intended circumvention through "highly unusual proposals." The Commission has expressed concern that looking only to the applicant's intent at the time of filing could produce an anomalous result. The example is given of a license application filed in 1975 on which the Executive Branch might not give views to the NRC until 1985.²⁶ This concern would seem capable of being dealt with under the general guidance of the Committee report not to permit circumvention through "highly unusual proposals."

At the time the first of the two applications here involved was filed on September 20, 1978, delays in previous exports from the United States had required that the Tarapur facility be operated at a reduced capacity in order to conserve fuel and avoid an interruption of service. The preceding annual fuel shipment had to be made by air in order to maintain efficient operation of the fabrication plant at the facility, even with the reactors operating at reduced capacity. The Government of India, faced with demands for electrical power in the region which exceeded even the maximum output of Tarapur, wanted to overcome the shortage of available fuel so that full scale operations could be resumed.

At the time the second license application was filed on August 17, 1979, the remaining supply of fresh fuel at Tarapur was virtually exhausted. Even if the first license had been issued immediately and the export accomplished by air freight, a second annual shipment at an early date was necessary in order to allow the reactors to be restored to full capacity, maintain an adequate supply of fresh fuel for the fabricating plant, and allow time for shipment by the far more economical surface transportation. The second license application specified shipment in February 1980. If the first license had been issued shortly after the second application had been filed and the second license issued in time to permit shipment beginning in February 1980, as proposed, this schedule would have achieved delivery in India of an additional one-year's supply of fresh fuel about four months before the supply of fuel from the first shipment was exhausted. This amount of lead time is considered prudent by the nuclear industry in its scheduling of fuel deliveries for facilities in other countries.

²⁴ These changes were all made in the Senate bill, S. 897, the text of which was adopted by the Senate in lieu of the House bill, 124 Congressional Record S 1341 (Feb. 7, 1978). The House then adopted the Senate amendment, 124 Congressional Record H 919 (Feb. 9, 1978).

²⁵ The NRC General Counsel's opinion of March 12, 1980 (copy attached), quotes at page 3 the testimony of an Administration witness that the original House bill would have had a "gullotine" effect; it then concludes at page 4 that a flexible application of section 128b. would be "inconsistent with the Congressional intent that there be a 'gullotine' approach in the implementation of the full-scope safeguards requirement." Thus an Administration objection to a bill which was not enacted is transformed by the NRC analysis to become the intent of Congress with respect to the substantially different bill that was enacted.

²⁶ NRC General Counsel's opinion of May 12, 1980 (attached), p. 4.

Thus, the two proposed shipments to India do not give rise to any question of circumvention. Both applications were filed before September 10, 1979. Each involved a one-year supply of fuel for India's Tarapur reactors, and specified a date before March 10, 1980, on which commencement of shipments was contemplated. The specified dates were consistent with the prior course of dealing between the parties, and gave no evidence of being attempts to circumvent the statute. The fact that the NRC made no decision on either application until after March 10, 1980, was attributable entirely to protracted delays by the U.S. Government in reaching a decision.

It would serve no purpose to speculate about other export license applications that might be considered under the case-by-case approach suggested herein. It should be noted, however, that among the license applications for fuel exports which were pending in the Executive branch on September 10, 1979, no other involved India. One proposal, for export to South Africa, has been pending for five years. The others are for proposed exports to Argentina and Spain. With only these three possible decisions as the maximum number which could be presented to the Commission (and then, only if the Executive branch first decided that the exports should proceed without full-scope safeguards and did not constitute circumventions), the case-by-case approach seems entirely manageable. Should any of these cases reach the NRC, the Commission would be free to take into account all relevant circumstances, including protracted delay, in deciding whether issuance of a license would constitute circumvention of section 128.

A final consideration is that time provisions in statutes ordinarily should be construed so as not to permit delay on the part of the public officer to prejudice private rights or public interests.²⁷ This general rule warrants that some attention be given to the interests of applicants and foreign governments, and to the Executive branch concerns which bore upon the above-described compromise legislative resolution of the full-scope safeguards issue. An automatic cutoff of these interests on March 10, 1980, because of government delays in processing the license applications would seem an unnecessarily harsh result.

CONCLUSION

The better interpretation of section 128b, with respect to license applications filed prior to September 10, 1979, would seem to be that the Commission should look to all the circumstances of a given proposal and decide whether, in those circumstances, approval of the proposed export would amount to a circumvention of the statute. This is obviously a more difficult task than regarding March 10, 1980, as an absolute deadline on shipments. However, it is more compatible with the statute's language and with the legislative history indicating that section 128b, represents a compromise intended to permit some flexibility. Under this interpretation, section 128 is not applicable to the two proposed exports to India. Therefore, a decision by the President to authorize those shipments would not constitute a waiver of the statute or a precedent for the approval of subsequently filed license applications.

JAMES H. MICHEL,
Deputy Legal Adviser.

STATE DEPARTMENT FACT SHEET ON TARAPUR

SUMMARY

The President has approved the export of certain nuclear fuel and components to India. To withhold these exports would jeopardize U.S. interests in the region and would be harmful to U.S. non-proliferation objectives there. This paper provides background on the issues and addresses questions which have arisen.

Nonproliferation considerations

Our fundamental non-proliferation policy objectives, consistent with the Nuclear Non-Proliferation Act (NNPA), are to prevent the spread of nuclear weapons and sensitive nuclear facilities which could contribute to nuclear explosive capabilities. Approval of the proposed exports for the Tarapur power reactors supports these non-proliferation policy objectives.

²⁷ *Diamond Match Co. v. United States*, 181 F. Supp. 952 (Cust. Ct. 1960).

To withhold these exports would adversely affect several key non-proliferation policies:

India has indicated that the refusal of the United States to provide fuel needed for the Tarapur facility will relieve it of its corresponding obligations under the relevant agreements. In that event:

India might reprocess U.S.-supplied spent fuel for recycle of plutonium in the reactors—a step which would undercut our worldwide effort to hold back reprocessing and discourage such use of plutonium in present day reactors;

It might also remove the Tarapur facility from its present coverage under the safeguards of the International Atomic Energy Agency—a precedential step with ominous implications for the entire structure of IAEA safeguards. This would be the first case anywhere in which IAEA safeguards were withdrawn;

India might also decide to end the present U.S. veto over any use of material already supplied other than to fuel Tarapur, e.g., our veto over use of this material for nuclear explosions. It also could end the present U.S. veto over any retransfer to another country of this material. It could terminate the present U.S. right to buy any derived plutonium in excess of Indian civil needs as well as end the present Indian commitment not to use Tarapur to irradiate any non-U.S. fuel.

A cut-off will make a continuing non-proliferation dialogue with India impossible at a time when we need more than ever to sustain our discussions on this concern in the Sub-continent and when India itself is becoming a nuclear supplier. A cut-off of U.S.-supplied fuel for Tarapur at this time would deprive the United States of the opportunity to discuss its differences with India on nuclear issues in an atmosphere conducive to progress. Constructive talks would not be likely after a cut-off.

A cut-off will not advance the objectives of the NNPA and our non-proliferation interests in India; it would simply result in the Indians obtaining fuel from other sources and/or recycling plutonium.

While some may view continued Tarapur supply as a weakening of U.S. non-proliferation policy, there is a greater risk that a cut-off could reinforce the perceptions of many countries of the unilateralism of U.S. non-proliferation policy and that the U.S. cannot be counted on as a reliable supplier.

A cut-off will only encourage those in India and in other countries who argue the need for a full fuel cycle independent of outside suppliers and international safeguards.

Other foreign policy considerations

The crisis in Iran and the Soviet invasion of Afghanistan have profoundly affected U.S. security interests in South and Southwest Asia. We consider it vitally important to support stability and systematically bolster our relations with this region.

We have sought in this context to maintain and strengthen constructive relations with India. It is the largest, strongest, and one of the most stable countries in the area. The policies it adopts on such issues of concern to the U.S. as relations with Pakistan and China, Afghanistan, Kampuchean recognition, U.S. naval presence in the Indian Ocean; and international economic affairs are important and influential.

Indo-United States relations have not always been smooth. Our policy perceptions and interests do not always coincide. We believe, however, that the best way to influence India to adopt policies beneficial to U.S. interests is to try to build a reliable and mature bilateral relationship.

Tarapur has become a crucial indicator to the Indians of the seriousness with which we view our relationship with them. A positive decision on Tarapur will help allay apprehensions about U.S. constancy and U.S. policies on issues sensitive to India, such as our relations with China and Pakistan.

A break in our fuel supply would damage our broader relationship with India without any commensurate gains—and with potential losses—on the non-proliferation side. Moreover, the Soviets would seek to take further political advantage by supplying India with any needed fuel. We have just seen in the \$1.6 billion arms deal the use they make of their resources to influence India. We can't afford at this critical time to deal ourselves out of the game by reducing our links with this key South Asian player.

BACKGROUND

The Tarapur Agreement and the NNPA

Under a 1963 agreement with India, the United States agreed to supply India, in accordance with the terms of a supply contract which was subsequently concluded, with all of the enriched uranium needed to operate two U.S.-supplied nuclear power reactors located at Tarapur during their thirty-year life span. In return India agreed, among other things, to use only U.S.-supplied fuel, to allow the application of IAEA safeguards to this material, not to use it for any nuclear weapons or other military purpose, and not to retransfer or reprocess the fuel without U.S. consent.

In 1974, India exploded a nuclear device using plutonium produced from a Canadian-supplied research reactor and most likely some U.S.-supplied heavy water. Both were supplied without safeguards arrangements but with the understanding that they would be used only for peaceful purposes. The Indians claimed that their explosion did not violate this understanding since it was a "peaceful nuclear explosion." As a result, the U.S. sought and obtained clarification from India concerning the Tarapur agreement that U.S.-supplied fuel would be used only at the Tarapur nuclear power station and thus not for any nuclear explosion device.

In 1978 the Congress passed and the President signed the Nuclear Non-Proliferation Act (NNPA). Among its provisions is a requirement that a non-nuclear weapons state such as India have all of its nuclear facilities under international safeguards (full-scope safeguards) in order to receive U.S. nuclear fuel unless the President, subject to Congressional veto, waives this requirement. The NNPA, however, delays the application of this criterion. Specifically, the law provides that the full-scope safeguard provision in the law (Section 128 of the Atomic Energy Act, as amended) will not apply to export applications filed prior to September 10, 1979 for exports which "would" begin prior to March 10, 1980.¹

Although India has accepted international safeguards on the U.S. material supplied to Tarapur and other material supplied from abroad, it also has a number of indigenously developed nuclear facilities which are not subject to safeguards. Over the last two years we have urged India to agree to place these facilities under safeguards, but it has refused.

There are two pending applications for nuclear fuel for Tarapur, both of which were filed before the relevant deadline in the law. The Executive Branch recommended to the NRC in March 1979 that the first license be issued.

Subsequently, the Executive Branch in May 1980 recommended to the Nuclear Regulatory Commission that the two fuel licenses, as well as licenses for replacement parts for the reactors, be issued. In its recommendations the Executive Branch stated that the statutory export criteria had been met, that the full-scope safeguard requirement did not apply to those licenses, and that withholding the exports would not be supportive of U.S. non-proliferation objectives and would jeopardize broader U.S. interests in the region.

On May 16, 1980, the Nuclear Regulatory Commission decided that it was unable to determine that these export licenses as well as the licenses for replacement parts for the Tarapur reactors meet the statutory export criteria. The Commission therefore referred all of these applications to the President for decision pursuant to Section 126(b)(2) of the Atomic Energy Act, as amended.

The NRC maintained that the full-scope safeguard criterion does apply to the two fuel licenses since, in the view of the Commission, this requirement is absolute with respect to any export made after March 10, 1980, irrespective of the date of the license application, the scheduled export date, or any other considerations.

The Commission noted, however, that its inability to issue these licenses should not be read as a recommendation one way or the other on the proposed exports and that the President may in such cases authorize the export by Executive Order if he finds "that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives or would otherwise jeopardize the common defense and security."

¹ Since the NRC and Executive Branch views differ on its interpretation, a detailed analysis of Section 128 is attached.

In making a decision to move forward with the exports, the Executive Branch has taken the following factors into consideration:

Nonproliferation aspects.—The continuation of the U.S. supply of nuclear fuel to India has been interpreted by some in the United States and abroad as an indication that the United States is backing away from its commitment to non-proliferation. This is not the case. The Administration remains firmly committed to preventing the spread of nuclear explosives, and to the universal acceptance of safeguards on all peaceful nuclear activities.

Terminating nuclear supply to India at this time would not promote achievement of these objectives, and there would be substantial non-proliferation costs involved. India has stated its view that the end of U.S. supply under the 1963 agreement would constitute grounds for India to renounce its obligations under this agreement. Continuation of controls on the U.S.-supplied fuel now in India would therefore be placed in jeopardy. In such an eventuality the Indians would almost certainly reprocess the U.S.-origin spent fuel in India and use the plutonium as further fuel for the Tarapur reactors. Such a consequence of a cut-off would be damaging to our worldwide efforts to hold back reprocessing and prevent recycling. If the existing safeguards on the Tarapur reactors and fuel are lost, it would be the first such instance and a serious blow to the international safeguards regime.

In addition, the end of nuclear supply would make a dialogue with India on non-proliferation issues impossible and eliminate whatever influence we have on India's nuclear program. The continuation of this dialogue does not of course promise that we will be successful in reconciling our differences, but an end to these discussions would ensure that no progress would be made.

It is also important that the United States meet nuclear supply commitments that are consistent with U.S. law and policy in order to avoid damage to our reputation as a reliable supplier. As noted above, the Executive Branch believes that these exports are not affected by the full scope safeguard criterion and meet the other U.S. nuclear export criteria; their approval would enhance our reputation in this regard.

India is one of the "second generation" supplier countries and will have the capability to become a significant exporter of nuclear technology and components during the next 10-15 years. So far the Indians have taken a thoroughly responsible stance in international nuclear commerce. India's continuing association with us and other supplier countries in a cooperative atmosphere will affect the future climate in which Indian supplier policies evolve.

Regional political considerations.—The virtual collapse of Iran and the Soviet invasion of Afghanistan have profoundly affected U.S. security interests in South and Southwest Asia. We consider it vitally important to promote stability and systematically bolster our relations with this region, particularly with those countries which can play a role in checking any future Soviet expansion.

Constructive and useful relations with any country depend on a web of ties which taken together form the fabric of a total relationship. Particularly at this time of crisis in the region, it is not in U.S. interests to deal ourselves out of the game by reducing our links to important countries. We risk being viewed as irrelevant to the needs and concerns of the region.

The maintenance and strengthening of good, cooperative relations between the United States and India is clearly in our interest. India is the largest, strongest, and one of the most stable countries in the South Asian area. It shares with us important democratic values. It is a leader of the moderate group in the Non-Aligned Movement and plays a significant role in international forums. The policies it adopts on issues of concern to the United States such as relations with Pakistan and China, Afghanistan, Kampuchean recognition, U.S. naval presence in the Indian Ocean, and international economic affairs can be important and influential.

Indo-United States relations have not always been smooth. Our policy perceptions and interests do not always coincide. There have been many times when we would have preferred that India take positions closer to ours. At the same time, we should recognize that in pursuing its independent role Mrs. Gandhi's government has taken positions on several important matters which we can welcome and has signalled to us that it wants a constructive relationship. It has moved from a pro-Soviet view of Afghanistan to oppose the Soviet invasion and call for prompt Soviet withdrawal. Mrs. Gandhi has personally spoken out

against critics of the Iran rescue operation. In sharp contrast to earlier negative Indian positions, her government has had little comment on the U.S. buildup in the Indian Ocean. Despite campaign pledges, it has not yet recognized the Vietnamese-installed regime in Kampuchea.

We believe that the best way to influence India to adopt policies most beneficial to U.S. interests is to build a reliable and multi-faceted bilateral relationship. The Tarapur issue is highly important in this regard. Affecting the supply of electricity to the industrialized area of Western India, it has taken on perhaps exaggerated significance in Indo-United States relations. Many in India see it as a litmus test of U.S. interest in maintaining good relations and of our recognition of the importance of constructive Indo-United States ties to our broader foreign policy concerns in South and Southwest Asia.

A positive decision on Tarapur will help to encourage India to act in ways favorable to us in the longer run as it faces up to the new situation posed for South Asia by the likelihood of a long-term Soviet presence in Afghanistan. It will also help allay Indian apprehensions about U.S. policies in areas sensitive to India. For example, Indian perceptions of our relations with China and Pakistan are likely to be influenced by the conclusions the Indians draw regarding our interests in India, as demonstrated by our handling of the Tarapur issue.

A cut-off of nuclear fuel would have the reverse impact. Moreover, the setback to U.S. interests which disapproval of the exports would bring about will be made more serious by the probability that the Soviet Union will move promptly to reap benefits from our negative action. They have already offered to supply the Indians with enriched uranium for Tarapur if we fail to do so. We have just seen in the \$1.6 billion cut-rate arms deal the use they make of their resources to influence India. We can't afford to deal ourselves out of India just as the Soviets are demonstrating the importance they attach to this key South Asian player.

Considerations related to the applicability of the full-scope safeguards provision.—The President's decision to authorize these exports is based on his determination that withholding these exports "would be seriously prejudicial to the achievement of United States nonproliferation objectives and would otherwise jeopardize the common defense and security." This action does not require a determination that the full-scope safeguard criterion of Section 128 of the Atomic Energy Act or other requirements of that Act or the NNPA are met. Nevertheless, the Executive Branch disagrees with the Commission's view that the full-scope safeguard criterion of the law applied to the two fuel applications and that, in effect, a waiver of Section 128 is therefore involved in approving these exports. In the view of the Executive Branch the legislative history of this section of the NNPA supports the view that the September 10, 1979 deadline in the law concerning filing of export license applications is the date certain for application of the Section 128 criterion and is not meant to apply to applications under which the first shipment was reasonably planned to occur prior to March 10, 1980 absent some indication of circumvention of the September 10, 1979 filing deadline. In these cases, the exports in question were reasonably planned to occur before March 10, 1980 and the failure of the shipments to be made in this time period was due to delays on the processing of these applications within the U.S. Government.

The CHAIRMAN. Thank you very much, Secretary Christopher.

Ambassador Smith, do you have a statement to present to us at this time?

Ambassador SMITH. I have no statement, Mr. Chairman.

The CHAIRMAN. Senator Glenn, did you have a statement you wished to make at this time, or would you prefer to wait?

Senator GLENN. I believe I can make my statement when my time comes up in the first round of questioning.

The CHAIRMAN. Very well. Thank you.

Mr. Secretary, the reasons you give for the decision are all pertinent and plausible. But, it would seem to me that these reasons as easily could be given next year or the following year for continued shipments to India as they can be given now.

When you say that this decision rests upon a determination by the administration that the applications for the shipments came within the grace period and that it is not to be a precedent for decisions filed after December 10, 1979, there is a suggestion there that this is where we intend to draw the line. But, on the next page, you tell us not to take that too seriously because you do not want to rule out the possibility of additional supplies in the future, when, presumably, you could not say that the application fell within the grace period.

Is that not true?

Mr. CHRISTOPHER. Yes; Mr. Chairman, what you say is true. But I would emphasize the unique character of these two applications. They reflect an agreement entered into in 1963, under which we were obligated to supply fuel for these reactors. We are in a situation where that agreement still is in effect. It has important benefits for the United States as well as for India.

We think that in the grace period it is desirable, from the standpoint of U.S. interests, to carry out that agreement. We are not trying to pass on future situations. I think it is only prudent to keep future issues open. Indeed, the statute itself does provide an opportunity for a Presidential waiver even after the grace period.

What I would be emphasizing here now is the unique situation in which we find ourselves: two applications within the grace period for fuel under a contract which the Indians regard as binding.

The CHAIRMAN. How long will the contract last under its terms?

Mr. CHRISTOPHER. Well, the obligation, which is to provide fuel for the reactors throughout their lives, which is estimated to be 30 years from the original date, runs until 1993.

The CHAIRMAN. According to the news account, the article that appeared in this morning's New York Times, a five-member Nuclear Regulatory Commission, acting unanimously, announced on May 16 that the shipments would violate the 1978 Nuclear Non-Proliferation Act, which prohibits all nuclear sales to countries which refuse comprehensive nuclear safeguards after March 10 of this year.

Now I take it to be the administration's position that it rejects the conclusions of the Nuclear Regulatory Commission that the President's decision is a violation of the law.

Mr. CHRISTOPHER. Mr. Chairman, on the broad question as to whether or not the exports should go forward, I think it is accurate to say that the Commission made no recommendation on the substance of the matter. What the Commission did was to indicate that in its view of the law, the applications were not filed within the grace period.

We differ on that evaluation of the law, both as to the matter of its text and its legislative history.

I think the Commission certainly would recognize that the power resides in the President to go ahead with the exports, subject to the statutory scheme. We are in a situation where the Commission has played its role. Now the President has acted in issuing the Executive order and we are in the third phase in which the Congress will decide whether or not to exercise its power under the statute.

I think at the present time there is no violation of the general provisions and structure of the statute.

The CHAIRMAN. If the Congress sustains the decision which the President has taken, what does that do to the credibility of our whole nonproliferation policy?

Mr. CHRISTOPHER. Mr. Chairman, that is a very pertinent and searching question. My view has been that, on balance, it strengthens our nonproliferation policy rather than weakens it.

I say this for several reasons. First, it does enhance the status of the United States as a reliable supplier. One of the problems we have around the world with other countries is our reputation for reliability in the supply of nuclear fuel for peaceful purposes. As more and more countries are finding the need for alternatives to oil, our reliability becomes of great importance. If we default on an agreement that we entered into with India or do not carry out its purposes, I think that reputation is called into question.

Second, if we do not go forward with these shipments, we give India a strong argument for feeling itself free not to comply with the commitments or obligations in the 1963 agreement, and thus feeling itself free to do whatever it wants to do with the nuclear fuel that it has in whatever form it now exists in India.

I think that would be a very unfortunate situation to have happen. India might turn to various regimes that would be quite adverse to our nonproliferation policy.

So, although I think the matter is one on which there are plausible arguments on both sides, I think it would enhance our nonproliferation policy rather than set it back.

I would say, as a third point on that, Mr. Chairman, that the unique character of these particular applications prevents it from having any broad precedential effect.

Ambassador Smith, who is the Ambassador at Large in charge of nonproliferation policy, should have a chance, if you are willing, to address that key question.

The CHAIRMAN. Yes; Mr. Ambassador.

Ambassador SMITH. Mr. Chairman, I would merely stress Mr. Christopher's last point, that is, it is not just the decision at which you should look when you ask the question about credibility, but it is the decision plus its consequences. To my mind, that combination obviously would result in a very bad setback for our nonproliferation policy.

If we have a country that is at liberty according to its likes to use plutonium from our fuel to run its present generation reactors, if it turns to the Soviet Union to replace us, if it says to inspectors from Vienna, which it will be at liberty according to its interpretation of its obligation to do, and says get out of here, we have it from the best authority in the agency that that would be a very bad body-blow for the whole structure of safeguards around the world. So, I think, if you look at this decision and its consequences, the clear weight of the evidence is against canceling this contract at this time, if your main interest is nonproliferation.

The CHAIRMAN. Well, I follow your argument. I think it has force. But if we permit the shipment to India, if we insist that this is even a unique situation and is not to be regarded as a precedent, can we really expect to insist that Brazil or Argentina or any other country to which we may be making shipments in the future accept full scope safeguards as a condition of our cooperation with it?

Mr. CHRISTOPHER. Yes; Mr. Chairman.

There are only very few cases that have any comparability to this at all. I think each of those cases we could demonstrate to the satisfaction of the committee will not present the same problems.

In Brazil they have what are de facto full scope safeguards. Spain, which is one of the few other cases where there are applications in this earlier period, we feel quite confident is moving in the same direction, as in Argentina.

The fourth country involved is South Africa. We have made it plain to South Africa that we are not going to furnish any nuclear fuel unless it accepts full scope safeguards and go even further, and to agree to the regime of the NPT.

So, I think the precedential effect on other countries will not be great.

The CHAIRMAN. Mr. Secretary, you are not really contending, are you, that your problems in convincing these other countries are going to be eased by this decision?

Mr. CHRISTOPHER. No; I don't think they will be eased by this decision. But I think they have been convinced or will be convinced notwithstanding this decision. I think they recognize the unique character of it and the fact that it does not provide an argument for them to escape full scope safeguards.

The CHAIRMAN. Very well.

Senator Percy, do you have questions?

Senator PERCY. I would yield to Senator Cohen, if I may.

The CHAIRMAN. Senator Cohen.

Senator COHEN. Mr. Chairman and Senator Percy, thank you very much. Since I just arrived, I would prefer to pass at this time.

The CHAIRMAN. Senator Pell.

Senator PELL. Thank you, Mr. Chairman.

Exactly how long do you consider the grace period should extend, Mr. Secretary? According to the act, it is 18 months or 24 months, depending on different circumstances.

Won't the same question come up again in 3 or 4 years and will the argument then be that the grace period should be extended? What would be the view of the administration?

Mr. CHRISTOPHER. On that point, Senator Pell, I think the law is clear. The statute establishes the date of September 10, 1979 as the deadline for applications. Any application for an export that is filed after that time clearly is out of the grace period.

The other date in the statute is March 10, 1980, which in our view is a date intended to prevent the circumvention of the law through a highly unusual export.

In other words, if an application was filed prior to September 10, 1979, but with no possibility or expectation that the export could take place by March 10, 1979, then it would not be within the grace period.

We regard these two as being within the grace period because they were filed before September 10, 1979, with the reasonable expectation that the export could take place by March 10, 1980. The exports have not taken place by that date, but for reasons which I think could not be laid at the door of India.

Senator Pell, there is only a very narrow category of applications which might be involved of those filed before September 10, 1979, and that is not a date that is likely to slip, nor are we ever likely to argue—indeed, I commit us not to argue—that an application filed after that time would be within the grace period.

Senator PELL. What we are talking about, really, is a dozen more years for the life of these reactors, isn't that correct—into the early 1990's?

Mr. CHRISTOPHER. Yes; Senator Pell.

But we would not argue, and I commit us not to argue, that an application filed in the future—that is, after September 10, 1979—is within the grace period.

Senator PELL. But this application is supposed to take care of the reactors at Tarapur until they become obsolete, in the 1990's, isn't that correct?

Mr. CHRISTOPHER. No, sir.

These two applications will cover only the period of the next year or two. This question will have to be faced again at that time.

Now the President does have the power to make a waiver with respect to applications filed in the future. But he could not contend, and would not contend, at that time that they were filed within the grace period.

Senator PELL. In other words, when the question comes up again several years from now, they would not be able to use the grace period argument, correct?

Mr. CHRISTOPHER. Exactly.

Senator PELL. For how long a period of time will the export that you propose be sufficient?

Mr. CHRISTOPHER. For a year or two.

Senator PELL. But there is quite a difference between a year and two.

Mr. CHRISTOPHER. Senator, I would have to say that this question may be back at this time next year.

But it is an important year in our relationships with India and in our relations with Southwest Asia.

Senator PELL. Isn't it correct, too, that the Nuclear Regulatory Commission rejects the State Department's interpretation that the exports still can take place after March 10, 1980?

Mr. CHRISTOPHER. That agency has a different interpretation of the law, Senator Pell. As I read its decision, it says that not only must the application be filed before September 10, 1979, but the export actually must have been made before March 10, 1980. The Legal Adviser of the State Department has advised us to the contrary. I think that that argument has the better of the case.

But, in any event, I think there is no doubt of the President's power to go ahead.

Senator PELL. I believe that some of the more technically proficient people than I in this field believe that the material India already has in its stockpile would allow that country to operate these reactors until the mid-1980's. I have been informed that the Indians already have 18 months of fuel on hand right now.

Would this accord with your own thoughts or not?

Mr. CHRISTOPHER. No.

Senator PELL. In other words, if this is granted, nothing more has to happen until 1985 or so?

Mr. CHRISTOPHER. I would like to ask Ambassador Smith to address that. But let me say that I find that to be more optimistic than I would be prepared to be in candor with the committee. I think we will find applications back from India before the mid-1980's. But I would ask Ambassador Smith to comment on that, if I may.

Ambassador SMITH. Senator Pell, I think about 1983 is the reasonable period to think about how long India could operate Tarapur with these two licenses.

There is an additional problem here in that they manufacture their own fuel elements out of our low-enriched uranium. They presently are hurting for a lack of feed supply for their manufacturing facility there. This is another reason why it is important that they get on with the shipments, because if we don't, it is my belief that that fuel fabrication plant will have to go down in a couple of months.

Senator PELL. Would it be correct that they have now on hand an 18-month supply?

Ambassador SMITH. I have heard that figure.

Senator PELL. In other words, this is a very important year. We could wait a year, but they still would have 6 months?

Ambassador SMITH. Well, if you waited a year, the first consequence would be that their fuel fabrication plant would have to go down, at considerable economic consequence to them.

Also, you would be in jeopardy of the Indians saying that we had violated the agreement. They had these applications in before the deadline. I think one of them has been in since 1978.

If we said well, wait a little longer, I think most likely they would say well, we are sorry, but you have not fulfilled your obligation to supply us, so we are free.

Senator PELL. From a political viewpoint, what would be the relationship between this sale and our nonproliferation policy toward Pakistan? Would Pakistan expect similar lenient treatment in your view?

Mr. CHRISTOPHER. Senator Pell, I would not expect Pakistan to be pleased with the approval of these exports. But, at the same time, I would not expect it to have any decisive effect on the nonproliferation policies of Pakistan or its nuclear plans.

I would think they are going ahead on a program and what is done here would not affect it one way or the other.

Let me put it in another way. If the President were to have denied these applications, I would not expect any different attitude on the part of the Pakistanis with respect to their own nuclear program.

If I may, I would like to add to Ambassador Smith's comments.

I do not think it a reasonable alternative to wait a year and then decide on these applications. My best judgment is that if we do not decide in this Congress on this period, the Indians will make other plans and we will have lost this opportunity to go forward and keep them bound to the 1963 agreement.

Senator PELL. Do you think there is any chance that the Indian Government might agree to full scope safeguards if Pakistan did the same?

Mr. CHRISTOPHER. One of the reasons we want to go forward is to give us an opportunity to talk with both countries.

This time could be very precious in working out an arrangement that might enhance our nonproliferation policies in both countries.

Senator PELL. I would hope that might be the case.

Ambassador SMITH. May I supplement the answer to your question, Senator?

Senator PELL. Please.

Ambassador SMITH. As you know, Senator Pell, we do not have any nuclear export relations with Pakistan, so there is quite a difference. We have to cut off that country's economic aid under a different statute.

I would also say that to my mind one of the greatest threats that we see today is in the Pakistani program, and one of the greatest possible solutions to that is some sort of Pakistan-Indian relationship.

Our ability to influence that relationship in a positive direction I think will be put at an end if we cut off India's nuclear supply. I think that is a very strong reason for not cutting it off.

Senator PELL [presiding]. Thank you.

Senator Percy.

Senator PERCY. Thank you.

Mr. Secretary, we welcome both you and Ambassador Smith very much. This is a tough problem. It does involve many interrelationships.

As I mentioned in my opening comments, the Near East is terribly important to us today because of Afghanistan and the implications of that situation.

I wonder if you could comment on the arms sale from the Soviet Union to India, exceeding several billion dollars on highly concessional terms, the likes of which I have not seen before, and involving combat vehicles, antitank and air defense missiles, MIGs, guided missiles, patrol craft and other equipment. Do you think it was in any way influenced by the desire of the Soviet Union to have an influence with India with respect to that country's attitude on Afghanistan?

Mr. CHRISTOPHER. Senator Percy, the arms deal concluded between the Soviet Union and India had been in the course of negotiation for almost 2 years. This is not something that Mrs. Gandhi began. It was begun under Desai and was continued under his successor and was concluded by Mrs. Gandhi.

Unquestionably, the Soviet Union is using its resources to try to build a more solid relationship with India. I think that is a continuing matter, and probably the inducement to bring the agreement to a conclusion reflected the tensions in the area and particularly reflected the Afghanistan situation.

I regard that arms deal as a reason for approving these applications, rather than turning them down. I think it would be the height of folly for us, at this point, when keeping India in a relatively nonaligned framework is so important for us, to give India an irritant in our relationship that simply would play into the hands of those who would be supporting the Soviets and who would be anti-United States in outlook.

It also is important to keep this arms deal in some perspective too. It was only about a year ago that the United Kingdom entered into a \$1.2 billion arms transaction with India for the sale of Jaguar aircraft to India. This is part of the constant struggle that goes on in countries in a nonaligned status. I think we need to use our best resources and our greatest ingenuity to make sure that those countries stay out of the Soviet orbit.

The invasion of Afghanistan I think has had a more profound effect on Indian opinion than is yet apparent. It would be my feeling that over the next 6 to 12 months we will see the effect of that invasion on Indian policy. I want us to be in the position of being able to take advantage of what I am sure is a very strong and adverse impact of that invasion on India.

For us, in these circumstances, to turn down this export and to throw that irritant into our relationship would be ill advised.

Senator PERCY. Are you rather pleased, as I am, that despite this very large arms sale India has stood firm in its opposition to the Soviet action in Afghanistan?

Mr. CHRISTOPHER. Yes.

I think it is a convincing indication of the depth of the concern, perhaps not all publicly expressed, by the Indians about the Afghan invasion.

India has moved, Mrs. Gandhi has moved, from a rather uncritical attitude about the invasion to one which is critical and one which calls for Soviet withdrawal.

I would not want to underestimate the importance of the Soviet Union as an arms supplier for India. That has been going on for a long time. It is a matter of concern to us. If the Soviets are the arms supplier to India, I think we would want to avoid their also becoming the energy supplier to India. If we turn our backs on these licenses, that is what will happen.

Senator PERCY. Is there any doubt in your mind that if we did reject this license, India would be able to and probably would purchase enriched uranium from the Soviet Union?

Mr. CHRISTOPHER. I think that is the likelihood, Senator Percy.

They might try some local reprocessing which would have adverse consequences as well.

My information, certainly my assumption is that the Soviet Union would be ready to move in behind us and would be delighted to do so.

Senator PERCY. Dr. Rowen and Senator Cranston yesterday pointed out the importance of our relationship with Pakistan, and I concur with that view. Our relationship with Pakistan is very important from many standpoints.

They felt that the honoring of this contract would harm our relationship with Pakistan.

We recently agreed to sell 3,700 TOW antitank missiles to India, however. In your judgment, would Pakistan look more critically upon that particular sale of conventional arms than it would upon supplying fuel for nuclear power usage?

Mr. CHRISTOPHER. Senator Percy, as I said, perhaps when you were out of the room, I feel sure that Pakistan will not be pleased and certainly will not express pleasure over our going ahead with these sales.

On the other hand, I think the implication of your question is correct. Pakistan is far less likely to be basically concerned over our carrying out a 1963 agreement with India than it would be to an enhanced military supply relationship.

I think it is quite unwise for us to be governed solely by the reaction of another country in the region, or particularly by its public reaction. We have to take into account the effect on them. We have to do what is in the interests of the United States, though, and that requires a very careful judgment in each instance. We should not be instantaneously reactive to what the press in another country might be saying.

Senator PERCY. I agree with you that that is in our self-interest. Obviously, it is in our self-interest also to work in cooperation with many of our allies, as in Europe, for instance, on policies that affect all of us. I am sure that we have consulted through the years with European powers who are nuclear powers as to what it would be wise for us to do to arrest proliferation. They have judgments on this and we have exchanged ideas with them, undoubtedly.

Has anyone discussed this dilemma with our European allies? They are well aware of our law. Do we have any judgment as to whether or not, if this sale were made, it would, in effect, put into jeopardy our whole nonproliferation policy?

Mr. CHRISTOPHER. Senator, I think the world is well aware of this particular issue. It is discussed frequently at conventions or conferences. It was certainly before the 44 countries that convened in the so-called INFCE Conference. Without attributing views to any particular country, I would say that if we did not go ahead and fulfill our part of this bargain, it would enhance the concern of our European allies about our reliability as a supplier in this field.

Senator PERCY. Dr. Rowen suggested yesterday that this would be a good time to establish a requirement for the return of spent fuel. He believes that we should try to get agreement from the Indians on the return of the spent fuel from Tarapur to the United States.

What are the implications of his proposal? Is it likely that if his proposal were implemented and we made the request, India would agree?

Mr. CHRISTOPHER. I think I will ask Ambassador Smith to answer that question.

Let me say simply that I think it is quite unlikely, but I would ask him to enlarge upon that answer.

Ambassador SMITH. The implications are that, first, it would be very costly. I have seen estimates of \$50 million to \$100 million to take back that spent fuel.

Second, and perhaps more importantly, would be the question of in what State would we store this spent fuel?

Senator PERCY. Well, I am not offering the State of Illinois. We have a little problem with spent fuel right now. [General laughter.]

Ambassador SMITH. We have not had very much success or interest in getting States to take foreign spent fuel, let alone domestic spent fuel.

We have talked to the Indians about this possibility, but I think they are not interested in discussing things like that with us until they know what our decision is; that is, are we or are we not going to honor this contract.

Senator PERCY. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Senator Glenn?

Senator GLENN. Thank you, Mr. Chairman.

This is truly a dilemma. We all want the benefits of a foreign policy, particularly in the subcontinent of Asia, that will be best for a long time to come. At the same time, our even longer term interests in nuclear nonproliferation cannot just go down the drain.

As I see it, this hearing represents a landmark event in the development of the administration's nonproliferation policy. Today the administration is appearing here in public for the first time, to argue that we ought to avoid our first important test of the Nuclear Non-Proliferation Act.

I do not like pretense. It seems to me that the only thing worse than not having a strong nonproliferation policy is to pretend that we have such a policy. The credibility of our Government is not enhanced by statements which claim we are committed to following one policy, yet through our actions, we are proclaiming very loudly and very clearly that we are following another course.

I can well understand the sensitivity of the administration to charges that another flip-flop in policy is in the works. If the issue of the Tarapur fuel licenses were an easy one, with all the good arguments only on one side, there would be no necessity for this hearing. Like it or not, many of us have examined the implications of a decision to send the fuel at the present time and have concluded that it is incompatible with at least the current state of implementation of the Nuclear Non-Proliferation Act, as intended by the Congress.

I think the NRC has interpreted this correctly, in spite of the statement a while ago in which you said you felt the NRC incorrectly had interpreted the intent of Congress regarding the guillotine provision. I think it interpreted the intent of Congress very correctly.

I think the legislative history that went into the development of this NNPA would back up that view.

So I, for one, cannot pretend that if the Congress lets these fuel licenses go by at that time the law will not have been very seriously undermined.

I, for one, wish that the State Department had spent as much time trying to find ways to agree with NNPA as it has spent trying to say that there is no guillotine provision in the law. I think the history and the intent to that effect has been very clear.

Shortly after the law went into effect, Joe Nye of the State Department was interviewed for a magazine article. It was a "Q&A" interview. He was asked about the 2-year transition period before supply would have to be cut off. Essentially 2 years after the date of the President's signature, which is March 10, we would have to cease exports to countries which have unsafeguarded facilities. This amounts to about five or six countries.

The question was asked: "Can you name them?"

"Answer. India, Argentina, Israel, Egypt, and South Africa." Then there was discussion of Spain.

There was no doubt that, at least at the time, including the State Department's own officials making comments, this guillotine provision

was considered to be very real. Now it appears to be somewhat in doubt.

At the center of the controversy over these licenses is the concern that if they are not approved, the Indian Government will claim that we are in breach of our agreement to supply the Tarapur reactors, and that the Indians, in turn, would thereby be released from their obligations under the agreement, in particular those covering U.S.-origin spent fuel from previous exports.

In this regard, the administration apparently fears the Indians would consider themselves free of their obligation to maintain international safeguards over the fuel and to obtain U.S. approval before reprocessing it to extract its plutonium content. They have already been doing that anyway. This would not be any real change in what they have actually been doing.

Based on our hearing yesterday and on analysis by the staff, however, I believe there is a crucial and a fundamental flaw in this argument which has been overlooked.

Under the United States-India agreement, the United States is obligated to supply only as much fuel as is, and I quote, "necessary for the full loading of the Tarapur atomic power station plus such additional quantity as in the opinion of the parties is necessary to permit the efficient and continuous operation of the station."

Indeed, the Indians are prohibited from having fresh fuel in excess of the amount that is needed to supply the Tarapur reactors.

What needs to be emphasized is that these exports simply are not needed at this time for the "efficient and continuous operation" of those reactors.

In fact, according to a detailed technical study by the NRC, these exports are not needed until February 1982, even allowing for the fact that the exported material would have to be manufactured into fuel rods once it had arrived in India.

I would like to enter into the record a statement of the analysis by the NRC on the subject, "Comparison of Fuel Requirements for the Indian Fuel Fabrication Facility and Tarapur Reactors." This goes into the precise amounts, when they actually are needed, and on what schedule. This backs up the statement I made a moment ago.¹

These exports are not needed until February 1982, then, even allowing for the fact that the exported material would have to be manufactured into fuel rods once it had arrived in India.

In other words, were the United States to reject these licenses, the Indian Government simply would have no present basis for claiming that we had not lived up to the agreement. Only if we continue our embargo past February 1982 could they begin to raise this complaint. By that time we could take vitally important steps to change the current situation.

For example, we could negotiate an arrangement for the return of our spent fuel, or make further progress on the full scope safeguards question. In the meantime, instead of caving in on the basic criteria in the Non-Proliferation Act, we would have enforced it. This would give the Indian Government and the rest of the world an unambiguous signal about the seriousness of our purpose in preventing the spread of nuclear weapons to more and more nations.

¹ See p. 43.

I think that it is important for the members of the two committees in the Senate with jurisdiction over nuclear nonproliferation matters to listen to the arguments of the administration and those with opposing views. The decisions that finally will stand in this case will send a very important signal to everyone regarding the U.S. commitment or noncommitment to a tough nonproliferation policy.

With time not having been of the essence in this regard, I wrote on May 28 to the Secretary of State, proposing that we hold up the shipments temporarily and for several reasons.

First: If we make this kind of commitment, our nonproliferation policy is not to be the policy for the future. Rather we are, in fact, going to take up each application for a license on a case-by-case basis. If that is the case, perhaps we should be very straightforward and change the Nuclear Non-Proliferation Act to reflect this, so that other nations are not misled.

Two other events are going to occur shortly, which would add to any deliberations we might make as far as reassessing the major provisions of NNPA. We have the NPT Conference in Geneva this August, in which we will be getting together with all of our nuclear supplier colleagues. It would be an excellent opportunity to discuss with them what they feel the policy should be. I think for the first year or so that we had the NNPA in effect they did, in fact, follow our lead. Their shipments probably were less than we would have anticipated during that time. That was good.

But, for the last 1½ years or so this has not been the case. They are not following our lead. In fact, it is business as usual. So, perhaps we have to reassess the NNPA.

I think we could benefit from this NPT Conference and the consultations that occur there.

Second: As part of the Nuclear Non-Proliferation Act, we commissioned the GAO to do a study, after the act had been in effect for a couple of years. They have begun this study, with some 20 people or more working on that right now. They are investigating how well the NNPA has operated. Their report is due next March.

I am sure we could speed this up and have it by late this year if it became an important factor.

For these reasons, I thought that it was better, rather than see our nonproliferation efforts go into what I would view as a "highly indefinite state," to say the least, that we take this time period to get the best information from the NPT Conference and the GAO study. At the later time we can make whatever changes the State Department, Administration, and President feel are necessary for what I view as a change in our nuclear nonproliferation policy.

I, for one, do not see how we can stand before the world with a policy that we expect other nations to live up to, while the first time this comes to a test, the most serious test it could have come to, we say well, we will ship and hope for the best for the future.

As I began, we are in a dilemma here. We want the best foreign policy relationship with India that we possibly can have, but we also in the much longer term want to prevent the spread of nuclear weapons.

Let me now go to a couple of specifics.

With regard to the fuel fabrication plant which kept coming into our testimony yesterday and which has been raised this morning, we have no obligation for that fuel fabrication plant. It did not even exist when the contract was signed. Only because we have tried to cooperate with India, we have done her a favor by trying to keep things moving, so that she could move that fuel fabrication plant. But it has no legal basis so far as any responsibility we have. I hardly think that in our efforts to work with India, when we signed a contract for Tarapur, we are automatically obligated to keep material flowing so India's plant 100 miles away also can keep going. I think it is good that we have cooperated with her in the past, but to say that we should pass this exemption to NNPA just to keep her fuel fabrication plant going, which had no connection with the original agreement, to me does not make sense.

The guillotine arrangement that we had in this law was debated long and hard. I feel that NRC has interpreted it in the way Congress intended.

India has indicated that she is going ahead with what are now called "nuclear experiments." They are not called PNE's [peaceful nuclear explosions] anymore but are called nuclear experiments. The word "experiments" now has the same connotation as PNE had, that is it is a nuclear explosion. Mrs. Gandhi has indicated her full intention of going ahead with whatever nuclear experiments she deems she may need.

It seems to me that the question is whether we are to be a party to her nuclear explosions or whether we are to say that we have had enough and we really meant it when we passed NNPA? Are we going to enforce NNPA? If that means that the United States drops out of some contracts we might otherwise have or get, so be it. Or will we change NNPA so that we can participate?

I agree that having American business involved around the world may be the best thing we can have now that other nations are not necessarily following our policy, which they were during the first year or year and a half of the NNPA's operation.

This was a debate that we had at that time, whether the long-term American interests would best be served by American business being out in the world, competing with everyone, trying to sell all of the equipment and everything we could, or whether we should go the other route with NNPA.

NNPA apparently is either not working or is being brought to its demise here, as I see it. Other nations are not following our lead with NNPA. Perhaps it is time to reverse some of our decisions and go back to the other option, which was to get as involved as possible all over the world and hope for the best.

Maybe that is the best way to go. I don't know. But I do know that I wish this had not been sent up here at this time. I wish we had the benefit of what may come out of the NPT Conference this summer and the GAO study now in progress before we had brought this to a head.

This is what I urged in my letter to the Secretary of State. I understand that he did bring it to the President's attention. I am sorry the decision went against that suggestion.

If Congress decides to hold up these shipments, then NNPA will stand. But if the Congress decides not to hold them up, then, at the least we all should get together to decide what changes are needed in the NNPA. It would be my intention to look into that. I will not commit myself to changes right now. But I certainly would want to consider that since I see that our policy now is going to be determined on a case-by-case basis rather than on an overall policy basis.

Mr. Chairman, I have taken up my whole 10 minutes delivering my statement. I did want to get it on the record, however.

Senator Hart requested that some questions be asked on his behalf. I submit those to the witnesses this morning for their reply in writing. I hope that will be included as part of the committee record.

The CHAIRMAN. Very well. It will be included.¹

Senator GLENN. Mr. Chairman, did I indeed take my full 10 minutes? If not, I would ask for the Secretary and the Ambassador to respond to my statement.

The CHAIRMAN. It is all right, Senator. I think a response is certainly in order.

Mr. CHRISTOPHER. Senator Glenn, we know of your deep interest in nonproliferation and in this act. I know that you are aware of the amount of consideration that was given to your letter and your views in this matter.

We have gone ahead because we think it is in the interest not only of our foreign policy but also of nonproliferation.

Where I sharply differ from you, Senator Glenn, is I feel that going ahead with this unique case does not constitute any kind of precedent and does not undermine the act for which you had a large responsibility. Indeed, I would think it is in the interest of nonproliferation for us to recognize the unique sui generis character of this particular shipment or these shipments and not build them into a huge loophole in the act. They do not constitute that. The act very squarely provides for the President taking the action that he did.

Let me get down to some of the factual matters that you raised.

It is important to me to recognize that India filed these applications in September 1978 and in August 1979. I think India is entitled to expect that the United States would act on these applications with relative promptness.

If we fail to act now, if we had failed to go forward at the present time, as I said earlier, my strong belief is that the Indian Parliament would have regarded that as a breach of the agreement and would have turned elsewhere.

Senator, I believe that you are factually wrong with respect to the fabricating plant. The fabricating plant in India is now operating on scrap. It is the only plant that provides fuel for these reactors.

I think it is part of our obligation to supply whatever is necessary for the efficient operation of their reactors which includes giving them a stabilized regular supply for the fabricating plant as well as for the reactors as a whole.

Two things are clear to me.

First: India expects us to act on these applications and if we fail to act, we do so at our very considerable peril.

¹ See p. 117.

Second: There will be a shortage of fuel in India in the relatively near future for its reactors unless we supply fuel so that it can be fabricated there and made available for the reactors at Tarapur.

I believe they are already operating at something less than capacity, supplying less light and less electricity than they normally would because either of the shortage of fuel or the potential shortage of fuel.

So we have a real situation on our hands.

Do we want to go forward with our commitment under the 1963 agreement or do we want to give India a fairly justifiable basis for saying we have breached that agreement?

That is an important issue. I understand that there are arguments on both sides of it. But for me, the right thing for us to do is to go ahead, to treat it as an exception that is justified by the statute and to carry out our nonproliferation policy as strongly as we can in the future.

Senator GLENN. Have you read the NRC analysis of when fuel is necessary over there, and the dates when the shipments could be made?

Mr. CHRISTOPHER. I have not read the NRC analysis, Senator, but I certainly have been advised on that subject.

Senator GLENN. If you could review the NRC analysis and give us your comments for the record, that would be appreciated. I think it would put a different light on this.

Mr. CHRISTOPHER. We certainly will provide that.

[The information referred to follows:]

STATE DEPARTMENT RESPONSE TO NRC'S ANALYSIS OF TARAPUR FUEL NEEDS

The United States-Indian Agreement for Cooperation obligates the United States to sell enriched uranium to India to meet all the fuel requirements of TAPS and further obligates the Indians to use no enriched uranium for TAPS other than that provided by the United States. The Tarapur Atomic Power Station (TAPS) is unique in that it has its own fuel fabrication plant devoted exclusively to production of fuel for those reactors. This Nuclear Fuel Complex (NFC) located at Hyderabad is currently the only source of fuel for TAPS.

The Agreement also provides that the quantity of enriched uranium provided shall not "be in excess of the quantity necessary for the full loading of the Tarapur Atomic Power Station, plus such additional quantity as, in the opinion of the parties, is necessary to permit the efficient and continuous operation of the Station". Since the Nuclear Fuel Complex is essential to the operation of the reactors, in our view this must include provision of enriched uranium for the operation of the NFC. In a letter of June 15, 1978, to Senator John Glenn, then deputy to the Under Secretary of State Joseph Nye stated: "We interpret the amount of material needed for operation to be the amount required to sustain normal operation of the Nuclear Fuel Complex at Hyderabad for the production of TAPS fuel, consistent with the usual method of operating this facility."

To help assure that the quantity of enriched uranium being provided for TAPS is consistent with our obligations noted above, the United States sent reactor management/fuel fabrication experts to India in September 1976 to review the enriched uranium requirements for the NFC and TAPS and to develop projections of future requirements. The report of these experts (the Last-Kiefer Report) has been used since that time as the basis for projecting the enriched uranium required to sustain the normal operation of the NFC and TAPS. A chart from that report showing the projected requirements through the end of 1980 is attached.

According to that projection, the enriched uranium provided under export license XSNM-845 would have been processed through the NFC by the end of 1977. Since that time we have provided an additional 24 tons of enriched uranium, which under normal operations would have met NFC requirements until April 1979. Accordingly, the material to be provided under XSNM-1379 should

have been shipped in early 1979 so as to be available to feed into the NFC beginning in May 1979. This material represents about a one year supply for the NFC so that the material under the second pending license (XSNM-1569) should have been shipped about January-February 1980.

In view of the uncertainties and delays in U.S. approvals for these shipments and the need to maintain the equipment in operational condition and to retain the experienced staff, the Indians have on several occasions been forced to extend the operation of the NFC by recycling of scrap material. During these periods the NFC has operated at about 20 percent of capacity and required additional downtime for clean out. Currently they are operating the NFC entirely on recycled scrap while awaiting the next shipment of fuel.

Because of delays in fuel supply, the Indians have also operated the plant at only about 60 percent of capacity and rationed power to industries in the region since early 1977 to stretch their inventory of fabricated fuel assemblies and avoid being forced to shutdown the station completely if the U.S. failed to supply additional fuel.

The NRC analysis (copy attached) concludes that "air shipment of XSNM-1379 probably can be made as late as August 1, 1980, without jeopardizing continued normal operations at the NFC" and "XSNM-1379 could be shipped 18 months later than NFC operations require, and still meet TAPS (Tarapur Atomic Power Station) needs." The NRC analysis leading to these conclusions is based on a number of assumptions which we do not believe are consistent with the U.S. commitment to provide fuel to permit the efficient and continuous operation of the Tarapur Station. First, the NRC analysis accepts as given both past delays in meeting the needs of the fuel fabrication facility which were caused by U.S. delays in approving enriched uranium deliveries over the last three years and the fact that the Tarapur reactors have been operated at only about 60 percent of power for several years due largely to uncertainties about fuel availability from the United States. The NRC analysis also assumes that the enriched uranium will be shipped by air freight rather than the more economical (a factor of ten less) surface shipment. Further, it assumes that extended interruptions of NFC operation or operation on scrap at 20 percent capacity (the current situation) is consistent with "efficient and continuous operation" of Tarapur.

The Executive Branch does not believe that these assumptions are consistent with sustaining normal operation of the facility as provided for in the Tarapur agreement and that the projections of the Last-Kiefer report are a more rational basis for determining the validity and appropriateness of export dates.

The CHAIRMAN. Senator Cohen?

Senator COHEN. Thank you, Mr. Chairman.

I will not take a great deal of time by reiterating much of what Senator Glenn has spoke about.

Mr. Secretary and Mr. Ambassador, my concern is that this will be perceived as the United States raising a white flag of impotence and weakness once again.

I suppose there is some irony that the OPEC nations have us over a barrel. Saudi Arabia, for example, has said that the United States should not take any action to fill its strategic petroleum reserves. In other words, we cannot take any action to insulate ourselves from the OPEC extortionist pricing policies, or else we will face the threat of a reduction in the supply or the production.

Now it appears that India has us over a barrel regarding our nuclear nonproliferation policy, and we are about to be rolled over that particular barrel.

I don't understand how you can say that this is not a precedent, that this act provides for Presidential action and therefore it is not a precedent.

There is an escape hatch in the language. The President, in order to approve the export, has to waive it on the grounds that it would be seriously prejudicial to the achievement of the U.S. nonproliferation objectives or would otherwise jeopardize the common defense and security.

Well, obviously, if the President invokes that particular provision, there never will be a precedent because he is acting within the full scope of the law.

This gets back to a problem that I have. There is the perception that is rampant throughout the world that every time we come to a confrontational situation, the United States retreats.

We can go back to last summer, for example, when the President said that the presence of Soviet troops in Cuba was a status that was unacceptable, and later he retreated from that particular position.

Last November I recall the President said that he would never negotiate with Iranian militants so long as the hostages were held in captivity. Well, we began negotiations. He said that we would never agree to the formation of a U.S. commission so long as our people were held hostage, yet we agreed to the formation of such a commission.

Frankly, I think this is a continuation of that perception.

I recall when President Carter was critical of President Ford back in 1976 because of his handling of the situation in India. He said at that time, and I will quote:

The State Department has become that country's chief advocate and apologist, even though India is not a Non-Proliferation Treaty party, used our past aid to explode a nuclear device, and even though there are no safeguards to prevent this from happening again.

I would ask how do you reconcile President Carter's statement in 1976 with his proposed action today?

Mr. CHRISTOPHER. There is no evidence that India intends to go forward with another nuclear explosion.

Senator COHEN. Senator Glenn has said that Mrs. Gandhi has indicated that she intends to continue nuclear experiments.

Mr. CHRISTOPHER. I don't think there is any evidence of that. She has said that they are going to be used for peaceful purposes, which I have said, accurately, does not exclude the possibility of a nuclear experiment; but there is no evidence, and none has been adduced here, Senator, that India intends to go ahead with a nuclear explosion.

Senator COHEN. What does "nuclear explosion for peaceful purposes" mean in your mind?

Mr. CHRISTOPHER. I don't think there is a nuclear explosion for peaceful purposes. I think there are nuclear explosions, period.

Senator COHEN. So how do you accept the rationale that they will continue for peaceful purposes?

Mr. CHRISTOPHER. Their conclusion is that there can be nuclear experiments in the category of explosions which they would fit under the rubric of peaceful purposes.

I would disagree with that. I believe our laws would require us to cut off any supply if India has another nuclear explosion.

I was simply addressing the factual question. I do not believe we have evidence that India is intending to have a nuclear explosion for peaceful purposes or otherwise.

Senator COHEN. I would simply say that that is a classic exercise in Orwellian "newspeak" if we accept that rationale, that they are going to engage in nuclear experiments which may include the possibility of an explosion, which we all agree does not entail peaceful purposes.

That is really using Mr. Orwell's "1984."

Mr. CHRISTOPHER. Senator, there is some misunderstanding here.

I did not say that they were going to go ahead with a nuclear experiment. We have no evidence to that effect. I was simply saying that their commitment does not rule it out.

I think you can understand the factual difference between those two statements.

Senator COHEN. If the United States is willing to waive it in this case to a country that has misused nuclear fuel in the past—at least on this the evidence is clear—what is going to be our response to, say, Israel, Japan, or someone else who might seek a waiver? Do we do what Senator Glenn is suggesting, the alternative of approaching on a case-by-case or ad hoc basis? Is that the alternative that we have?

Mr. CHRISTOPHER. Senator, these applications are within a very particular time period. They were filed during the so-called grace period. I have referred to the only other countries that have applications during that period, all of whom have accepted full scope safeguards or we believe, are on the verge of doing so. So I do not think we are likely to have any comparable case.

Indeed, neither of the countries you have mentioned has filed applications within the grace period.

Ambassador Smith would like to comment?

Ambassador SMITH. Senator, we have no nuclear cooperation with Israel, so the likelihood of that country applying for nuclear aid from us I think is very low.

In the case of Japan, it is a member of the Non-Proliferation Treaty. It has taken a solemn international commitment to have full scope safeguards.

Senator COHEN. What about Pakistan?

Ambassador SMITH. We have no nuclear relations with Pakistan at all.

Senator GLENN. Will the Senator yield?

Senator COHEN. I yield.

Senator GLENN. Mrs. Gandhi was asked some questions in the Indian Parliament and made a statement about this. I will cite part of her statement, which I will take out of context in the interest of time. She said, "We remain committed to the use of atomic energy, whether for peaceful purposes, or we have to have explosions or implosions, whatever is necessary, for our development and other peaceful purposes. This will be done in the national interest."

I think she makes her position pretty clear.

The press reported this and it was not denied. I will not read this whole document, which I will submit as part of the record, but it indicates that the press interpretation in India was that she was going ahead with additional peaceful nuclear experiments, as they are now called, which are really just nuclear explosions.

[The information referred to follows:]

[Bombay—The Times of India in English Mar. 20, 1980]

TERMINATION OF UNITED STATES-INDIAN NUCLEAR AGREEMENT URGED

(By Inder Malhotra)

Almost all delicate diplomatic negotiations involve an element of hypocrisy and double-talk. But these unhappy attributes of diplomacy have been carried too far in the uneasy Indo-U.S. nuclear dialogue. This has been the case particularly since Mr. Morarji Desai was inveigled into accepting the hare-brained scheme to appoint an international panel to devise an acceptable version of full-scope safeguards from which even he had to wriggle out later.

What has been going on of late is best illustrated by a brief, chronological account of events since early January when a new phase in the talks over the supply of the U.S. nuclear fuel to Tarapur began with Mrs. Gandhi's return to power.

President Carter sent her a long letter on the U.S. response to the Soviet intervention in Afghanistan in the course of which he also included a reference to the vexed question of fuel for Tarapur. According to authoritative sources, the U.S. President outlined a three-point approach. First, that the problems had become unduly complicated because of the difference between the two countries over full-scope safeguards insisted on by the U.S. Nuclear Non-proliferation Act (NNPA) and that in an election year little could be done to narrow down these differences. Secondly, a future settlement could perhaps be facilitated if the two pending and overdue shipments could be sanctioned which he was willing to do. And this brought him to his third and most ticklish point—that the Indian government should publicly give such assurances on its nuclear policy as would dissuade the U.S. Congress from using its authority under the NNPA to overturn, within 60 days, the executive sanction of the two shipments for Tarapur.

REACTION

The Prime Minister's reaction understandably was that the question of Tarapur fuel—governed by an agreement between the two governments that has the force of a treaty—could not be mixed up with Afghanistan and other developments in the region. She therefore sent a reply to Mr. Carter on all subjects other than Tarapur which continued to be discussed through normal diplomatic channels. On a visit to New Delhi in some other connection, the chief U.S. negotiator on nuclear issues, Mr. Thomas Pickering, took the opportunity to discuss the vexed question with the chairman of the Atomic Energy Commission, Dr. Homi Sethna, and the secretary in the external affairs ministry, Mr. Eric Gonsalves. Some days later Mr. Gonsalves had occasion to go to Washington where the subject was gone over again.

During these discussions it was made clear that there was no question of this country accepting the U.S. demand for an assurance that it would abstain from peaceful nuclear experiments. For the rest, there was reluctance on New Delhi's part to reiterate its determination to implement the Tarapur agreement, in letter and spirit, if the United States also faithfully fulfilled its obligations. But if the United States reneged on its contractual responsibilities, it could not demand, as it evidently was in terms of President Carter's letter to Mrs. Gandhi, that the Tarapur atomic power plant should continue to be subjected to all the safeguards and restrictions that apply to it at present. More specifically, the curious U.S. suggestion that even in the event of its refusal to supply enriched uranium for Tarapur, India should not reprocess the plant's spent fuel was wholly unacceptable.

It was in this context that Mrs. Gandhi wrote to President Carter pointing out that India's commitment to using nuclear technology for purely peaceful purposes was complete and unreserved. That such use included peaceful nuclear experiments when required in the national interest and that there was no further need or scope for assurances by India on this subject. Assurances, she added, were required from the United States about the continuity of timely fuel supplies to Tarapur. This letter was dispatched to Washington nearly a fortnight ago and some days later Mrs. Gandhi had occasion to outline the government's nuclear policy in the Rajya Sabha.

DECLARATION

And yet, day after day, the official spokesman of the U.S. State Department goes on declaring that the U.S. Government is engaged in the "diplomatic process" of seeking some assurances from India. The unstated and unwarranted implication is that a decision by the White House on the pending shipments of 19.8 tonnes each is being delayed because of the time being taken by New Delhi to respond to Washington's request. The U.S. Ambassador, Mr. Robert Goheen, has made the confusion worse confounded. He has declared in Calcutta that the U.S. Government has sought some "clarifications" about Mrs. Gandhi's recent statement on nuclear policy. But inquiries from south block indicate that no query has been received in this connection either here or in Washington.

Clearly, the U.S. authorities are engaged in an attempt to create an impression as if, over Tarapur, the ball is in India's court rather than America's though, in fact, the position is precisely the reverse.

They have also drawn another red-herring across the trail by inspiring reports in American newspapers that if only India would go to the World Court to enforce its right to get the nuclear fuel for Tarapur, this would give President Carter enough leverage to sanction the overdue shipment. The sympathetic camouflage notwithstanding, a more sinister trap cannot be thought of.

For one thing, if anyone in New Delhi is foolish enough to take the issue to The Hague, the whole matter can hang fire for years, instead of being expedited. For another, such a step would give the Americans an excellent opportunity to press this point about the reprocessing of Tarapur fuel. Indeed, implicit in the news items in question is the threat that the United States might on its own go to the World Court to prevent the reprocessing of the spent fuel.

It is crystal clear therefore that, whatever the pretence on either side, the Indo-U.S. nuclear dialogue has reached its moment of truth. There is no meeting ground between the two sides and the sooner this fact is amicably recognized by both sides the better for all concerned. A friendly termination of the agreement which has already broken down for all practical purposes—would be more beneficial than the prolongation of an acrimonious debate which already threatens to embitter the overall relationship between the two countries.

BROUGHT HOME

During the diplomatic exchanges in recent weeks, it has been brought home to the United States that in one essential respect the framework of the nuclear dialogue has become worse than before. Formerly, the United States was guilty of applying double standards, treating the nuclear haves, including China, most favourably and trying to get the nuclear have-nots short shrift. Now it is adopting triple standards. For, while the pressure on India to accept full-scope safeguards in one form or other continues, the United States is evidently reconciled to a nuclear Pakistan. In any case, even if the United States concern over Pakistan's nuclear ambitions remains undiminished as some American sources claim, the

resumption of U.S. economic and military aid to Pakistan is no longer conditional on the kind of assurances on nuclear policy that are being so insistently sought from this country.

In the event of the termination of the Tarapur agreement, one way or other, it would be futile to go to third parties for enriched uranium though this course has been suggested by Mr. Goheen at Calcutta and others earlier. This is because even other suppliers are almost certain to insist on unacceptable safeguards and assurances. It is no doubt true that the development of the alternative mixed-oxide fuel cycle indigenously will take time. Even so, this is India's best bet. In the meantime the spent fuel can be easily reprocessed at the facility for this purpose that has been lying idle and the Tarapur power plant kept going at a lower capacity than at present by the fuel in the pipeline.

If the Americans are really keen to prevent this denouncement, they will have to come forward with adequate nuclear fuel immediately so that Tarapur can be kept going until the USA's obligations to this country and its law on non-proliferation can be no other basis for continuing the conversations which have already turned into a dialogue of the deaf.

Ambassador SMITH. As I understand it, Senator, the Indian position is that India has the right to conduct experiments. As far as we know, India has no plans to do so. If the Indians did so, we would cut off any nuclear assistance to them automatically under another law.

In my judgment, the deterrence to their going ahead would be much greater if we were supplying them than if we were not supplying them.

Senator GLENN. Thank you.

Thank you for yielding, Senator.

Senator COHEN. I would only suggest that we have found ourselves in a situation in which we allow other nations at least to flaunt what we have laid down as a rule of law in this country. If we mean what we say, and this is the point I tried to make yesterday, if we have laws on the books which either are ignored or unenforced, that tends to breed a contempt for the rule of law.

I think we are going to lose either way on this, Mr. Secretary. I think it is almost a no-win situation. There are adverse consequences in either step that we take. Your judgment, it appears, is that it is less adverse if we approve this than it would be without it.

I simply find it difficult to accept the proposition that whenever we come into a confrontational situation where our rules of law run into conflict with the existing reality, where there is, for example, an invasion by the Soviet Union into Afghanistan, we respond now at least by trying to pull India back into better relations with the United States. I think that our rule of law suffers. I think the image of the United States once again will be seen to be vacillating, to be equivocating, and to be impotent.

Senator GLENN. Would the Senator yield again for 30 seconds?

Senator COHEN. I yield.

Senator GLENN. I saw some heads wag down in the room when I referred to press reports, as though it was not true.

Let me quote from the Times of India, which commented on the whole nuclear picture. Again, this is taken a bit out of context. This is from the Times of India on March 20, 1980.

It was in this context that Mrs. Gandhi wrote to President Carter, pointing out that India's commitment to using nuclear technology for purely peaceful purpose was complete and unreserved, that such use included peaceful nuclear experiments when required in the national interests and that there was no further need or scope for assurances by India on this subject.

I think that is pretty clear.

Thank you for yielding, Senator.

Senator COHEN. There is another point that I would make.

Yesterday, Senator Glenn pointed out that the Governmental Affairs Committee is conducting hearings under Senator Jackson's chairmanship dealing with the whole issue of the transfer of technology.

We have found over the years that the United States has been the principal instigator of creating exceptions to some of the restrictions that we have proposed, at least regarding sale of certain technology. One of the principal rationales that we have used is the argument of foreign availability, that if we don't supply it somebody else will.

It seems to me that this is almost a continuation of that particular line of thinking, that if we do not transfer certain technology, in this case, fuel, then they will get it elsewhere, so we are better off in supplying it.

I would simply say, so far as our transfer of technology to the Soviet Union and the Warsaw Pact countries is concerned, it has proven to be a rather devastating policy that we have followed. It has to be corrected. I suggest that it has to be corrected rather soon.

Mr. CHRISTOPHER. Mr. Chairman, I wonder if I could respond briefly to one point.

I doubt if Senator Cohen and I are going to come into agreement on this, but I think it is worth saying for the record that if you are concerned about the rule of law here, the agreement that we reached with India in 1963 to supply fuel for these reactors has a very important rule in determining what the rule of law is that needs to be complied with here.

The world is going to see us having turned our back on an agreement with another state at a time when it needs fuel.

I do not want to get into litigation of that particular issue before the committee here in open session, but that will be the perception of the Indians and that will be the perception of a number of countries around the world. The rule of law which you have raised is certainly more complicated than your comment would indicate and has more than one side.

The CHAIRMAN. I am moved to comment that when the Senator commenced his question, he referred to what appeared to be a contradiction between what President Carter said when he was running for office and what he says now. If there is such a contradiction, it is not the first time that this has happened in our political experience.

I remember in 1960, at the Kennedy Convention, Lyndon Johnson was counseling with Mr. Democrat at the time, the Speaker of the House. Some time after midnight, the Speaker of the House told him that one thing he must never do, whatever else he decided, was to accept an offer by the nominee, Mr. Kennedy, to run as his Vice Presidential candidate.

During the night the offer was made. Early the next morning, the Speaker called Lyndon Johnson and said, "By all means, accept it."

Johnson said, "Mr. Speaker, the last thing you told me last night was never to accept. What accounts for your change of position?"

Thereupon, the Speaker said, "This morning I am a much wiser man." [General laughter.]

So, perhaps that needs to be taken into account, too.

Senator COHEN. Would that be consistent, Mr. Chairman, with the statement that the President had learned more about the Soviets in the last 3 days or 3 weeks than he had known before?

The CHAIRMAN. Possibly.

They tell me that being President is a very intense educational experience. [General laughter.]

Senator Tsongas?

Senator TSONGAS. I might say that the one hope I have if next year we have Mr. Reagan as President is that he will not fulfill all of his campaign promises. [General laughter.]

Mr. Secretary, I am not decided on this issue genuinely. My inclination is to be opposed to the sale.

Let me raise a couple of issues with you. The first is this. We took a great deal of time in this committee last week and today to talk about what you see as the progress India is making toward a non-aligned position in some of the statements that have been made recently.

Those are viewed as very important developments.

I have in front of me the Washington Post article of June 14 where India and Iran arrived at an understanding on increasing trade.

Let me ask if this has been covered by the committee in my absence?

Mr. CHRISTOPHER. No, sir, it has not been raised.

Senator TSONGAS. The question I have is this: They knew that this was before the Senate and before the Congress. The President signed the Executive order today and yet, literally 4 or 5 days before that, India arrived at an agreement with Iran which basically undermines the effects of the Western trade sanctions which you and your Department are working so hard to implement.

Does that not suggest a remarkable insensitivity, not only to what we think, but to the interests of the United States as well?

I would imagine that that was of some irritation to you when it was done.

Mr. CHRISTOPHER. Senator Tsongas, I certainly do not expect that everything India does will be either satisfying or acceptable to the United States. India, like other countries, especially those in the non-aligned movement, will do what it thinks is in its interest.

I guess I would be disappointed in India if it felt that by taking some contrived position it could affect a decision of this great body on these applications.

Naturally I was disappointed to read what India had done to the extent that it was inconsistent with our sanctions, and I think it tends to be. On the other hand, I think our duty here is to try to determine what is in the best long-term interest of the United States. I think an enhanced relationship with India is. I think the refusal to go ahead with these licenses will have a devastating, negative effect on that relationship.

I don't think we can watch for India actions and expect to be pleased by each one. But I am somewhat encouraged by India's overall action to what I think is the most important geopolitical issue in the world today, and that is the invasion of Afghanistan.

Senator TSONGAS. Well, as you may know, I am not one who argues that anyone should parrot the U.S. line. On the contrary. But I do think the timing of this action was remarkable, considering the deliberations before this body.

I don't know what your view of the Senate is, but outside events do influence how people vote around here. I would assume that the Indians are sophisticated enough to know that.

Let me raise another issue.

Indira Gandhi is no neophyte to international politics. She plays us quite well and she plays the Soviets quite well. I think she probably is as experienced in this as anybody could be.

Why do we assume that it is in the interest of India to have the Soviet embrace be any more intensive than it is? We assume the Indians will go to the Soviets for fuel and somehow that this implies India will become more dependent upon the Soviets.

I buy that argument in general, when we are talking about military aid, as we were yesterday when we were talking about North Yemen. But they are very close. There have been historical animosities between these two countries, on the other hand.

So, why would she not be hesitant about that kind of relationship with the Soviets, as we would be, in terms of that relationship?

Mr. CHRISTOPHER. I think she will be hesitant about it, Senator, especially in light of the invasion of Afghanistan. But the Indians need the fuel in order to supply light and electricity for the country. I think Mrs. Gandhi will regard the adequate supply of fuel as being a domestic imperative.

India's reactors are now operating on a reduced power basis because of the uncertainty of the U.S. supplies. I don't think she will permit that to continue. I think in her domestic interests she probably will be unable to do so. My own judgment is that she will take the fuel from the Soviet Union if we turn her down because she will think that it is only a small additional reliance on a country with which she already has a relationship.

I think it is an important increment and one that we should avoid.

Senator TSONGAS. I have spent some time trying to understand what is and what has been in her mind these last few weeks as this issue has unfolded, and, for the life of me, I cannot understand it.

One possible conclusion to which I have come is maybe she does not understand how strongly the Congress feels about nonproliferation. Perhaps she feels that she simply can make an argument—and I think there are arguments for the sale—to the administration. She thinks that it would agree and that that is all there is to it, not really appreciating the role of the Congress and the fact that Congress does not ultimately bear foreign policy responsibilities in the sense of the results. We may make foreign policy, but we do not live with the results of it. Unfortunately, Mr. Secretary, you do. That is a different perspective and nonproliferation is a serious issue on the Hill.

Has that been discussed? Do you think she is mindful of this?

Mr. CHRISTOPHER. Yes; I think she is very mindful, Senator Tsongas.

Unfortunately, we all live with the results of our foreign policy—you, I, and 220 million other Americans. That is what makes this so difficult.

Viewed from her perspective I think the situation looks this way.

She feels that she is operating under a 1963 agreement, which was entered into solemnly by both countries, which was firmed up in a fuel supply contract in 1966, and which was extended in an amendment which she entered into at our request in 1971.

She sees that agreement as being binding. She wonders why we do not comply with it. She also feels that she filed the applications for these two shipments well within the grace period and so she feels in no conflict with the policies of full scope safeguards which are reflected in the act.

This agreement is one which was discussed with the Congress at the time it was entered into.

So, from her standpoint, viewing this only from the eyes of Mrs. Gandhi, she says, "United States, why don't you go forward and comply with the agreement which was entered into between our two countries? Why do you threaten to break it?"

Senator GLENN. Paul, would you please yield?

Senator TSONGAS. Yes.

Senator GLENN. Does that then mean the South African application, which has been in since 1975, can be acted on 4 or 5 years down the road from now and be exempt from the provisions of NNPA?

Mr. CHRISTOPHER. Senator, as I said earlier, we do not intend to go ahead with fuel applications or fuel shipments to South Africa until it does not one, but two things: that is, until it accepts full scope safeguards and until it agrees to comply with the NPT.

Senator GLENN. Thank you for yielding.

Senator TSONGAS. Well, the legal question may be very clear in her mind, but it is not really clear in mine. It is not clear either to the Nuclear Regulatory Commission. As I understand it, it is not even clear to your Department, in which there has been a great debate as to which position should be arrived at.

I would feel much more comfortable if I felt that there was a sensitivity on her part to the proliferation issue and to the issue that was raised regarding the question of the hostages.

I am not one to go around making that the pivotal decisionmaking point. But I do suggest that it gives you an insight into where she is coming from. I find that very troubling.

Thank you, Mr. Chairman.

The CHAIRMAN. Congressman Markey has asked to be recognized. He has been patient and has waited for the Senators first to ask their questions.

As a matter of courtesy we welcome him here to the other side of the Capitol. I recognize him at this time.

Senator TSONGAS. Mr. Chairman, I will acquiesce to his asking questions if he just does not get used to being a Senator. [General laughter.]

Representative MARKEY. You assume that there will not be another vacancy, soon, and I have not accepted that as definitive.

Senator TSONGAS. Neither have I.

Representative MARKEY. Mr. Chairman, I thank you for the courtesy that you extend to me in allowing me to participate here today.

Mr. Secretary, at the present moment I am circulating a resolution of disapproval in the House of Representatives to override the President's Executive order that gives the green light to ship nuclear fuel to India.

Last week, I sent a letter, signed by 62 Members of the House, representing a broad, bipartisan coalition, urging President Carter not to capitulate to the demands of the Indian Government to ship urani-

um fuel, demands that are made in the face of India's recalcitrant refusal to accept full scope safeguards and inspections on all of its nuclear facilities.

It is my personal view that the House will move quickly to block, by a wide margin, the sale of nuclear fuel to India. I hope the same will occur on the Senate side.

It will be a lopsided vote against the President, which will be a serious political defeat for him with international implications for the U.S. image abroad. But the mood of the House is clear on this issue. The United States should not allow itself to be blackmailed by the Government of Prime Minister Gandhi on a crucial national security issue of nuclear nonproliferation.

The choice is simple: should the United States stand by its principles and defend its antiproliferation policy, a policy which was enacted into law in 1978, with only three dissenting votes in the entire House and Senate, or should we submit to Indian pressure and supply more nuclear fuels, even though India rejects international safeguards and explicitly reserves its option to use civilian nuclear materials for nuclear bombs? To a vast majority of the House, nonproliferation is a crucial national security issue which protects the United States from the specter of nuclear threat emanating from virtually every region of the world.

Mr. Secretary, the way I look at it, and what I am taking from your testimony, is that we no longer have a nuclear nonproliferation policy. What we have is a selective proliferation policy. What we are allowing is for Prime Minister Gandhi, by her stonewalling, to set an example to the other countries in the world that if they are recalcitrant, if they refuse to abide by the restrictions which we place upon the Indian Government, they, too, can be sure that they might also be able to dictate our nonproliferation policy.

I think what we are witnessing here today is the collapse, the failure, of our nonproliferation policy. Indeed, we are sending a signal to the rest of the world of our inability to stand by the principles which we so correctly enunciated 2 years ago with our Non-Proliferation Act. I think we would set a very poor precedent for our future negotiations with other countries which would be seeking similar kinds of nuclear shipments from the United States.

Would you comment on that, please.

Mr. CHRISTOPHER. Congressman Markey, you and I view this matter differently. I cannot see it with the simplicity that you do. It seems to me that this is not an abrogation of our nonproliferation policy. On balance I think it advances our nonproliferation policy. We do not intend to abandon that policy. Over 110 nations have signed the Non-Proliferation Treaty. We have agreements for nuclear cooperation with scores of countries.

This happens to be a very particular situation in which we have a longstanding commitment to supply nuclear fuel to India. On balance, we think it is better to keep that agreement in effect than to have it abrogated.

I feel that the consequences of not going forward with these shipments will be to see the abrogation of that agreement and the loss of the commitment that we do have from India. In effect our agreement with India and also to keep in effect the improving relations that we have with India on a political front.

The most sound approach to this problem, it seems to me, is to keep Now I cannot gainsay your counting of votes in the House of Representatives. All I can say to you is that the President and his advisers feel that on balance we should go forward with these shipments because they are in the best interests of the United States.

I feel that the Congress, when it looks at the matter, when it considers the pros and cons of it, will agree that these shipments should not be denied to the Indians.

Representative MARKEY. But we do that in the face of reports from India to which Senator Glenn referred, that Prime Minister Gandhi, in testimony before the Indian Parliament, indicated a clear intention to keep her nuclear options alive in the future. It is clear that we, as a country, ought to accept the fact that Mrs. Gandhi will never accept full scope inspection of her nuclear facilities and that everything else we are talking about is just so much smoke. We have a clear indication of the Indian Government's attitude toward our nonproliferation policy, a clear intention of its direction toward expansion of its nuclear program. We are trying to cut a very fine point here in looking at the semantics of her statement. I think we have to look more at her actions than we do at her words.

In 1974, India exploded a bomb and we did nothing. Ambassador Smith says if the Indians explode another one, we will cut off our nuclear supplies. Well, I don't think that is clear. I think there would be ample opportunity for this administration or the next one to take advantage of the exceptions which now are available to this or any subsequent administration where the national security is "threatened" or our nonproliferation policy is advanced.

This is our real test. This is the place where we have to draw the line. If we allow India to breach the policy which we have established as our national nonproliferation policy, I think we will have made a very grave mistake.

Mr. CHRISTOPHER. I certainly have complete agreement with your determination to forward the nonproliferation policy, Congressman. My own judgment is that whatever Mrs. Gandhi's present intentions with respect to nonproliferation policy—and I would have to say they are somewhat ambiguous—I can assure you that if we deny these shipments to India, the chances of its adopting full scope safeguards are much less than they would have been the day before.

Representative MARKEY. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Are there any other questions of these witnesses?

Senator PERCY. Yes, Mr. Chairman.

Senator GLENN. Yes, I have some.

The CHAIRMAN. I think it is clear that we will not be able to get to the next panel of public witnesses which we had hoped to hear today.

I apologize to the panel, but time is running out. I hope that since the members of the panel do come from Washington, it will be possible to arrange for them to come back at another time to present their testimony on this matter.

So, we will complete the hearing this morning with these witnesses and the questions that remain for them.

I recognize Senator Percy.

Senator PERCY. Thank you, Mr. Chairman.

I think the question does come up now very clearly as to whether this is the place to take our stand or whether we should take it at another point where there is no ambiguity.

The problem I have, as one of the authors of the bill, is this: When we have a judgment from the administration and when we have some doubt among ourselves as to whether this is not a shipment in the gray area, and when we will come to a time when in the not too distant future that a matter will arise where there will be no gray area, should we wage the battle now or then?

I have the President's Executive order before me, which I did not see until this morning. The President says this:

I do, in fact, regard these export applications as having fallen within the statutory grace period before the full scope safeguard requirements of section 128a takes effect. Thus, my authorization of these exports does not constitute a precedent.

I think it is important that we establish that on the record, that this is not a precedent, at least in the judgment of the administration.

The President says further, "These exports will help us to maintain a dialog with India," and so forth. Now, speaking personally, from my own discussions with them, I am not too hopeful about that, but at least we can carry that on. This is important:

The exports will avoid the risk of a claim by India that the United States has broken an existing agreement between the two governments and has thereby relieved India of its obligation to refrain from reprocessing the fuel previously supplied by the United States.

Supply of this fuel will also ensure the continuation of safeguards and other U.S. controls on disposition of U.S.-origin fuel that has been supplied to India.

The whole question in my mind boils down to whether we would be not honoring an agreement, whether we would be looked upon by many others in the world as not honoring an agreement, and whether, in a sense, we would free up India to do something that we certainly would want to prevent, if at all possible.

My own recollection of the negotiation of this agreement—and there were final negotiations with the administration in 1977 so as to avoid a flood of applications that would come in under the September 10 date—is that we then extended and put in one more deadline. That was the March 10 deadline by which shipments would be made.

It would be unconscionable for us to have put that in there as clear notice, to have them file applications that could well have been shipped before the deadline shipment date, and then, by our unilateral action, prevent the shipment being made when it was all in our hands. As I see it, India was ready to receive shipment at any time.

I would like to put the question to you, Mr. Secretary, of what really happened during that period of time, if it was our intention to extend the date so as not to get into the problem of a backlog of applications being submitted to us and rushed in to us, that has prevented the shipment. What legal authority stands behind the President's assertions to Congress that we might risk the claim by India that the United States has broken an existing agreement and thus relieved them of all of the restraints that we now have on them, which would, in a sense, be totally contrary to everything we have ever tried to do in nonproliferation? We would be the perpetrators in that case, then, if India has legal grounds. Already the President of the United States has given India the legal ground to stand on. Is the President basing

his judgment on an opinion from the Attorney General? If so, can this committee have a copy of that opinion? Is it an opinion of his own counsel? Just what is the authority for this? Is it State Department counsel?

Mr. CHRISTOPHER. Senator, you have made several points, many of which I agree with.

Let me go back a few paragraphs and then I will come to your final question.

Congress provided the grace period in the statute. I think you have defined as well as anyone I ever have heard how that grace period ought to be interpreted; that is, there is one fixed deadline and there is a second deadline for shipments, but the second deadline needs to be interpreted in terms of whether there is a reasonable probability of shipments within the period.

We feel that the flexibility provided by the Congress in giving the grace period should be taken advantage of here to see if some way can be worked out either to get full scope safeguards or to work out an amicable termination of the agreement.

What the President has said, and I think has quite carefully said, is that the exports will avoid the risk of a claim by India that the United States has broken an agreement.

I have no doubt in my mind that if we do not go forward with these shipments, India will claim that we have broken the agreement. There are various things she might do if she feels that the agreement is broken. There are international fora to which she might go to seek an adjudication.

I doubt if she will do that. I think she will simply state that there has been an abrogation, that she therefore is freed of her responsibilities under the agreement to go ahead and do the things that I outlined in my statement which I think would be so adverse to us.

That is what I think we ought to avoid. That is why I think we ought to use the advantage of the grace period provided by Congress in order to either get an acceptance of full scope safeguards or work out some termination that will not have the nonproliferation consequences that would be so adverse.

What has happened during the intervening period? Unfortunately, a good deal of the time has been taken up by the processing within our own bureaucracy. A good deal of the time has been taken up because other licenses were pending. I would like to be able to furnish for the record the actual time that was taken by the NRC.

As you know, other applications were backed up behind these, and they finally came out processing the two of these together. That is why we are where we are today.

I think that is the essence of your question.

Let me now go back to your final question, Senator, and say that the President has not indicated that the United States will be breaching an agreement, but he has indicated that going forward will avoid the risk of a claim by India that we were breaching an agreement. I would have to say that it would not be an insubstantial claim.

Senator PERCY. Can we get some backup on the legal judgment?

I do think to research the history of the legislation is an important point.

Mr. CHRISTOPHER. We would like to be able to submit, Senator, an opinion on this.

[The information referred to follows:]

REVIEW PERIOD FOR APPLICATIONS TO NRC FOR FUEL AND EQUIPMENT EXPORTS FOR USE IN TARAPUR ATOMIC POWER STATION (TAPS)

NRC No.	Date received in executive branch	Description	Date extended	Date reported to Congress	Date to NRC	Remarks in congressional report	NRC or executive branch rationale for delay
XSNM01379	Oct. 18, 1978	487.3 kg U ₂₃₅ in 19,858.8 kg uranium enriched to 2.71 percent for TAPS reload.	Dec. 15, 1978	Dec. 27, 1978	Mar. 28, 1979	"Final executive branch action on XSNM01379 has been delayed pending review of the quantity of uranium fuel proposed for export and its intended use."	NRC rationale: NRC was awaiting executive branch response to letter dated Aug. 15, 1979 which requested an executive branch assessment of the impact of the changes in the Indian Government on the previously submitted executive branch recommendation and analysis.
XSNM01569	July 4, 1979	do	Nov. 1, 1979	Nov. 28, 1979	May 7, 1980	"Executive branch action on application XSNM01569 has been delayed pending further policy review."	Executive branch rationale: Executive branch recommendation and assessment could not be completed until consultations were held with new Indian Government on nonproliferation issues.
XCOM0240	May 9, 1979	Miscellaneous replacement parts for TAPS such as ion chambers, thermal sleeves, control rod drive parts, etc.	NA	NA	June 11, 1979	NA	NRC rationale: NRC was awaiting executive branch response to letter dated Aug. 15, 1979 which requested an executive branch assessment of the impact of the changes in the Indian Government on the previously submitted executive branch recommendation and analysis.
XCOM0250	May 16, 1979	6 traversing incore probe detector assemblies for TAPS.	July 13, 1979	July 13, 1979	Oct. 22, 1979	"Final executive branch action on this application has been delayed pending review of the quantity of components required for the station end-use." (Stockpiling concern.)	Do.
XCOM0376	Mar. 19, 1980	Miscellaneous parts and components for TAPS primary coolant and other pumps.	NA	NA	May 13, 1980	NA	NA.
XCOM0381	Mar. 20, 1980	Zircaloy-4 fuel channels for TAPS.	NA	NA	do	NA	NA.
XCOM0395	Apr. 28, 1980	Miscellaneous parts for primary coolant and other pumps for TAPS.	NA	NA	do	NA	NA.

Note: NRC Commissioners by unanimous vote May 16, 1980 referred all of the above export cases to the President under sec. 126b. (2) of the Atomic Energy Act, as amended, on the basis that they could not find that these requests met the criteria of the act.

Senator PERCY. We ought to make clear whether this is just a claim that they could make or whether they could really make that claim stick.

My final question is this.

We will continue our negotiations with India, but if this shipment is made and the negotiations continue and the Indians make another application where there is no equivocation about the dates, what will be the administration's position? What in your judgment should be our action? Should we make no shipments? Isn't it fairly logical that if the Indians anticipate we will not make any shipment beyond this shipment, they will begin negotiations with the Soviet Union or somebody else to become a supplier? Wouldn't they get all set to go if we then turned them down? What do we gain, in other words, other than a year?

Mr. CHRISTOPHER. Not necessarily, Senator. I think India would much prefer to have the United States be the supplier of its nuclear fuel. India, I think, particularly at this moment in its history, would like to diversify her suppliers.

I think if these transactions are approved, we will have an opportunity to negotiate with India and see if we either can improve the safeguard situation or work out a termination that would keep in place the various restrictions.

I guess I would disagree with the implication of your remark, Senator, as to the importance of a year. With the conditions in Southwest Asia and South Asia, maintaining a good relationship with India during this period has very high importance. India may be the key, or one of the keys, to an ultimate resolution of the Afghanistan problem. I think India sees that as a problem for India in a way that was not perceived by India when the invasion first took place.

I would want to use this time as effectively and as creatively as we can to enhance our overall relations with India and also to try to work out our nonproliferation and our nuclear supply relationships with India.

With respect to the legal opinion, I am afraid I interrupted your remarks, Senator. We would be glad to submit a legal opinion to you. I think you can understand that if it involves any concession against U.S. interests, it would have to be submitted on a classified basis.

Senator PERCY. Yes, we would certainly accept it on that basis.

I want to assure you that I will continue working with you to do everything that I can to convince India that this is in the interest of our total relationship. I feel that we have a good basis for continuing a solid relationship with India. The Afghanistan situation must have shaken India severely. India must stand together with the rest of the world now. Certainly her position in the nonaligned coalition is an important one. Her leadership is very important at this particular stage.

I would hope that we could convince the Indians that it is in the overall interest of humanity that we find an answer to this problem.

Thank you very much.

The CHAIRMAN. Senator Glenn.

Senator GLENN. Thank you, Mr. Chairman.

I don't think there are really any new issues that I want to bring up. I just want to restate my view so that it will not be misunderstood.

I am very sympathetic to wanting to keep the very best of relations with India.

I disagree very, very strongly, though, with the action the President has taken. With no changes whatsoever in the NNPA, it seems to me that we are starting down a path where NNPA will be emasculated to the point where it really cannot be applied practically or from a pragmatic standpoint anywhere else. Every other nation who wants a waiver on this will always be able to find some international political reason as to why it will be desperately necessary at that particular time to have a waiver.

If we start down this route, without changing the NNPA, we will make NNPA very ineffective in the future.

Since this is the decision that has been made, I would hope the administration would get to work on what its suggested changes for NNPA will be to bring it into line with our new case-by-case approach to nuclear proliferation, which is actually what we are doing. I think we here on the Hill probably should get going in the same direction whatever happens, because, even if we turn down this shipment and keep NNPA in effect, it seems to me we will also have to consider whether other nations are following our lead. We all hoped when we passed NNPA that other nations would follow our lead. Well, they did for a while, but I don't think they are doing it much now. Do we need to make changes to reflect that new status not only to permit, but perhaps to encourage, American business to get back into the act again?

We had our best shot at it. We thought it was working, but it really does not appear to be going, and now we culminate it with this waiver. It seems to me this sort of puts the final "stake through its heart," although that may be stating it a little too dramatically.

I do not think this was necessary at this time. We would have been far better advised to have taken this time period and used it to try to work out what changes are necessary in NNPA so that other governments do not view this as just one more flip-flop in our policy.

We were given the President's actual message only this morning after we had arrived at the committee meeting. At the bottom of page 2 he talks about India's failure to accept international safeguards on all of its peaceful nuclear activities and its failure to commit itself not to conduct further nuclear explosions as being a serious concern to him. He says, "These exports will help us to maintain a dialog with India in which we try to narrow our differences on these issues."

I don't know who put that wording together for the President. While I can't say it is actually humorous, it borders on that. We have tried for 2 years, and India, in effect, has told us to "bug off" every time we wanted to talk about these matters. Now we seem to think that if we give in and ship to her, which is what she wants us to do, somehow she will suddenly come around. I do not think that is reasonable to assume. I do not think that should be held up to us as a reason to send out this shipment.

We will have ample opportunity to talk to India about other matters. We are shipping or approving shipment of some arms. The TOW case already has been brought up this morning.

My main concern, Mr. Chairman, is that we not stand before the rest of the world and state that we have a policy, and try to get every-

one to follow our lead, while we do not really have that policy in effect. Everyone will know it and will be out there, selling as hard as they can. They are moving in that direction now, anyway, and have been for the past year or so. I think we just are not doing right by this. I wish we had had the benefit of the GAO study and the meeting this summer of the NPT Conference before we had to go through this, but we no longer have that option.

I hope we all can sit down and talk about what changes we may need in the future in the NNPA.

Thank you.

The CHAIRMAN. Are there any further questions?

[No response.]

The CHAIRMAN. There being no further questions, let me thank you very much, Mr. Secretary and Mr. Ambassador.

This hearing is adjourned.

[Whereupon, at 12:07, p.m., the committee adjourned, subject to call of the Chair.]

[Additional questions and answers follow:]

ADMINISTRATION'S RESPONSE TO QUESTIONS SUBMITTED FOR THE RECORD BY
SENATOR GARY HART

Question 1. McGeorge Bundy, in a recent article in the Washington Post, reiterates the State Department argument that the shipment of nuclear fuel to India should go forward because of the legal position taken by India that, pursuant to the 1963 U.S.-India Tarapur agreement, it would be free "to make any use it likes of the ton and a half of plutonium it can get from the fuel we have already supplied" if the United States cuts off supply of fresh fuel for Tarapur. India's legal position is based on its assertion in Article VI, Paragraph A of the agreement that India's acceptance of safeguards on the spent fuel are conditioned upon uninterrupted supply of fresh fuel for Tarapur by the United States.

A. Is it true that the United States did not accept this assertion by the Government of India and that disagreement on this point is specifically noted in Article VI, Paragraph A of the agreement?

B. Why did the United States conclude the Tarapur agreement containing such a substantial disagreement with India?

C. Is the State Department now prepared to concede India's claim to free access to the plutonium content of the Tarapur spent fuel in the event fresh fuel is no longer supplied by the United States? Please explain in detail the current U.S. position on this issue.

D. Article VI, Paragraph D, of the agreement gives the United States the right to require the return of equipment, devices and material (including the spent fuel) in the event of noncompliance by India with the safeguards guarantees or provisions of the agreement. Is the United States prepared to exercise this right if India takes possession of the plutonium in the Tarapur spent fuel? Please explain.

Answer. This question assumes that India's legal position, in the event of cessation of U.S. supply, would be based on Article VI A of the agreement. In our view, this is probably incorrect. Rather, India would probably argue that a failure of the United States to supply fuel for Tarapur was a violation of the obligation in Article II of the agreement. They would probably take the position that such a violation was a material breach of the agreement. They would consequently argue that under international law, as codified in Article 60 of the Vienna Convention on the Law of Treaties, that this breach legally entitled India to consider the agreement for cooperation terminated or suspended, in whole or in part. India could then argue that it was not bound by any of the provisions in the cooperation agreement, including those contained in Article VI.

The disagreement embodied in Article VI A is not relevant in any way to the implementation of the safeguards provisions in the cooperation agreement since India has agreed under Article II to use no other special nuclear material than that made available by the United States in the Tarapur Atomic Power Station.

Thus, safeguards under the agreement apply to the reactors at all times. It was for that reason that India was ready to accept the provisions in Article VI B.

If the United States ceases fuel supply, the Indian Government would probably, as indicated above, consider itself relieved of the obligations contained in Articles II E and VI D. While the U.S. Government takes a contrary position, if this situation occurs, the United States would be in a difficult position in trying to "exercise" either of these rights.

In regard to the specific points in the question:

A. Article VI(A) does reflect a theoretical difference between India and the United States on whether safeguards should only be triggered by the supply of fuel or also should be triggered by the supply of reactors.

B. This disagreement has no practical effect since India agreed to use only U.S.-supplied fuel in the Tarapur reactors. The fuel and the reactors are thus always under safeguards.

C. If the U.S. ceases supply, India would probably claim that it is consequently entitled to consider itself relieved of the obligations in the 1963 agreement, including those in Article VI D. The Deputy Secretary commented on the U.S. position in face of such a possible claim in executive session of the Senate Foreign Relations Committee on June 11, 1980.

D. Article VI D gives the United States the rights to suspend or terminate the 1963 agreement for cooperation and to require the return of equipment and devices transferred under the agreement and any safeguarded special nuclear material produced through its use in the event India does not comply with the guarantee or safeguards provisions of the agreement and subsequently fails to take steps to fulfill these provisions in a reasonable time. The United States has not given up these rights. In the event this provision is triggered, the United States would have to make a decision on whether to require return in light of the particular circumstances.

Question 2. McGeorge Bundy, in the same article, reiterates another State Department argument for permitting the shipment of nuclear fuel to go forward to India: "The likeliest alternate supplier is the Soviet Union; would such a switch be a gain for the good cause?" In this regard, it is my understanding that the Soviet Union has an agreement with India that international safeguards shall apply in perpetuity to all byproduct materials (including plutonium) from Indian reactors using Soviet supplied heavy water, even if India eventually replaces the Soviet heavy water with its own.

A. Is this true?

B. Does the United States have a similar agreement with India guaranteeing perpetuity of safeguards on byproduct materials from Tarapur even if U.S.-supplied fuel is no longer used in this reactor? If not, please explain.

C. If the NRC denial of the Tarapur export license stands, would the State Department seek Soviet cooperation in obtaining a continuation of safeguards on existing Tarapur spent fuel as a condition for serving as the alternative supplier of fresh fuel to India?

Answer. (A) We understand that the Soviet-Indian heavy water supply agreement in effect calls for safeguards in perpetuity on the Rajasthan reactors and any material used in or produced through their use if the Soviet heavy water is introduced into these reactors. This is in conformity with IAEA document GOV 1621 adopted by the nuclear suppliers in 1978 in connection with future supply commitments. If the heavy water is used in other reactors, IAEA safeguards would apply to material used in that reactor or produced through its use only while it contained the Soviet heavy water.

(B) Under the U.S.-India agreement on Tarapur, India guarantees that only U.S. origin fuel will be used in the Tarapur reactors and that this material and material produced through its use will be subject to safeguards. The situation described in the question thus falls outside the purview of the agreement.

It is likely that, should the United States refuse to supply additional fuel for Tarapur, the Indians will deem the U.S. to have unilaterally breached the agreement. In this case, they could regard themselves as relieved of the obligations imposed on them by the agreement, including the obligation to use only U.S.-supplied fuel. Thus, the agreement, which was entered into in 1963, a number of years before the development of GOV 1621 or the nuclear suppliers guidelines, provides effective safeguards while it remains in force but does not deal with the situation which would arise from its abrogation. However, recent U.S. nuclear cooperation agreements in conformity with the nuclear suppliers guidelines, correct this problem.

(C) Should this situation arise, the United States would make a concerted effort to preserve safeguards on the spent fuel. However, it is clearly premature to speculate about the tactics to be employed in this effort. In particular, a judgment as to whether and in what manner to involve the Soviets would depend on the circumstances at the time.

[From United States-Indian Tarapur Agreement (1963)]

ARTICLE VI

A. The Parties to this Agreement emphasize their common interest in assuring that any material, equipment or device made available to the Government of India for use in the Tarapur Atomic Power Station, or in connection therewith, pursuant to this Agreement shall be used solely for peaceful purposes. The Government of India emphasizes in contrast to the position of the United States, that its agreement to the provisions of this Article in relation to equipment or devices transferred pursuant to this Agreement has been accorded in consideration of the fact that, as provided in this Agreement, the Tarapur Atomic Power Station will be operated in no other special nuclear material than that furnished by the Government of the United States of America and special nuclear material produced therefrom, in consequence of which the provisions of this Article in relation to equipment or devices in any case ensue from the safeguards on fuel.

D. In the event of noncompliance with the guarantees or with the provisions of this Article, and the subsequent failure of the Government of India to fulfill such guarantees and provisions within a reasonable time, the Government of the United States of America shall have the right to suspend or terminate this Agreement and require the return of any equipment and devices transferred under this Agreement and any special nuclear material safeguarded pursuant to this Article.

[From the Washington Post, June 13, 1980]

SHIP THE FUEL TO INDIA

(By McGeorge Bundy)

The debate over shipments of nuclear fuel to India is one with good guys on both sides, which is refreshing in itself. This is not a contest between the children of light and the children of darkness; the central question is simply whether the general purpose of encouraging nuclear restraint in the world will be served better by shipping the fuel or not. With all respect for the excellent intentions of those who are against the shipments, I submit that they are wrong on the merits. Failure to allow these shipments will predictably serve all the forces already working against nuclear restraint in India—it will be a self-inflicted wound for the general cause of nonproliferation.

To understand this reality, it is necessary only to consider this matter as it looks to Indians. To them, the starting point is the 1963 Agreement for Cooperation between our two countries. That agreement, in their view, can be changed only with the consent of both sides, and it is not superseded by our Nuclear Non-proliferation Act of 1978. Moreover, they have lawyers to defend this view, just as the Nuclear Regulatory Commission and many in Congress have lawyers for the opposite position. That is not surprising because the intersection between international agreements and national statutes is a natural habitat for legal dispute. On the naked merits, there is room for both legal and political sympathy with each side.

But what will decide the effects of this affair in India is what Indians think. And what they will think, if shipments are ended, is that the United States has broken its word as part of a process of pressure to which no self-respecting nation can submit—and Indians have at least an average amount of self-respect. They will then declare that our action has ended the 1963 agreement. This position will be unchallengeable in India and widely supported abroad. The Indian government will then feel free, as it does not today, to make any use it likes of the ton and a half of plutonium it can get from the fuel we have already supplied. This freedom might or might not be used to make weapons, but the end of all external restraint on the use of the Tarapur plutonium is the inescapable political consequence of any American decision to end shipments.

The Tarapur plutonium would be enough to make at least a hundred fission weapons of uncertain but utterly non-trivial yield. It could also be reprocessed as

an alternative source of reactor fuel, thus setting an example to the world that we could hardly cheer. I find it hard to see how opening the door to such results would be good for the general cause of nonproliferation.

Nor should we suppose that the stiff position taken by India on this question is a matter of bluff, or the result of some special pride in Indira Gandhi. The Indian stand has been essentially the same under both Morarji Desai and Gandhi, for the excellent reason that any other position would be regarded as outrageous by Indian public opinion. (That countries with free elections often respond to such public sentiment will surely not surprise inhabitants of Washington.)

And the Indians are not bluffing, because there is no longer any American monopoly on the kind of nuclear fuel Tarapur consumes. The likeliest alternate supplier is the Soviet Union; would such a switch be a gain for the good cause?

For reasons unknown to me, the administration has spoken softly on this matter, but its position is correct, and it is not the result of any shallow desertion of nonproliferation in deference to geopolitical crisis. It is the cause of nonproliferation itself that should persuade us not to kill the 1963 agreement.

That agreement is not perfect: it bears the birthmarks of the excessive enthusiasm for nuclear sales abroad that was prevalent in the administration of that time—*nostra culpa*. But it is vastly better than nothing, and India has respected it, the Indian explosion did not come from Tarapur.

If we end the shipments, the agreement too will end. We should avoid that result, even at the price or some understandable disappointment over the difficulty of exporting virtue by statute.

The writer, special assistant for national security affairs in the Kennedy and Johnson administrations, is a professor of history at New York University.

APPENDIX

PREPARED STATEMENT OF JAMES N. BARNES AND S. JACOB SCHERR, ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL AUDUBON SOCIETY, UNION OF CONCERNED SCIENTISTS, SIERRA CLUB, AND FRIENDS OF THE EARTH¹

We are pleased to appear before the Committees on behalf of the Natural Resources Defense Council, National Audubon Society, Union of Concerned Scientists, Sierra Club, and Friends of the Earth. We appreciate the opportunity to present our views regarding the President's waiver of the NRC decision to deny export licenses for the shipment of low-enriched uranium fuel to India.

The environmental community has long been actively concerned about the hazards posed by U.S. nuclear exports, particularly the risks of nuclear weapons proliferation. In 1976, three environmental organizations filed petitions with the NRC, challenging further exports of nuclear fuel for India's Tarapur reactors. The organizations participated at the Tarapur hearings before the NRC in July 1976, the first public hearings ever on a nuclear export license. The environmental community testified frequently during the development of the Nuclear Non-Proliferation Act of 1978 and has monitored the NNPA's implementation.

The question now facing Congress goes beyond whether the United States should supply some 40,000 kilograms of low-enriched uranium for use at the Tarapur Atomic Power Station. There are two broader issues at stake. The first is whether the United States continues its policy of accommodation towards India which set the stage for the Indian explosion of an atomic bomb in 1974. The second is whether or not the U.S. abandons the requirement of full scope safeguards as a central tenet of its nonproliferation efforts. It is our view that the Congress should draw a clear line and say "no" to further nuclear commerce with India until the Indian government accepts international safeguards on all its nuclear activities. If principles are to mean anything, they must be followed even in hard cases.

I. BACKGROUND

For over twenty years, we have heard the same arguments about the importance of maintaining U.S. leverage over the Indian nuclear program by providing them nuclear equipment, material, and technology. We have seen the State Department, time and time again, go to great lengths to avoid confrontation with India by relying on hair-splitting legalisms and ambiguities. The United States has been outmaneuvered and outnegotiated by India, which has demonstrated to the world that a non-nuclear weapons state can explode an atomic bomb using U.S.-supplied nuclear materials and get away with it.

The illusion of Atoms for Peace was shattered on May 18, 1974 when India exploded a "peaceful" atomic explosive with a yield of 20,000 tons. The Government of India immediately claimed that the plutonium device it had exploded was all-Indian: "Not a single thing used in it was foreign." The statement sought to mask twenty years of United States and Canadian assistance to Indian development of nuclear power. The nation of Gandhi was to serve as a model for the introduction of atomic energy in developing countries. Atomic power would provide cheap electricity to lift Indian's rural masses out of abject poverty. As a leader of the Third World, India's acceptance of international safeguards on part of its program would be viewed as a triumph. India would show that nuclear power could provide great benefits without weapons proliferation.

¹ Mr. Barnes is an attorney with the Center for Law and Social Policy; and Mr. Scherr is an attorney with the Natural Resources Defense Council. Patrice Perille, a Law Student Intern at the Center, assisted in the preparation of this statement.

Eager to have the Atoms for Peace program succeed, the United States and Canada began in the mid-1950's to provide India with nuclear assistance, choosing to ignore the repeated warnings of India's intentions. In 1954, Canada provided India with a natural uranium research reactor, called the CIRUS; and the United States supplied the heavy water needed to operate the reactor. Both nations sought Indian agreement to safeguards on the reactor and the heavy water. India strongly resisted, and a vague "peaceful uses only" pledge was accepted as sufficient.

As early as the late 1950's, the Indians began efforts to develop their own capability to reprocess the fuel used in reactors, ostensibly to recover plutonium for use in breeder reactors. The Indians' first reprocessing plant relied on blueprints of the Purex process developed by the U.S. Government to make its first plutonium bomb. Yet the U.S. Government turned a blind eye to the possible military applications.

Indian protests against safeguards were carried into international discussions. During negotiation of the statute of the International Atomic Energy Agency, the Indian Government sought to limit the ability of the agency to account for nuclear materials and inspect nuclear facilities. They claimed that requiring safeguards only in non-nuclear weapons states was inequitable and would interfere with national sovereignty and economic independence. The many loopholes in the International Atomic Energy Agency's regulatory framework are a tribute to Indian persistence.

The most visible American contribution to India's nuclear program are the two 200-megawatt General Electric reactors at the Tarapur Atomic Power Station near Bombay. It was argued that the deal would help keep India on the side of the West and open up the market for U.S. nuclear manufacturers. The Indians agreed to international safeguards on the fuel to be supplied by the United States for Tarapur, but not to international inspection of India's other nuclear facilities. Equipment and fuel provided to Tarapur were for "peaceful purposes only."

By the mid-1960's, the United States and Canada became worried that India and other non-weapons countries might interpret such pledges as permitting peaceful nuclear explosives. It was made clear in the 1968 Non-Proliferation Treaty that there was no difference between peaceful nuclear explosives and atomic bombs—both were expressly precluded in non-nuclear weapons states. India refused to sign the NPT.

By 1970, it had become obvious that India was developing "peaceful" nuclear explosives. Assurances were sought that the Indians would not use Canadian or U.S.-supplied equipment or material to manufacture plutonium for explosives. The Indians rejected these "unilateral" attempts to vary the terms of earlier agreements. Yet U.S. and Canadian assistance to India continued. That same year, the Indian AEC announced an ambitious program to develop rocket systems and satellites—for civilian uses only.

The Indian nuclear explosion of 1974 came as a shock to the American public. The official United States response was muted. The CIRUS reactor provided by the Canadians had been identified as the source of the plutonium used in the explosive. It was argued that the incident was solely a matter between India and Canada. The Tarapur reactors had not been involved. The fact that the United States had provided heavy water for the CIRUS reactor was not mentioned. It was not until August 1976 that the United States admitted that there was "a high probability" that plutonium for India's first atomic bomb had been produced with U.S.-supplied heavy water. While the Canadians halted nuclear assistance to India, Secretary of State Kissinger ordered that there be no interruption in U.S. supplies of uranium fuel to India. Efforts by the U.S. Atomic Energy Commission to get an unambiguous pledge from India that it would not use the Tarapur reactors or fuel for nuclear explosives failed. The Nixon Administration wanted to forget the whole matter, but the Indian explosion touched off a debate in Washington on the dangers of nuclear weapons proliferation and the inadequacy of United States and international controls. It was this debate which provided the impetus for the passage of the Nuclear Non-Proliferation Act of 1978.

II. THE NUCLEAR NON-PROLIFERATION ACT AND THE 1978 WAIVER FOR INDIAN EXPORTS

The NNPA established the first specific criteria for the licensing of nuclear exports by the NRC. Perhaps most important and far reaching was the requirement in § 128 of the NNPA that U.S. nuclear commerce be conditioned upon

acceptance of safeguards on all nuclear facilities in the recipient country. During the consideration of the NNPA, the Executive Branch stated that the full-scope safeguards provision was of "crucial and pivotal importance to an effective non-proliferation policy. . . ." The Congress recognized that some time would be needed to bring countries into compliance, specifically mentioning India and South Africa. Thus, the operation of § 128 was delayed 18-24 months or until March 1980 at the latest.

The first test of the NNPA came shortly thereafter when the NRC, in a 2-to-2 decision, denied the licenses for the shipment of nuclear fuel for Tarapur. President Carter then overrode the NRC decision. The matter was reviewed and then approved by Congress.

At the time, there was substantial official optimism that the Government of India would agree to full-scope safeguards. Mrs. Gandhi had been replaced by Prime Minister Desai, who had publicly renounced India's need or intent to conduct further peaceful nuclear explosives. As Commissioner Ahearne said in his opinion approving the 1978 export:

"The current (Desai) Government of India has taken truly significant steps to meet these proliferation goals. India is the only country that having exploded a nuclear device, has turned away from nuclear weapons, and has demonstrated the ability to make the difficult choice of not continuing down that path. Although the previous (Gandhi) government was certainly not supportive of non-proliferation policy and acted in a manner which was inimical, the present government has done just the opposite—it has acted responsibly and courageously."

Senator Glenn was willing to accept the State Department's assertions that a breakthrough in negotiations with India was imminent. However, in regard to requests for waivers following the § 128 grace period, Senator Glenn stated:

"I would not want to see us at that time making the same argument . . . and that we should, therefore, make another fuel shipment. We have granted an 18-month grace period. It is time which should be put to good use in working this out. It is unlikely that there will be additional waivers beyond that period."

III. THE PENDING LICENSE APPLICATIONS

On May 17, 1980, the NRC Commissioners, in a unanimous decision, denied the applications for continued shipment of nuclear fuel to Tarapur. In some respects, there is no change from the situation in 1978:

The U.S. agreement with India still does not explicitly rule out the use of U.S.-supplied material for nuclear explosives, and we do not have a clear, unequivocal statement on this point from the Government of India;

India still claims that there is a difference between a "peaceful" nuclear device and an atomic bomb;

Significant Indian nuclear facilities remain outside international safeguards; and

India's explosives program appears to be continuing.

The major difference is that Prime Minister Gandhi, who was responsible for the first Indian atomic bomb, has returned to power. Prime Minister Gandhi has refused to rule out future peaceful nuclear explosions, should this be considered in India's interest.

Given the failure of the United States for over a decade to persuade India to accept full-scope safeguards and the U.S. position on acceptable "peaceful uses", it is extremely unlikely now that agreement on these issues could be reached even if the grace period in the NNPA for application of § 128 requirements was extended beyond March 1980. Instead of dealing directly with the question of yet another extension, the State Department has developed the disingenuous argument that the pending export applications fall within the two-year period. The State Department relies on an incredibly strained reading of the language of § 128, arguing the date triggering application of full-scope safeguards should be the intended shipping date planned by the applicant, rather than the actual shipping date. Yet two years ago, the State Department took a different position. In response to questioning at the first waiver hearings in May of 1978, then Deputy to the Undersecretary of State Joseph Nye referred to the § 128 cut-off as coming into effect 18 months after the signing of the bill or two years in terms of the "actual shipment." We agree with the NRC that the State Department's latest interpretation is inconsistent with the Congressional intent underlying § 128.

The State Department also has argued on equitable grounds that these applications should not be penalized because their issuance was unreasonably delayed by U.S. Government beyond the March 10th deadline. Yet the delay was not due to bureaucratic errors or oversight, but rather the failure of the State Department to respond to requests for information from the NRC. Indeed, the applications for nuclear exports to India here at issue were processed as fast and even faster than any such application since 1976.

Some have argued that the United States must continue to supply fuel for Tarapur or the Indians will view the Agreement for Cooperation as breached and follow through with their threat to reprocess the spent fuel which we have already provided to them. First, it is our view that the Agreement will not be breached if the pending licenses are denied.

The nuclear fuel for the Tarapur reactors is provided pursuant to a 1963 Agreement for Cooperation with India. It has been suggested that the U.S. obligation under Article II of the Agreement to "sell" enriched uranium to India for use at Tarapur is immutable. Yet we believe that as a matter of long-standing practice, the Indian Government has accepted that the export of nuclear fuel for Tarapur is fully subject to U.S. law and licensing requirements.

Article V of the 1963 Agreement provides that exports of materials, equipment, and devices for use at Tarapur, other than special or source nuclear materials, will be "subject to applicable laws, regulations and licenses requirements of the Government of the United States of America . . .". The exclusion of special nuclear material or nuclear fuel is readily understandable, since in 1963 the U.S. Government was the direct supplier and exporter of fuel; and in such circumstances, fuel exports were not subject to the licensing requirements of the Atomic Energy Act.

In 1964, the Congress amended the Act to permit limited private ownership of special nuclear materials. Under an amendment to Section 53, authority to license exports of special nuclear materials was provided to the Atomic Energy Commission. The Commission already had this power in regard to exports of nuclear equipment and the 1964 amendment extended its licensing responsibility to fuel. Congress was fully aware of our existing international agreements and the across-the-board scheme established for fuel export licensing. There can be no question that Congress fully intended its licensing requirements to apply to fuel shipments to Tarapur.

In 1971, the United States and India renegotiated a sales contract for the Tarapur nuclear fuel. The Indian Government explicitly agreed in that contract that the export of special nuclear materials would be subject to U.S. licensing requirements:

"The purchaser shall procure all necessary permits or licenses (including any special nuclear material license) and comply with all applicable laws, regulations and ordinances of the United States and of any state, territory or political subdivision, in connection with the material delivered to the purchaser pursuant to Article IIIA or to the seller pursuant to Article VII."

Since 1971, India has regularly sought export licenses for Tarapur fuel.

The U.S. commitment to "sell" nuclear fuel to India is not fixed, but rather is fully subject to the requirements of the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978. A Congressional decision not to waive U.S. law in respect to continued fuel exports to Tarapur would be consistent with domestic law and practice under the Agreement of Cooperation.

Also it should be noted that according to the NRC, India already has enough low-enriched uranium on hand to supply the needs of both Tarapur reactors until the end of 1982. A refusal to grant these licenses at this moment could not be reasonably construed as violating even an absolute U.S. obligation under Article II of the Agreement to provide the fuel necessary for the continuous and efficient operation of the Tarapur reactors. There is no obligation under the Agreement to provide India with a long-term stockpile of fuel for Tarapur. And there is nothing preventing India from agreeing to full-scope safeguards before they run out of fuel for the plants. In that case, the United States should be willing to resume shipments.

The threat that India will reprocess the spent fuel now in storage at Tarapur is not a new one nor is it a risk which will disappear if the U.S. caves in and agrees to supply fuel to Tarapur for the duration of the Agreement. The Agreement expires in 1993, at which time India would be completely free to reprocess the spent fuel and stockpile plutonium outside international safeguards. There is no sense in simply making the present situation worse by continuing to add to a

possible future Indian stockpile of plutonium. Twenty years of U.S. nuclear assistance to India did not stop them from exploding an atomic bomb; thus, it is unreasonable to believe that the assurance in our Agreement alone will prevent the Indians from eventually reprocessing the fuel. The United States should use whatever leverage is available, including a possible denial of U.S. military assistance, to force the Indians not to reprocess the Tarapur fuel.

There is some hope that the Indians will maintain safeguards on Tarapur and the fuel even if the Agreement is terminated. In May 1978, Dr. Nye testified that:

"I think the Indians probably would regard a cessation of fuel supply as a violation of the agreement. It does not necessarily follow that they would cease safeguards. I would point out that in the case of Rajasthan reactor, when Canada ceased its supply, India kept on the safeguards."

India has strong incentives not to remove the materials at Tarapur from IAEA safeguards. This would be a very serious step. India is a member of the IAEA; a refusal of access to IAEA inspections would constitute a repudiation of the IAEA role within India and would harm India's relations with all IAEA members. More importantly, removal of safeguards would have consequences for India's relationship with Pakistan and China.

V. THE ADVERSE EFFECTS ON U.S. NON-PROLIFERATION EFFORTS

As Professor Rowen pointed out in his testimony yesterday, the continued failure of the United States to halt nuclear fuel shipments to India has the widest implications for U.S. nonproliferation policy. India has always been the test case of our resolve to halt the spread of nuclear weapons. Other nations, including Brazil, Argentina, Pakistan, South Africa, and Iraq, will be watching these Congressional deliberations closely.

We agree with the statement that Senator Glenn made in May 1978 that the NNPA requirement of full-scope safeguards is the "cornerstone" of the Act. To waive this provision in regard to India would make meaningless our efforts to encourage other nations to accept the Non-Proliferation Treaty or its equivalent. It would promote an unending stream of other special pleadings and demands for equal treatment. Newspapers in South Africa, which has an application for nuclear fuel pending before the NRC, have already expressed resentment over the leniency being shown towards India.

We call upon Congress to uphold the credibility and integrity of U.S. efforts to halt the spread of nuclear weapons. Too often in the past, the pressures of the day have forced the United States to back away from the tough stands essential to meeting our longer-term nonproliferation objectives.

We must make it clear now that the United States will no longer engage in nuclear commerce with nations not renouncing nuclear explosives and not agreeing to international safeguards on all their nuclear activities. The policy embodied in the NNPA represents our last chance to reverse the trend toward a "nuclear-armed crowd" and a world where the risks of nuclear war are greatly enhanced. If we fail here, the prospect for the future are dim.

It is worth recalling President Carter's remarks upon signing the NNPA: "The Nuclear Non-Proliferation Act sets the conditions and criteria which will govern U.S. cooperation with other nations in our efforts to develop the peaceful use of nuclear energy. The encouragement of universal ratification of the Non-Proliferation Treaty is central to the act, as is the establishment of a comprehensive set of controls, including application of International Atomic Energy Agency safeguards and provision of a stable framework for international nuclear cooperation and commerce."

We agree, and thus urge you to override the Executive Order and deny the proposed export licenses.

PREPARED STATEMENT OF RICHARD K. BETTS, THE BROOKINGS INSTITUTION

Thank you, Senator, for the invitation to testify. I would like to note that the views I will express today are my own, and should not be attributed to the Brookings Institution. The issue before this committee is a difficult one, and there are powerful arguments on both sides of the dispute. My statement will present a case for permitting the shipment of fuel for India's Tarapur power station, under the 1963 agreement on supply, to go forward.

There are two fundamental beliefs that underlie my argument. First, opposing the denial of fuel supplies for Tarapur does *not* mean that one is insufficiently concerned with proliferation. The spread of nuclear weapons is one of the principal dangers facing the world in coming decades, and the United States should place a high priority on policies designed to prevent or minimize it. I would argue, in fact, that focusing anti-proliferation policy primarily on control of technology, rather than on more difficult measures to reduce the insecurity of states who may want nuclear weapons to protect themselves, is a policy that places a very limited priority on nonproliferation. Second, the only thing worse than an ineffective policy against nuclear spread is a counterproductive one. The United States should at least refrain from undertaking actions in the name of nonproliferation that may actually make the danger greater.

There are three dimensions to the Tarapur fuel supply issue: legal, strategic, and diplomatic. I do not believe that the reasons for denying the shipment under discussion are compelling in any of these dimensions. Let me discuss the most difficult one first.

The Nuclear Non-Proliferation Act of 1978 presents grounds for terminating fuel supply, because India refuses to accept full-scope safeguards. Since I am not a lawyer, I cannot presume to argue the legal case against enforcing the act. The contractual obligations of both parties, however, can be disputed. In India's view, the 1978 act amounts to an *ex post facto* law, and cannot override legal obligations incurred in 1963 to supply fuel for thirty years. Some American officials maintain that the provision of the 1963 agreement requiring conformity of fuel supply contracts with U.S. laws validates the applicability of the Non-Proliferation Act. Whether or not there is any doubt about this within the American legal community, Indians reject this interpretation. Moreover, the Indian government maintains that if the United States refuses to honor the obligation to supply fuel, the 1963 agreement will be abrogated and India will be freed from the provisions that require U.S. approval of the disposition of spent fuel from the Tarapur reactors. P. R. Chari, of the Indian Institute for Defense Studies and Analyses, wrote in the Fall 1978 issue of *International Security*:

Article 60 of the Vienna Convention on the Law of Treaties provides that a bilateral treaty may be terminated or suspended . . . by one party should a material breach in its terms be committed by the other party. Further, Article 27 of the Convention expressly prohibits a party to a Treaty from invoking the provisions of its internal laws as an excuse for failure to perform treaty obligations. The U.S. insistence on seeking additional undertakings [i.e., full-scope safeguards] to supply enriched uranium, under threat to abrogate the TAPS agreement, is legally untenable.

To reiterate, I do not claim that Indian legal interpretations are correct. What appears evident, though, is that a consequence of U.S. denial of fuel supplies may be an Indian move to take possession of accumulated spent fuel which could then, if desired, be reprocessed into weapons-grade plutonium. This may smack of blackmail to observers in Washington (although Indians assert that U.S. demands for full-scope safeguards amount to blackmail). But the tangible *result* of denial, what ever the merits, would probably be a partial *release* rather than a restraint on India's capacity to build nuclear weapons. This danger is compounded by the internal political ramifications within India. In the past Indian public opinion has favored development of a nuclear force, and it was the government that was the restraining element. Some analysts even make the case that the 1974 test was designed as a means to placate the pro-bomb lobby without actually moving to deployment of weapons. An American refusal to supply fuel for Tarapur will be interpreted in that country not only as illegal, but as an insulting power play. It will inflame Indian nationalism and enhance the appeal of arguments that India needs nuclear weapons to show it is not a pawn of arrogant superpowers.

India already has the capacity to build nuclear weapons, as the 1974 explosion demonstrated. Refusal to supply fuel may not even cripple the operation of Tarapur itself, since the Indians may replace that fuel with their own mixed-oxide substitute, or might be able to purchase fuel from the Soviet Union. The significance of the legal issue is as a matter of principle and precedent. If the Non-Proliferation Act must be enforced in this case it cannot be because it will prevent proliferation by India, but because it will serve as an inhibiting exam-

ple to other potential proliferators. But will it, on balance, necessarily reduce the odds of proliferation in general? The answer is far from certain. This question takes us into the strategic dimension. The following part of my remarks is not meant to challenge the wisdom of the Nuclear Non-Proliferation Act. Before this body, that would be presumptuous, and the act is, for better or worse, the law of the land. What the remarks are meant to do is to suggest that if there are any grounds for waiving the requirements of the act in regard to India, those grounds should not be dismissed lightly.

The problem of nuclear weapons proliferation is not identical with the problem of the proliferation of sensitive technology. Technical capacity is the necessary condition for a weapons program, but not the sufficient condition. The more significant determinant is the incentive to acquire nuclear striking power—either as a deterrent against aggression by conventional forces of a stronger neighbor, or as a supporting capability for aggression.

If a nation's desire for nuclear weapons is strong enough it can probably acquire the technical capability to produce fissionable material without the help of major nuclear suppliers, because facilities necessary for producing fissionable material for weapons are less sophisticated than those involved in a program for generating electric power. Such a course would require higher risks, greater expense, less efficiency, and much more lead-time, but construction of crude facilities for reprocessing—or even for enrichment—is not beyond the grasp of most of the countries who are prime candidates for proliferation, if they are willing to make the sacrifice. The most likely ones, indeed, already have developed such capabilities (Taiwan and South Africa) or are engaged in attempts to do so (Pakistan). By the same token, a nation desperate for nuclear weapons may not be deterred by safeguards, which may provide *warning* of a program, but do not prevent it. Conversely, if a country's incentives are low enough, its capability does not matter, because it will not exercise the option. West Germany and Japan are obvious examples.

The reason for trying to prevent the acquisition of weapons-applicable technology through normal commercial transactions, or for insisting on full-scope safeguards, is not that such restraints will preclude acquisition of nuclear weapons, but that they will make it more difficult. For countries that have only a marginal interest in getting weapons, such obstacles will suffice to dissuade them. The ones we should worry about most, however are those that have *more* than a marginal interest.

Blanket provisions of the Nuclear Non-Proliferation Act are helpful in ensuring that if a country wants to build a nuclear force, it will not be able to do so easily. But by attacking the problem with a uniform set of standards, while the countries we are dealing with are not a uniform group, the law does both too much and not enough. It does as much to prevent proliferation by, say, Ecuador (which is really in no danger of entering the nuclear club) as it does against Pakistan (which *does* present a great danger). And it also means that in the case at issue today we find ourselves in the position of feeling we must apply the law (because no one should be above the law) even though sanctions really have no impact on proliferation potential in this case itself. Stopping fuel for Tarapur would not delay India's capability to launch a nuclear weapon against China or Pakistan; it would only be a symbolic gesture showing that we mean business. This reason for enforcing the act, however, is outweighed by the negative impact that doing so would have on the goal of nonproliferation.

In some ways, unfortunately, provisions of the act work against the intent behind it. By holding fuel supply hostage to demands for submission to U.S. policy, the law highlights the dependence of countries who rely on that supply. It enhances their incentives to end that dependence, to acquire autonomy in their energy-generating nuclear programs, to ensure that those programs cannot be disrupted by change in our policy or mood. These countries may ask themselves: If the Americans can change the rules of the game with India, half-way through the thirty-year period of their fuel supply agreement, what is to prevent them from changing their minds again sometime in the future, and doing the same thing to us? Wouldn't our nuclear program be safer if we can provide its requirements on our own? The effect is not completely dissimilar to the American reaction against OPEC, which heightened our attention to achieving energy independence.

For nonproliferation, it is more useful to keep countries from *acquiring* sensitive fuel cycle capabilities than it is to put safeguards on ones they already have.

But one of the principal arguments that the United States has used against the spread of indigenous reprocessing and enrichment facilities is that they are not necessary because commercial fuel supplies are available. To the extent that we cast doubt on the assurance of such supplies we also cast doubt on the arguments about developing alternative sources internally, sources which can yield weapons-applicable materials.

The third dimension of the Tarapur issue is diplomatic. Is it necessary that we damage the full range of our relations with New Delhi because of this legal disagreement? Contrary to the stereotype some Americans have, India is not a fourth-rate country, full of funny mystics, a nation irrelevant to our global interests. India is one of the principal emerging middle powers. It has the third largest complement of scientific manpower in the world, after the United States and the U.S.S.R. With the fourth largest armed forces in the world (including an army bigger than our own) it dominates the region of South Asia, which, since the Soviet invasion of Afghanistan, has become an area of vital concern to the United States. Since Indira Gandhi's return to power, Indo-Soviet relations have warmed up again. Outrage in India, over what is regarded there as American hanky-panky in abrogating solemn fuel supply agreement, can only encourage a further tilt by New Delhi toward Moscow. Allowing fuel shipment to proceed will not, of course, make the Gandhi government fall into our arms, but it will at least help keep our relations from getting even worse.

Our political interests in general, as well as the goal of nonproliferation, would be better served by releasing the shipment than by denying it. This argument admittedly does not resolve the problem of appearing to back off from the Non-Proliferation Act. The United States does not want to look like a pushover, or a nation that does not take its own laws seriously. Is there any middle ground on which the United States could thread its way through this dilemma? As a compromise, why not submit the dispute to the World Court? Normally, I confess, I see little useful role for that institution, but in this case it might help us to have our cake and eat it too. If the Court decided in India's favor, that the Non-Proliferation Act could not supersede the 1963 agreement, we would still have managed to preserve the principle of the sanctity of the law, and we would appear magnanimous and reasonable. If the Court decided in favor of the United States, on the other hand, India would have less persuasive grounds on which to denounce American perfidy, and we would have the symbolic force of international jurisprudence to back up the fairness of our policy. In either case we would be better off than if we deny the shipment unilaterally, in a way calculated to provoke charges of deviousness, unreliability, and illegal strong-arm tactics.

If adjudication by the World Court is infeasible, unrealistic, or undesirable, then I believe the United States should make the best of a bad situation and allow the shipment to proceed. This would pose some costs, but we face costs either way we turn. There is no free lunch in nonproliferation policy.

FEDERATION OF AMERICAN SCIENTISTS,
Washington, D.C., June 19, 1980.

HON. FRANK CHURCH,
Chairman, Senate Foreign Relations Committee, Dirksen Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Tarapur Nuclear Power Plant problem raises timely issues concerning current U.S. non-proliferation policy: are its means commensurate with its goal if applied only on a nation by nation basis?

Originally U.S. non-proliferation policy sought to prevent proliferation by keeping secret the method of building nuclear weapons. When, later, it became evident that the secret could no longer be kept, the U.S. shifted to the strategy of a political bandwagon. Using the non-proliferation treaty as our vehicle, we persuaded as many countries as possible to come aboard. In this way, we established a world climate against proliferation.

The success of this strategy has left us, today, with residual hard-core cases. In these hold-out nations, underlying security problems, or long-standing rivalries, dominate their arguments for nuclear weapons—or at least militate for their keeping relevant options open. To these remaining non-signatories (and to some "false adherents" of the non-proliferation treaty) the plans of numerous distant signatories are less relevant than those of nearby adversaries.

In sum, for those who have not yet seen fit to sign the non-proliferation treaty (or to permit safeguards on all their nuclear materials and facilities) there is some deeply felt reason. Is it not likely, for example, that the Indians will only forego the option of procuring many nuclear weapons when the Pakistanis have foregone such options also?

With this in mind, U.S. non-proliferation policy has got to move on to working on the underlying security concerns at issue. In the absence of their solution, the U.S. will normally lack the necessary leverage to achieve its goal. What, after all, can we do to India that is worse for it than its falling behind in a Pakistani-Indian nuclear arms race. Similarly, the problem of Brazil has got to be dealt with eventually as part of the problem of Argentinean proliferation. Iraqi desires for a bomb are related to the Middle East dispute and the West Bank. The South Koreans will harbor latent interest in a bomb until the Korean peninsula is unified. And only when Peking and Taipei make their peace, can we stop worrying about a Taiwanese bomb.

Now in the case of India and Pakistan there ought to be a clear mutual interest in avoiding an Indian subcontinent nuclear arms race. After all, the chance of conflict between the two countries is very real indeed. If one side builds a nuclear armory, the other will also, so that subsequent conflicts will likely escalate to nuclear violence. And with nuclear weapons, the extent of destruction to both would be enormously greater than it is now. Both countries should be sobered by this prospect.

With this background we wonder if the real, and valuable, current pressure in the NRC, the press, the public and the Congress against waiving the requirements of the Nuclear Non-Proliferation Act could be transmuted into a diplomatic effort to get the Indians and the Pakistanis into a suitable agreement.

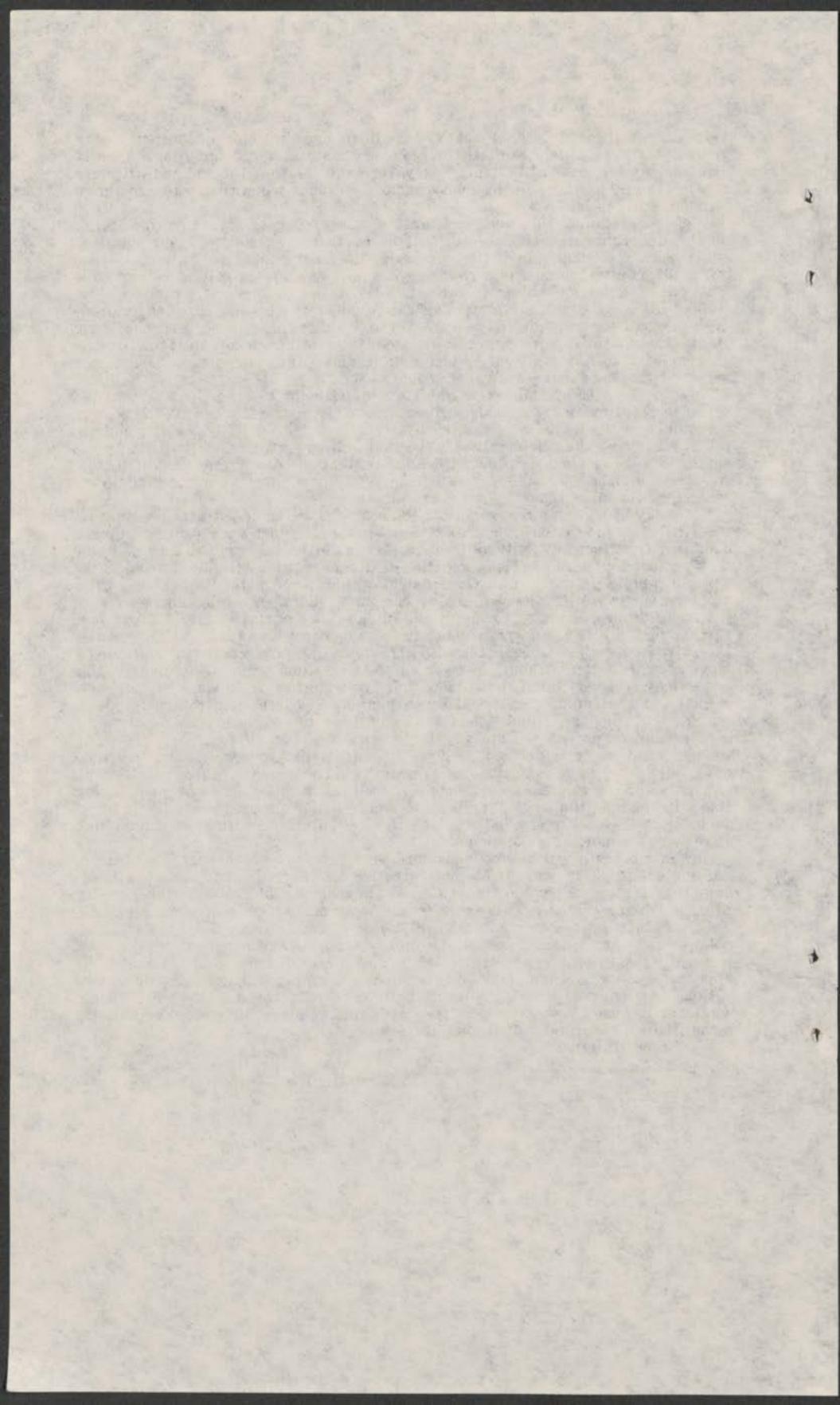
For example, if the Indian Government would agree publicly to accept full-scope safeguards if the Pakistani Government would also, would this be a valid justification for continuing to supply the Indians with nuclear materials for some further period? Such an arrangement would, in turn, give the Pakistanis some incentive to negotiate since, if they did not, the Indian program would continue to move forward (and without safeguards) for that same period. Conceivably, the world major powers might be induced jointly to guarantee, in some fashion, the security of the Indians and Pakistanis, against each other, in return for both making such pledges. (Such a method would have the additional merit of being generalizable to other areas and problems).

These and other efforts to resolve the underlying security issues are not, obviously, going to be easy. But the current hard choice makes them timely. And efforts to address the real security concerns will, at least, be aimed at the relevant issue. In the long run, regional efforts to secure non-proliferation are likely to be superior to a series of eye-ball to eye-ball confrontations with those individual states who see more at stake than we.

Our membership wants very considerable pressures to be brought to bear on nations not to go nuclear. If no more creative alternative exists than to simply deny this license, we have no doubt that our members would, on the whole, prefer to do so. Whatever risks exist of a tough non-proliferation policy must be balanced against the real current risks of failing to follow through on the existing policy—a failure which might destroy our non-proliferation effort. But we do want American pressures to be applied in ways that have maximal promise. This appears to mean: recognizing the full force of the proliferation dynamic in the nations at issue; designing solutions that encompass the dynamic; and using whatever influence America does have available to press for regional solutions rather than only for individual compliance.

Respectfully,

FRANK VON HIPPEL, *Chairman,*
JEREMY J. STONE, *Director.*





APPENDIX I

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

June 25, 1980

MEMORANDUM FOR: Chairman Ahearne
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Hendrie
Commissioner Bradford

FROM: LB Leonard Bickwit, Jr., General Counsel

SUBJECT: STATE DEPARTMENT ANALYSIS OF NNPA'S
SECTION 128

In its legal memorandum of June 18, 1980, the State Department's Office of Legal Adviser has concluded that "the two proposed exports [of low enriched uranium to India for use in the Tarapur reactor] may properly be regarded as falling within the grace period provided by the statute as finally enacted and, therefore, are not subject to the full-scope safeguards requirements of section 128a." ^{1/} We have carefully reviewed this memorandum and remain convinced that the Department's legal position on the effective date of section 128 is supported neither by the statute nor its legislative history.

Section 128 provides that the full-scope safeguards criterion "shall be applied as an export criterion with respect to any application . . . which is filed after eighteen months from the date of enactment of this section [September 10, 1979], or for any such application under which the first export would occur at least twenty-four months after the date of enactment of this section [March 10, 1980]." Three points should be made regarding the Department's interpretation of this provision.

First, the Department focused on the verb tense difference between "is filed" and "would occur" to support its conclusions that "Congress did not intend March 10, 1980, to be an absolute deadline" ^{2/} and that "with respect to license applications

^{1/} Department of State, Application of Section 128 of the Atomic Energy Act of 1954 with Respect to Fuel Exports to India, at 1 (June 18, 1980).

^{2/} Id. at 9.

CONTACT:
Carlton R. Stoiber, OGC
4-3224

filed prior to September 10, 1979 . . . the Commission should look to all the circumstances of a given proposal and decide whether, in those circumstances, approval of the proposed export would amount to a circumvention of the statute." 3/ The State Department takes the view that "would occur" refers to the shipping date contemplated by the applicant when submitting its export license application. This verb tense difference is worth noting. However, there is a simple, practical reason for the difference that argues against the inference which the State Department seeks to draw. Section 128b. is an instruction to the licensing agency to be read by that agency at the time it makes its licensing decision. In that context, one would expect that different tenses would be used to describe the date by which the application must be filed and the date by which the export must take place. The application, having already been filed, is appropriately referred to in the certainty of the present tense. 4/ The date of export, however, cannot be referred to with similar certainty because, as the licensing agency approaches its decision, that date cannot be definitely known. For applications considered prior to March 10, the licensing agency no doubt was expected to use its best judgment in determining whether the export, if authorized, would occur before the deadline. The future conditional is the most appropriate tense with which to convey that instruction. For applications such as this one, however -- where no final decision had been reached prior to March 10 -- a similar exercise of judgment would not be necessary and could not have been contemplated.

Second, the Department's memorandum suggests that the examples of legislative history quoted in our earlier memorandum that refer to the "guillotine" effect of section 128 are misleading because the statements cited are based on an earlier version of section 128 subsequently modified by Congress before enactment of the statute. The Department of State, however, significantly fails to address the abundant post-enactment statements by key Members of Congress and administration officials which indicate that a "guillotine" effect was contemplated at the end of two years. For example, in our earlier memorandum we quoted testimony delivered by Dr. Joseph Nye, Deputy Undersecretary of State for Security Assistance, Science and Technology, before the Senate Foreign Relations Committee in 1978, after the NRC had referred Tarapur export license application XSNM-1060 to the President. Dr. Nye testified that "India is fully aware of the

3/ Id. at 14.

4/ The past tense also would have been suitable.

recently enacted Non-Proliferation Act that establishes that a recipient country must, within 2 years, have all its peaceful nuclear activities subject to IAEA safeguards as a condition for U.S. supply after that time. India is, of course, also aware of the time when this requirement comes into effect." ^{5/} See also e.g., Statement of Senator Glenn, Hearings on Nuclear Fuel Export to India Before the Subcomm. on Arms Control, Oceans, and International Environment of the Comm. on Foreign Relations, 95th Cong., 2d Sess. at 5, 6 (May 24, 1978); Statement of Representative Bingham, Hearings and Markup on Export of Nuclear Fuel to India Before the Comm. on International Relations, 95th Cong., 2d Sess. at 17 (May 23, 1978). These remarks are clearly at odds with the flexible approach which the Department is now urging on the grace period issue.

Finally, the State Department does not provide an adequate answer to the concern expressed in our earlier memorandum regarding our applications to which the Department's reasoning might apply. In that memorandum, we stated:

Use of the applicant's proposed shipping date could in fact lead to obviously unintended results. For example, in 1975 an application was filed with the NRC seeking authorization to export high-enriched uranium to South Africa. The Executive Branch has not yet provided the NRC with its views on that application. Suppose that five years from now the Executive Branch recommended issuance of that license. Under the State Department analysis full-scope safeguards would not be required because the application was filed prior to September 10, 1979, and the applicant expected to export the material prior to March 10, 1980. Certainly this is

^{5/} Nuclear Fuel Export to India Hearing Before the Subcomm. on Arms Control, Oceans and International Environment of the Senate Foreign Relations Comm., 95th Cong., 2d Sess., at 339 (1978). The Supreme Court in Seatrains Shipbuilding Corp. v. Shell Oil, ___ U.S. ___, 48 U.S.L.W. 4149, 4156 (Feb. 20, 1980), recently sanctioned the use of post-enactment legislative history to ascertain Congressional intent. The Court stated that although legislative history developed by a "subsequent Congress cannot override the unmistakable intent of the enacting one, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 359 n.39 (1977), such views are entitled to significant weight, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure."

inconsistent with the Congressional intent that there be a "guillotine" approach in the implementation of the full-scope safeguards requirement.

The Department points out that its policy would not dictate an export in the situation discussed above because the application in that situation could be regarded as a "highly unusual proposal" that the Congress admonished the NRC to reject. Yet the Senate report language to which the Department's analysis refers in making this point states:

The NRC should also not permit any other highly unusual proposals which are intended to circumvent this statutory provision. 6/ (emphasis added)

In this context, the intent referred to can only be that of the applicant for the license. In the situation posed regarding South Africa, no possibility exists that the applicant intended to circumvent a statute which, at the time of the application, was not yet in existence. The Department's argument that this application is a "highly unusual proposal" within the meaning of the Senate report thus fails in this case as it would in other cases where no intent to circumvent could be established.

For the reasons set forth in our legal memorandum of May 12, 1980, OGC remains convinced that the section 128 full-scope safeguards criterion is applicable to the fuel export license applications that the Commission referred to the President. We believe our analysis is consistent with both the legislative history and the Congressional purpose of the NNPA.

cc: OPE
OCA
IP
EDO
ELD
NMSS
SECY

6/ S. Rep. No. 95-467 at 18.

○

