

1 6 JAN 1981

## MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's Power to Set the Terms and  
Conditions of Nuclear Exports He Authorizes

out 1/19/81

This memorandum recounts our advice to the Office of the Counsel to the President on the President's power to set the terms and conditions of exports of nuclear materials. On October 2, 1980, at 4:30 p.m., Philip Bobbitt of that office contacted an attorney in this office, read to that attorney a proposed memorandum by the President, 1/ the text of which is attached, and asked the attorney to approve it. Mr. Bobbitt said that our approval was urgently needed.

The memorandum is concerned with an export of nuclear materials to India. The Nuclear Regulatory Commission disapproved this export, but the President exercised his authority under § 126(b)(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2155(b)(2), to overrule the Commission and authorize the export. The executive order which the President issued to overrule the Commission, on its face, would apparently authorize the exporter to make the entire export at the times specified in the license application. In order to dissuade Congress from passing a concurrent resolution opposing the export, Secretary Muskie promised that the Administration would delay, for about a year, one of the several shipments of nuclear material included in the proposed export. The purpose of the proposed memorandum was to enable the Administration to fulfill its commitment to Congress by giving the Secretary of State authority to require the exporter to delay one of the shipments.

This memorandum presents at least three substantial legal questions. The first is whether the President has the power to set the terms and conditions of an export he permits under § 126(b)(2). Section 126(b)(2) speaks only of the President's power to authorize "the proposed export." Arguably, this gives the President only the power

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1/ The memorandum was subsequently revised, signed by the President, and published at 45 Fed. Reg. 67629 (1980).

to approve or disapprove the export proposed by the exporter and passed upon by the Commission. The President cannot, arguably, approve it conditionally, or approve a different export from the one proposed. Presumably, the President cannot say that the export is authorized but must be shipped to Pakistan instead of to India; similarly, it might be argued, he cannot say that the export may proceed but at a different time from the one proposed by the exporter. Second, even if the President does have this power to modify "the proposed export," it can be argued that the power cannot be delegated to the Secretary of State. Section 126(b)(2) says that the President may authorize an export by issuing an executive order. If the power to set the terms and conditions of the export is somehow ancillary to this power to authorize the export -- and we see no better argument for the existence of the power to set terms and conditions -- then arguably, that power must also be exercised by executive order. And one can argue that when Congress specifies that a power be exercised by executive order, it expects the President to exercise the power himself and not delegate it. Third, by parallel reasoning, it can be argued that any exercise of the supposed power to set terms and conditions -- like exercises of the § 126(b)(2) power to which it is ancillary -- must lay before Congress for 60 days.

Despite these arguments, on the morning of October 3 this office advised the Office of the Counsel to the President that the memorandum, and the President's claim of authority to set the terms and conditions of the export to India, were defensible. 2/ In our view, it can plausibly be argued that

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2/ We also suggested two changes in the memorandum. We said that the word "notification" appeared to be insufficient to delegate the power to set the time, terms, and conditions of the export. We suggested that the memorandum be changed to make it clear that the President was delegating power to establish the time, terms, and conditions. The White House Counsel's Office later informed us that this change would be made. It is noted on the attachment. Second, we suggested that the term "receipt and shipment" be changed to "export" or "exports." Our reason was that the President's power over exports is clearer than his power over the receipt and shipment of nuclear materials, and that the Commission may have a stronger claim to authority to set terms and conditions of receipt and shipment. This change, also noted on the attachment, was also made.

the power to authorize an export, fairly interpreted, includes the power to set reasonable terms and conditions that do not alter the basic character of the export; it is, arguably, difficult to imagine any reason for Congress to have withheld that power from the President. It can also be argued that Congress was, in effect, on notice that the President believed he had this authority under the executive order that permitted the export; indeed, Congress all but insisted that the President exercise such authority. Since that executive order lay before Congress for sixty days, the executive branch may take the position that Congress cannot claim that the proposed terms and conditions must lay before it for sixty days. The delegation is supportable under 3 U.S.C. § 301.

We also advised the Office of the Counsel to the President that we could not say any more than that the proposed memorandum was defensible, particularly in view of the short time we had been given to make a judgment. We pointed out that the Administration had known at least since the congressional debates on the export to India -- during which Secretary Muskie made his commitment to delay the second shipment -- that there would be a question about the President's authority to order such a delay. We made it clear that we were not criticizing the White House Counsel's Office, but that we felt it was intolerable that we had been given so little time to address the issue.

John M. Harmon  
Assistant Attorney General  
Office of Legal Counsel

Attachment

MEMORANDUM FOR THE SECRETARY OF STATE

By virtue [sic] of the authority vested in me by Section 301 of Title 3 of the United States Code you are authorized to perform the following functions on my behalf:

1. Notification to exporters [determinations] of the time, terms, and conditions of receipt and shipment [exports] made pursuant to any Executive order heretofore or hereafter issued under Section 126(b)(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2155(b)(2)).

2. Issuance of such rules, regulations, and procedures as you may from time to time deem necessary or desirable for the exercise of the functions delegated by paragraph 1.

This memorandum shall be published in the Federal Register.

Jimmy Carter