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APPROVED
AUG 17 1974

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

AUG 13 1974

Posted 8/17/74

To Archives 8/19/74

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 3669 - Omnibus atomic energy bill
Sponsor - Sen. Pastore (D) Rhode Island

Last Day for Action

August 17, 1974 - Saturday

Purpose

Authorizes AEC to transfer to foreign nations special nuclear materials in excess of existing statutory ceilings subject to disapproval within 60 days by a concurrent resolution of the Congress, extends the system of rewards for information on illegal uses of special nuclear materials, clarifies authority for a clearance program for persons having access to such materials, permits the exemption from licensing requirements of certain classes or quantities of special nuclear materials upon special findings as to risk, clarifies authority for approved States to license the use of nuclear materials, and extends the existing authority of AEC to require compulsory licensing of nuclear patents.

Agency Recommendations

Office of Management and Budget	Approval
Atomic Energy Commission	Approval
Department of State	Approval
Department of Defense	No objection
Department of the Treasury	No objection
Central Intelligence Agency	No objection
Department of Justice	Defers to AEC

Discussion

This bill amends the Atomic Energy Act of 1954 and the Atomic Weapons Rewards Act of 1955 in a number of ways--all of which were proposed by AEC except two provisions noted below.

Atomic Weapons and Special Nuclear Materials Rewards Act

The bill would amend the Atomic Weapons Rewards Act of 1955 to change its title and to establish a system of rewards for information concerning the actual illegal introduction, manufacture, or acquisition of nuclear materials or weapons. Previously, the Act applied only to attempts to introduce, manufacture, or acquire such material.

The bill would extend the Act to cover the export or attempt to export such materials and to cover conspiracies to introduce, manufacture, acquire, or export such materials. It would also embody in the Act a change made by Reorganization Plan No. 4 of 1965, to place the determination of the entitlement of a reward in the Attorney General, rather than in an interagency Awards Board.

The Atomic Energy Act of 1954

The bill would clarify the authority of the AEC to institute measures to control and approve persons who have access to, or control over, substantial amounts of nuclear material. Under a recent Supreme Court decision, the authority over access to materials is in doubt, although the control over access to in-information is clear. These changes will clarify AEC's authority over access to nuclear materials and aid in protecting nuclear material and nuclear weapons from diversion to unauthorized uses.

The bill would clarify the authority of States, having a federally-approved program, to license persons for the distribution of nuclear byproduct material, which is useful in a great many commercial activities. As currently worded, present law may be read to limit such distribution only to persons with Federal licenses. Since the AEC carefully evaluates a State's nuclear program before approving it, protection against misuse of such materials should be sufficient.

S. 3669 would authorize the AEC to exempt from licensing requirements certain classes, quantities, or kinds of uses or users of

special nuclear materials; e.g., nuclear-powered cardiac pacemakers. Exemptions would be allowed after a finding by the AEC that they would not endanger national security or unreasonably risk public health and safety. In its views letter on the enrolled bill, AEC comments:

> "Developments in technology have led, and are expected to lead to the production and use of products and devices incorporating special nuclear material as a power source in such quantities and forms that an AEC license for the ultimate user may not be necessary (e.g. persons with cardiac pacemakers fueled with small amounts of plutonium-238)."

If materials are exempt under the above authority or if plutonium-238 is involved, the bill authorizes the AEC to issue export licenses even though there is no agreement for cooperation with the receiving nation.

The bill would amend the Act to provide that AEC's proposals to increase the existing statutory ceilings or change the duration or conditions for transferring special nuclear materials to the International Atomic Energy Agency or to other groups of nations would have to be submitted to the Congress. If Congress did not pass within 60 days of continuous session a concurrent resolution disapproving such a proposal, the change would go into effect. Currently, an act of Congress is required to make such changes. This provision would allow more flexibility in the administration of such transfers. In its views letter, AEC evaluates this provision as follows:

> "The Commission believes that elimination of the requirement that new legislation be passed to permit distribution of additional quantities of special nuclear material to IAEA and EURATOM, and addition of a more flexible method of establishing such amounts will provide the Commission with the flexibility now required to respond to the increasing nuclear power needs of the nations of EURATOM, and the nations who desire to obtain their nuclear power fuel through the IAEA. Moreover, the Commission recognizes that the review mechanism established by the Bill is consistent with the widely expressed Congressional view as to the desirability of ensuring that each house of Congress will have an adequate opportunity for careful and timely review of and

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decision on, the additional quantities of special nuclear material and periods of time during which such quantities may be so distributed."

In its views letter on the enrolled bill, Justice indicates that it believes the concurrent resolution in S. 3669 violates the provisions of Article I, section 7 of the Constitution, since it is not a bill subject to the President's approval or his veto. After stating its reasoning, it observes: "Of course, we cannot deny that the practice of providing in statutes for amendment or repeal of legislative authority by concurrent resolution has continued for some years..." Subject to consideration of the observations made in its letter, Justice defers to the AEC as to whether the bill should be approved.

The concurrent resolution approach was not, of course, proposed by the Administration; and we share Justice's concern about its unconstitutionality. Nevertheless, we believe the bill should be approved despite its inclusion for the following reason. A similar provision already exists in law with respect to congressional disapproval of military agreements concerning nuclear weapons. In S. 3669, Congress is willing to permit AEC to transfer special nuclear materials to international organizations or groups of nations in excess of existing statutory ceilings without requiring an act of Congress to approve such transfers, but wants to retain some form of control over the transfers because of concern about granting too large a proportion of our uranium enrichment capacity to foreign nations and perhaps because of apprehension that the materials may be channelled into illegal uses. Under all the circumstances, we do not believe that Congress' desire for a measure of review is unwarranted, although unfortunate in form.

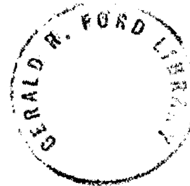
S. 3669 would extend for five years, until September 1, 1979, the AEC's existing authority to require the nonexclusive licensing of any privately owned patent if it finds that: (1) the invention is of "primary importance" in the production or utilization of special nuclear material or atomic energy; and (2) the licensing is of "primary importance" to effectuate the policies and purposes of the Atomic Energy Act. The Commission did not request this provision but supported its inclusion.

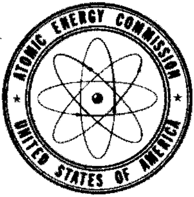
The AEC would then be empowered to use the invention itself or require its licensing to others upon payment of a reasonable royalty fee. While this power has never been used, it could

be important if companies which have developed a substantial amount of knowledge and experience with public assistance should refuse to share their expertise with others.

Wilfred H. Rommel
Assistant Director for
Legislative Reference

Enclosures





UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

AUG 8 1974

Mr. Wilfred H. Rommel
Assistant Director for
Legislative Reference
ATTN: Mrs. Louise Garziglia
Legislative Reference Division
Office of Management and Budget

Dear Mr. Rommel:

The Atomic Energy Commission is pleased to respond to your request for its views and recommendations on Enrolled Bill, S. 3669, "[t]o amend the Atomic Energy Act of 1954, as amended, and the Atomic Weapons Rewards Act of 1955, and for other purposes."

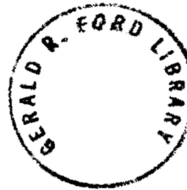
The Atomic Energy Commission recommends that the President sign the Enrolled Bill.

The Commission believes the bill will aid the performance of its functions in a number of areas, including safeguards, foreign distribution of special nuclear material, licensing and regulation, distribution of by-product material, and patents.

It should be noted that there are four typographical errors in the Bill. The most significant involves the last section, which is erroneously designated "Section 6." The first two lines of the last section are as follows: "Section 6. Subsection 153 h. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:". These lines should be: "Section 7. Subsection 161 i. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:". Another error in the last section is the omission of the word "and" in subparagraph 161 i.(2), between "Act," and "to" (the 35th and 36th words in 161 i.(2)). There is also a typographical error in the "new" subparagraph 54 a.(i). The date "June 1, 1960" should be "July 1, 1960." Finally, the 34th word in subparagraph 54 b.(2) should be "for" rather than "of".

Section 1 amends the Atomic Weapons Rewards Act of 1955 by changing the title to "Atomic Weapons and Special Nuclear Materials Rewards Act," broadening the coverage of the Act, and making certain conforming and technical changes.

The Weapons Rewards Act presently covers, among other things, payment of rewards to persons furnishing original information with respect to the illegal attempted introduction into the United States or attempted

  AUG 8 1974

manufacture or acquisition therein of special nuclear material or an atomic weapon. The amendment would extend the coverage of the Act to information regarding (1) the actual introduction of special nuclear material or an atomic weapon into the United States, (2) actual manufacture or acquisition contrary to U.S. law, and (3) conspiracy to introduce or manufacture or acquire such material or weapon contrary to U.S. law. The amendment would also extend coverage to information with respect to the export, attempted export, or a conspiracy to export, special nuclear material or an atomic weapon contrary to the laws of the United States. The amendment would transfer from an interagency Awards Board to the Attorney General the authority to make awards. The statute would thus reflect the transfer to the Attorney General which was made by Reorganization Plan Number 4 of 1965. The amendment includes an explicit provision that a determination of an award made by the Attorney General shall be final and conclusive, and that no court shall have power or jurisdiction to review it.

Section 2 amends section 54 of the Atomic Energy Act. Subparagraph 54 a. (ii) has been added which provides that, notwithstanding the foregoing provisions of the subsection, the Commission may distribute to the International Atomic Energy Agency, or to any group of nations, such amounts of special nuclear materials and for such periods of time, other than those amounts and periods specified in subparagraph 54 a.(i), as are established by the Commission. However, before they are established by the Commission, such other amounts and periods shall be submitted to Congress and referred to the Joint Committee on Atomic Energy and a specified period of 60 days shall elapse. Any such other amounts and periods would not become effective if during such 60-day period Congress passes a concurrent resolution stating in substance that it does not favor the proposed action. The Joint Committee, prior to the elapse of the first 30 days of any such 60-day period, would submit a report to Congress of its views and recommendations respecting the proposed amounts and periods and an accompanying proposed concurrent resolution stating that Congress favors, or does not favor, the proposed amounts or periods.

The Commission believes that elimination of the requirement that new legislation be passed to permit distribution of additional quantities of special nuclear material to IAEA and EURATOM, and addition of a more flexible method of establishing such amounts will provide the Commission with the flexibility now required to respond to the increasing nuclear power needs of the nations of EURATOM, and the nations who desire to obtain their nuclear power fuel through the IAEA. Moreover, the Commission recognizes that the review mechanism established by the Bill is consistent with the widely expressed Congressional view as to the desirability of ensuring that each house of Congress will have an adequate opportunity for careful and timely review of and decision on, the

additional quantities of special nuclear material and periods of time during which such quantities may be so distributed.

The new subsections 54 b. and c. would liberalize the requirement of the present section 54, which prohibits the Commission itself from exporting, or issuing a license for, or otherwise authorizing, export of special nuclear material except under the terms of an agreement for cooperation arranged pursuant to section 123. These subsections would permit the Commission to export, and to authorize others to export, other than under an agreement for cooperation, special nuclear material in classes or quantities or of kinds of uses or users that had been exempted pursuant to subsection 57 d. as amended, and any quantity of plutonium containing 80 percent or more by weight of plutonium-238.

The new subsections would thus eliminate unnecessary expenditure of time and effort required to process license applications for export of special nuclear material for peaceful applications under the current provisions of the Act and the prohibition on exports of special nuclear material for peaceful purposes to countries which have not entered into agreements for cooperation when such exports would not adversely affect the common defense and security.

The provision permitting export of plutonium containing 80 percent or more by weight of plutonium-238 other than under an agreement for cooperation is consistent with the guidelines of the International Atomic Energy Agency which exempt plutonium-238 from the requirements of safeguards agreements under the Treaty on the Non-Proliferation of Nuclear Weapons.

Since it is not practical to utilize plutonium-238 as fissile material, because of the decay heat, adequate control of plutonium-238 exports can be exercised through the licensing process without the need for an agreement for cooperation.

Section 3 adds a new subsection 57 d. to the Atomic Energy Act. The subsection authorizes the Commission to exempt certain classes or quantities of special nuclear material or kinds of uses or users from the requirements for a license set forth in the Act when it makes a finding that the exemption of such classes or quantities of special nuclear material or such kinds of uses or users would not be inimical to the common defense and security and would not constitute an unreasonable risk to the health and safety of the public.

Developments in technology have led, and are expected to lead to the production and use of products and devices incorporating special nuclear material as a power source in such quantities and forms that an AEC license for the ultimate user may not be necessary (e.g. persons with cardiac pacemakers fueled with small amounts of plutonium-238).

Section 4 amends section 81 of the Atomic Energy Act to make clear that byproduct material may be made available to persons licensed by Agreement States as well as to persons licensed by the Commission. A narrow reading of section 81 as it is now worded may limit such distribution only to persons licensed by the Commission. A substantial number of states (24 at the end of FY 1973) are now Agreement States and they are all active in evaluating applications for licenses for receipt of byproduct material. Byproduct material is useful in a great number of commercial activities ranging from radiographs of welds to analyses of air and river water with respect to potential environmental problems. When the Commission enters into an agreement with a state under section 274 of the Act, the State's standards and procedures for licensing nuclear materials, including byproduct material, are very carefully evaluated. Therefore, there is no reason to differentiate between those persons authorized under Agreement States and AEC licensees. Thus, the proposed amendment of section 81 would be a logical, conforming change facilitating the distribution of byproduct material.

Section 5 makes conforming technical changes.

Section 6 amends subsection 153 h. of the Atomic Energy Act by extending the operation of section 153 from September 1, 1974 to September 1, 1979. The section essentially provides that either the Commission or a private party may institute a proceeding to compel a patent owner to license a patent for a reasonable royalty.

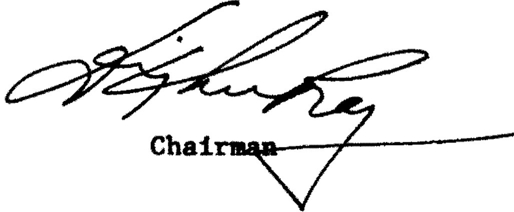
The original authority of the Commission to compel the licensing of certain patents was based on subsection 11 c. of the Atomic Energy Act of 1946. In its present form, the authority has been in the Atomic Energy Act since 1954. It was enacted for a five-year period to assure that a limited number of companies could not establish a dominant patent position to exclude others desiring to enter the field. As participation broadened, it was intended that the authority would be allowed to lapse. Subsequent five-year extensions in 1959, 1964, and 1969 have extended the provisions to those patents based on applications filed prior to September 1, 1974.

While the industrial base is now broader than at the time of the initial legislation in 1954 and the extensions in 1959, 1964, and 1969, it is still limited in certain fields to a relatively few companies. In addition, important new developments in atomic energy are just emerging from the research phase to a possible commercial phase. As examples of such new fields, we note fast breeder reactors, the uranium enrichment field, and the laser fusion field. Furthermore, patenting may take place in areas directly affecting public health and safety. The section's authority, therefore, can still provide a useful "standby" safeguard to private industry and the public.

Section 7 amends subsection 161 i. of the Atomic Energy Act to clarify and make explicit the authority of the Commission to institute a clearance program for inquiry into the associations and backgrounds of persons who have access to or control over significant quantities of special nuclear material.

Although Chapter 12 of the Atomic Energy Act provides in section 145 authority for the security clearance program for access to Restricted Data and other classified information, it speaks only in terms of access to information and not of access to or control over materials. Without legislation explicitly authorizing a clearance program for persons having access to or control over unclassified special nuclear material, questions may be raised as to the legal validity of such a program. We believe that this section and the amendment of the Atomic Weapons Rewards Act will aid the Commission's program of safeguarding special nuclear material and atomic weapons from diversion to unauthorized uses.

Sincerely,



Chairman

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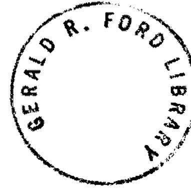
DEPARTMENT OF STATE

Washington, D.C. 20520

AUG 9 - 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503



Dear Mr. Ash:

This is in response to your request for the views of the Department of State on an enrolled bill (S.3669) captioned "An Act to Amend the Atomic Energy Act of 1954, as Amended, and the Atomic Weapons Rewards Act of 1955, and for Other Purposes". The enrolled bill affects the responsibilities of the Department of State in two respects.

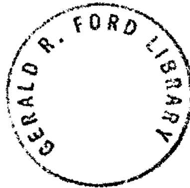
First, Section 2 would amend Section 54 of the Atomic Energy Act of 1954, as amended, to authorize the distribution of special nuclear material to the International Atomic Energy Agency (IAEA) or to any group of nations (such as EURATOM) in such amounts and for such period of time as are established by the Atomic Energy Commission, provided that the Commission's proposals are submitted to Congress and 60 days have elapsed during which Congress may approve or disapprove the proposal by concurrent resolution. Since existing law requires an act of Congress authorizing each proposed quantity for distribution, the effect of the amendment would be to streamline the requirements for cooperation with IAEA and groups of nations. We would have preferred that authority to distribute materials to the IAEA be delegated to the AEC with less stringent provisions for Congressional review, but nevertheless consider the enrolled bill to be an improvement over existing law. We take note of the provision for Congressional disapproval by concurrent resolution and are aware of the views expressed by the Justice Department in other contexts as to the constitutionality of such provisions. However, we do not consider that this issue is sufficient cause for a veto and defer to the Department of Justice on the need for a signing statement.

Second, Section 2 of the enrolled bill adds to Section 54 of the Atomic Energy Act of 1954, as amended, provisions which would facilitate the distribution to persons outside the United States of certain categories of special nuclear mate-

rials which are, or are determined by the AEC to be, not inimical to the common defense and security and would not constitute an unreasonable risk to the health and safety of the public. This provision will enable the distribution of special nuclear material for use in such devices as heart pacemakers and was proposed by the AEC. The Department of State fully supports its enactment into law.

Accordingly, the Department of State recommends approval of the enrolled bill by the President and defers to the Department of Justice for its views on the constitutional issues that are raised.

Cordially,

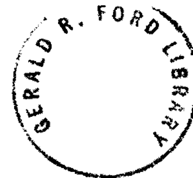


Linwood Holton
Assistant Secretary for
Congressional Relations

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

12 August 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503



Dear Mr. Ash:

This is in response to your request for the views of the Department of Defense comments on the enrolled enactment of S. 3669, 93d Congress, "To amend the Atomic Energy Act of 1954, as amended and the Atomic Weapons Rewards Act of 1955, and for other purposes."

The legislation would amend several sections of the above Acts as follows:

-- expand the provisions of the Atomic Weapons Rewards Act of 1955.

-- expand the authority of the Commission to distribute special nuclear materials to groups of nations (e.g. EURATOM) subject to Congressional overwatch.

-- authorize the Commission to distribute plutonium containing 80 percent or more Pu ^{238} and other special nuclear materials to individuals outside the United States (Pu ^{238} is used in nuclear powered heart pacemakers).

-- extend the provisions covering patent applications pertaining to non-military utilization of atomic energy to 1979.

-- expand the authority of the Commission to protect Restricted Data and to guard against the loss or diversion of special nuclear material.

The Department of Defense has reviewed this legislation and has no objection to its enactment

Sincerely,

Martin R. Hoffmann

THE GENERAL COUNSEL OF THE TREASURY

WASHINGTON, D.C. 20220

AUG 6 1974

Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Attention: Assistant Director for Legislative
Reference

Sir:

Your office has asked for the views of this Department on the enrolled enactment of S. 3669, "To amend the Atomic Energy Act of 1954, as amended, and the Atomic Weapons Rewards Act of 1955, and for other purposes."

The only provisions of the proposed legislation of interest to this Department are contained in the first section of the enrolled enactment. That section would, among other things, amend the Atomic Weapons Rewards Act of 1955 to reflect in its text the transfer of the functions of the Award Board to the Attorney General which transfer was accomplished by Reorganization Plan No. 4 of 1965. Prior to that time, the authority to grant awards was vested in the Board, which consisted of the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Director of Central Intelligence, and one member of the Atomic Energy Commission.

The Department would have no objection to a recommendation that the enrolled enactment be approved by the President insofar as the foregoing provisions are concerned.

Sincerely yours,

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Richard R. Albrecht

General Counsel

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

6 August 1974

Mr. Wilfred H. Rommel
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Rommel:

This is in response to your letter of 5 August requesting our comments and recommendations on enrolled bill S. 3669 which amends the Atomic Energy Act of 1954 and the Atomic Weapons Rewards Act of 1955.

The portions of S. 3669 that amend the Atomic Energy Act of 1954 deal principally with foreign distribution of special nuclear material and as such reflect the judgment of the Congress on this policy issue. These matters are beyond the jurisdictional interests of the Central Intelligence Agency and I accordingly have no objection to them.

Under the Atomic Weapons Rewards Act of 1955 as presently constituted and as amended by S. 3669, the Director of Central Intelligence is to effect payment of any awards made thereunder out of funds appropriated or available for the administration of the National Security Act of 1947. The instant amendments do not affect this provision of the 1955 Act and I therefore have no comment on or objection to them.

Sincerely,

W. E. Colby
Director

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

AUG 9 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

In compliance with your request I have examined a facsimile of the enrolled bill S. 3669 (93rd Cong., 2d Sess.) "To amend the Atomic Energy Act of 1954, as amended, and the Atomic Weapons Rewards Act of 1955, and for other purposes."

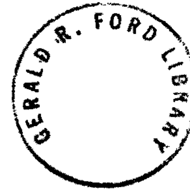
Section 2 of the enrolled bill would amend Section 54 of the Atomic Energy Act of 1954, as amended, to provide that:

> ...that any such proposed amounts and periods shall not become effective if during such sixty-day period the Congress passes a concurrent resolution stating in substance that it does not favor the proposed action...

It is the position of the Department of Justice that this concurrent resolution veto provision violates the provisions of Article I, section 7 of the Constitution.

The language of the Constitution clearly indicates that the veto power of the President was intended to apply to all actions of Congress which have the force of law. It would be difficult to conceive of language and history which could more clearly require that all such concurrent action of the two Houses be subject to either the President's approval or his veto. Two provisions of Article I, section 7 are involved. Thus, the Constitution provides first that every bill which passes the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President for his approval or disapproval. If disapproved it does not become law unless repassed by a two-thirds vote of each House (Art. I, Sec. 7, clause 2). At the Convention it was recognized that Congress might evade this provision by passing resolutions rather than bills. During the debate on this clause, James Madison observed that--

> "if the negative of the President was confined to bills; it would be evaded by acts under the form and name of Resolutions, votes ***."



Madison believed that additional language was necessary to pin this point down and therefore

> "proposed that 'or resolve' should be added after 'bill' *** with an exception as to votes of adjournment &c."

Madison's notes show that "after a short and rather confused conversation on the subject," his proposal was, at first, rejected. 2 M. Farrand, The Records of the Federal Convention of 1787 301-02 (1937 Rev. ed.) ("Farrand"). However, at the commencement of the following day's session, Mr. Randolph, "having thrown into a new form" Madison's proposal, renewed it and it passed by a vote of 9-1. 2 Farrand 303-05. Thus, the Constitution today provides in the last paragraph of Article I, section 7:

> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question Of Adjournment) shall be presented to the President ***; and before the Same shall take Effect, shall be approved by him, or being disapproved by him shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

The intent of this clause was clearly to prevent resolutions designed to evade the specified legislative procedure.

The purpose of the veto was not merely to prevent bad laws but to protect the powers of the President from inroads. Leading participants in the Convention of 1787, such as James Madison, Gouverneur Morris and James Wilson, pointed out that the veto would protect the office of President against "encroachments of the popular branch" and guard against the legislature "swallowing up all the other powers." 2 Farrand 299-300, 586-87. In The Federalist (No. 73), Hamilton states that the primary purpose of conferring the veto power on the President is "to enable him to defend himself." Otherwise he "might be gradually stripped of his authorities by successive resolutions, or annihilated by a signle vote."

If it is argued that this concurrent resolution veto provision is valid, then there seems to be no limit to the powers of Congress to upset the historic concept of executive-legislative relations by reserving the right

in legislation to amend or repeal the statute by concurrent resolution. This would avoid presentation of subsequent legislative decisions to the President as contemplated by Article I, Section 7. See R. Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 594-95 (1953); J. P. Harris, Congressional Control of Administration 205-206, 238-40 (Brookings, 1964); Statement of Erwin N. Griswold, National Emergency, Hearings before the Senate Special Committee on the Termination of the National Emergency, 93rd Cong., 1st Sess., Part 3, 741-747 (1973); L. Henkin, Foreign Affairs and the Constitution 121 (Foundation Press, 1972). But see J. & A. Cooper, The Legislative Veto and the Constitution, 30 G.W.L. Rev. 467 (1962); The Constitution of the United States, Analysis and Interpretation, S. Doc. No. 39, 88th Cong., 1st Sess. 135 (1964).

Of course we cannot deny that the practice of providing in statutes for amendment or repeal of legislative authority by concurrent resolution has continued for some years. There are new proposals made in each Congress not only for legislative action by concurrent resolution but by the action of only one House or by one or more committees of Congress. An important example is section 5(c) of the War Powers Act, 87 Stat. 555 (1973), passed over the President's veto, despite a veto message including the statement that the concurrent resolution provision for terminating certain powers of the President was unconstitutional. State Dept. Bull., Nov. 26, 1973, p. 662. The House Committee Report on the War Powers Act (93-287) considered this question and, without making any attempt to come to grips with the language of the Constitution, concluded that the provision was valid because there was "ample precedent" for it. In support the report noted that most of the important legislation enacted for the prosecution of World War II provided for termination of powers upon adoption of concurrent resolutions, including the Lend-Lease Act, First War Powers Act, Emergency Price Control Act and others. See Ginnane, supra; Harris, supra. Admittedly, the Executive branch has not been entirely consistent as far as articulating its position has been concerned. E.g., R. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953). Nevertheless, we do not believe that the matter can be determined by recent usage alone. Although custom or practice can be a source of constitutional law, the cases indicate that this can occur if the test is ambiguous or doubtful but not where the practice is clearly incompatible with the supreme law of the land. McPherson v. Blacker,

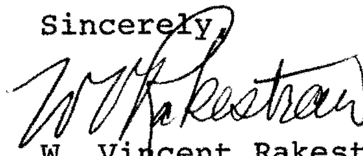
146 U.S. 1, 27 (1892); Inland Waterways v. Young, 309 U.S. 517, 525 (1940); Field v. Clark, 143 U.S. 649, 691 (1892); Nixon v. Sirica, 487 F. 2d 700, 730 (D.C. Cir. 1973) and cases cited therein (McKinnon, J., concurring in part). Here, as noted, the recent practice contradicts the clear text of Article I, section 7.

Moreover, if one is to look to constitutional precedent, the recent trend toward the use of Congressional veto devices is not the only relevant practice. The contemporaneous construction of the Constitution that was followed until recent times points in an entirely different direction. A careful analysis of the practice compiled by the Senate Judiciary Committee in 1897 beginning with the first Congress through the nineteenth century shows that concurrent resolutions were limited to matters "in which both House have a common interest, but with which the President has no concern." They never "embraced legislative provisions proper." S. Rep. No. 1335, 54th Cong., 1st Sess. 6 (1897). The report concluded that the Constitution requires that resolutions must be presented to the President when "they contain matter which is properly to be regarded as legislative in its character and effect." Id. at 8, quoted in part in 4 Hinds' Precedents of the House of Representatives § 3483.

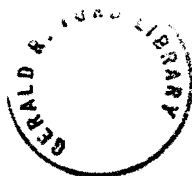
It appears that it was not until 1919 that it was seriously suggested that Congress could make an affirmative policy or legislative decision by a concurrent resolution not presented to the President. Actual enactments of this kind did not begin until the 1930's. Ginnane, supra at 575. Thus, if any deference is to be given to practice and precedent, we believe that the practice begun with the adoption of the Constitution and continued uniformly for approximately 150 years is entitled to far greater weight than the more recent sporadic and often debated examples of lawmaking by concurrent resolution.

Subject to your consideration of the above observations, the Department of Justice defers to the Atomic Energy Commission as to whether this bill should receive Executive approval.

Sincerely,



W. Vincent Rakestraw
Assistant Attorney General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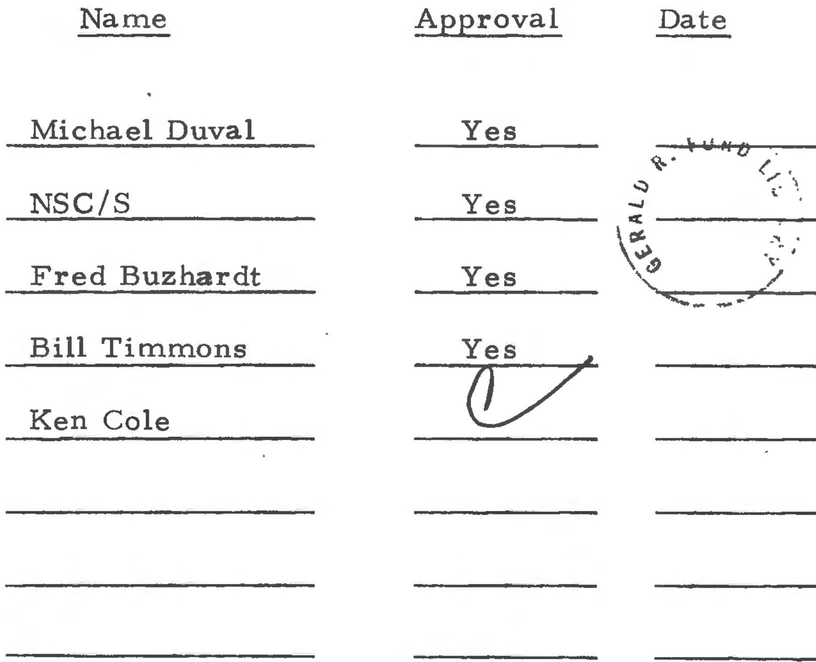
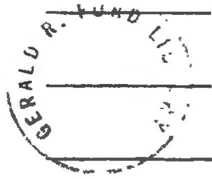
THE WHITE HOUSE
WASHINGTON

ENROLLED BILL

SUBJECT: Enrolled Bill S. 3669 - Omnibus Atomic Energy Bill



Name	Approval	Date
Michael Duval	Yes	
NSC/S	Yes	
Fred Buzhardt	Yes	
Bill Timmons	Yes	
Ken Cole	✓	



Comments:

Possible signing statement on the Constitutionality of Section 2 of the Bill.

THE WHITE HOUSE

WASHINGTON

ACTION MEMORANDUM

LOG NO.: 507

Date: August 13, 1974

Time: 12:30 p.m.

FOR ACTION:
✓ Michael Duval
✓ NSC/S - approves but should be accompanied by a signing statement on the constitutionality of Sec. 2 of the Bill.
✓ Fred Buzhardt
✓ Bill Timmons

cc (for information):
Warren K. Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Wednesday, August 14, 1974 Time: 2:00 p.m.

SUBJECT: Enrolled Bill S. 3669 - Omnibus Atomic Energy Bill

ACTION REQUESTED:

___ For Necessary Action	XX For Your Recommendations
___ Prepare Agenda and Brief	___ Draft Reply
___ For Your Comments	___ Draft Remarks

REMARKS:

Please return to Kathy Tindle - West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

To Warren Hendriks 8-13-74

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

AUG 13 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 3669 - Omnibus atomic energy bill
Sponsor - Sen. Pastore (D) Rhode Island

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Last Day for Action

August 17, 1974 - Saturday

Purpose

Authorizes AEC to transfer to foreign nations special nuclear materials in excess of existing statutory ceilings subject to disapproval within 60 days by a concurrent resolution of the Congress, extends the system of rewards for information on illegal uses of special nuclear materials, clarifies authority for a clearance program for persons having access to such materials, permits the exemption from licensing requirements of certain classes or quantities of special nuclear materials upon special findings as to risk, clarifies authority for approved States to license the use of nuclear materials, and extends the existing authority of AEC to require compulsory licensing of nuclear patents.

Agency Recommendations

Office of Management and Budget	Approval
Atomic Energy Commission	Approval
Department of State	Approval
Department of Defense	No objection
Department of the Treasury	No objection
Central Intelligence Agency	No objection
Department of Justice	Defers to AEC

Discussion

This bill amends the Atomic Energy Act of 1954 and the Atomic Weapons Rewards Act of 1955 in a number of ways--all of which were proposed by AEC except two provisions noted below.

Atomic Weapons and Special Nuclear Materials Rewards Act

The bill would amend the Atomic Weapons Rewards Act of 1955 to change its title and to establish a system of rewards for information concerning the actual illegal introduction, manufacture, or acquisition of nuclear materials or weapons. Previously, the Act applied only to attempts to introduce, manufacture, or acquire such material.

The bill would extend the Act to cover the export or attempt to export such materials and to cover conspiracies to introduce, manufacture, acquire, or export such materials. It would also embody in the Act a change made by Reorganization Plan No. 4 of 1965, to place the determination of the entitlement of a reward in the Attorney General, rather than in an interagency Awards Board.

The Atomic Energy Act of 1954

The bill would clarify the authority of the AEC to institute measures to control and approve persons who have access to, or control over, substantial amounts of nuclear material. Under a recent Supreme Court decision, the authority over access to materials is in doubt, although the control over access to in-information is clear. These changes will clarify AEC's authority over access to nuclear materials and aid in protecting nuclear material and nuclear weapons from diversion to unauthorized uses.

The bill would clarify the authority of States, having a federally-approved program, to license persons for the distribution of nuclear byproduct material, which is useful in a great many commercial activities. As currently worded, present law may be read to limit such distribution only to persons with Federal licenses. Since the AEC carefully evaluates a State's nuclear program before approving it, protection against misuse of such materials should be sufficient.

S. 3669 would authorize the AEC to exempt from licensing requirements certain classes, quantities, or kinds of uses or users of

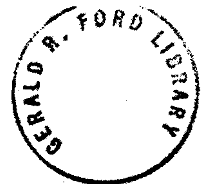
special nuclear materials; e.g., nuclear-powered cardiac pacemakers. Exemptions would be allowed after a finding by the AEC that they would not endanger national security or unreasonably risk public health and safety. In its views letter on the enrolled bill, AEC comments:

> "Developments in technology have led, and are expected to lead to the production and use of products and devices incorporating special nuclear material as a power source in such quantities and forms that an AEC license for the ultimate user may not be necessary (e.g. persons with cardiac pacemakers fueled with small amounts of plutonium-238)."

If materials are exempt under the above authority or if plutonium-238 is involved, the bill authorizes the AEC to issue export licenses even though there is no agreement for cooperation with the receiving nation.

The bill would amend the Act to provide that AEC's proposals to increase the existing statutory ceilings or change the duration or conditions for transferring special nuclear materials to the International Atomic Energy Agency or to other groups of nations would have to be submitted to the Congress. If Congress did not pass within 60 days of continuous session a concurrent resolution disapproving such a proposal, the change would go into effect. Currently, an act of Congress is required to make such changes. This provision would allow more flexibility in the administration of such transfers. In its views letter, AEC evaluates this provision as follows:

> "The Commission believes that elimination of the requirement that new legislation be passed to permit distribution of additional quantities of special nuclear material to IAEA and EURATOM, and addition of a more flexible method of establishing such amounts will provide the Commission with the flexibility now required to respond to the increasing nuclear power needs of the nations of EURATOM, and the nations who desire to obtain their nuclear power fuel through the IAEA. Moreover, the Commission recognizes that the review mechanism established by the Bill is consistent with the widely expressed Congressional view as to the desirability of ensuring that each house of Congress will have an adequate opportunity for careful and timely review of and



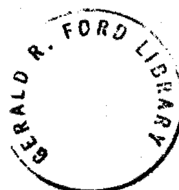
decision on, the additional quantities of special nuclear material and periods of time during which such quantities may be so distributed."

In its views letter on the enrolled bill, Justice indicates that it believes the concurrent resolution in S. 3669 violates the provisions of Article I, section 7 of the Constitution, since it is not a bill subject to the President's approval or his veto. After stating its reasoning, it observes: "Of course, we cannot deny that the practice of providing in statutes for amendment or repeal of legislative authority by concurrent resolution has continued for some years..." Subject to consideration of the observations made in its letter, Justice defers to the AEC as to whether the bill should be approved.

The concurrent resolution approach was not, of course, proposed by the Administration; and we share Justice's concern about its unconstitutionality. Nevertheless, we believe the bill should be approved despite its inclusion for the following reason. A similar provision already exists in law with respect to congressional disapproval of military agreements concerning nuclear weapons. In S. 3669, Congress is willing to permit AEC to transfer special nuclear materials to international organizations or groups of nations in excess of existing statutory ceilings without requiring an act of Congress to approve such transfers, but wants to retain some form of control over the transfers because of concern about granting too large a proportion of our uranium enrichment capacity to foreign nations and perhaps because of apprehension that the materials may be channelled into illegal uses. Under all the circumstances, we do not believe that Congress' desire for a measure of review is unwarranted, although unfortunate in form.

S. 3669 would extend for five years, until September 1, 1979, the AEC's existing authority to require the nonexclusive licensing of any privately owned patent if it finds that: (1) the invention is of "primary importance" in the production or utilization of special nuclear material or atomic energy; and (2) the licensing is of "primary importance" to effectuate the policies and purposes of the Atomic Energy Act. The Commission did not request this provision but supported its inclusion.

The AEC would then be empowered to use the invention itself or require its licensing to others upon payment of a reasonable royalty fee. While this power has never been used, it could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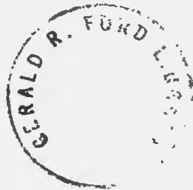
be important if companies which have developed a substantial amount of knowledge and experience with public assistance should refuse to share their expertise with others.

Wilfred H. Rommel
Assistant Director for
Legislative Reference

Enclosures



THE WHITE HOUSE

WASHINGTON

August 14, 1974

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TO: WARREN HENDRICKS

FROM: Glenn Schleede

SUBJECT: Enrolled Bill S. 3669 - Omnibus Atomic Energy Bill

I have checked the views of others concerned on the NSC Staff suggestion that the President issue a statement concerning the constitutional issue(discussed on pages 3-4 of the enrolled bill memo) when he signs S. 3669.

OMB (Rommel and Ebner) feel very strongly that there should not be a signing statement and indicate that they do not know what logically could be put in a statement. They would like to be involved if any further thought is given to a statement because of their past involvement in previous similar questions as because of their long term work on the Congressional encroachment issue.

Mr. Buchen has also been consulted and he believes that a signing statement is not desirable. Mike Duval initially thought a statement might be desirable but now agrees with Mr. Buchen's conclusion.

Col Kennedy of NSC is the person who recommended a statement but I have been unable to reach him to find out if he now wishes to withdraw the suggestion or pursue it further. No one else on the NSC staff is prepared to speak for him.

I will call/you as soon as I hear from Col. Kennedy. If you must move before we hear from him, I'd recommend proceeding on the assumption that there shouldn't be a statement.

(Incidentially, no statement has been drafted. Because the people familiar with the issue in OMB and the WH Counsel's office don't believe a statement is desirable, they aren't anxious to do a draft. If you think we need one as a contingency measure, please let me know.)

THE WHITE HOUSE

WASHINGTON

Date: 8/16/74

TO: GLENN SCHLEEDE

FROM: Kathy Tindle

For your information: ______

Comments:

Per our conversation. Also, could you please return this material when you are finished.

Thanks much.

THE WHITE HOUSE

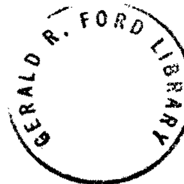
WASHINGTON

August 14, 1974

MEMORANDUM FOR: MR. WARREN HENDRIKS

FROM: WILLIAM E. TIMMONS

SUBJECT: Action Memorandum - Log No. 507
Enrolled Bill S. 3669 - Omnibus Atomic Energy Bill



The Office of Legislative Affairs concurs in the attached proposal and has no additional recommendations.

Attachment

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 507

Date: August 13, 1974 Time: 12:30 p.m.

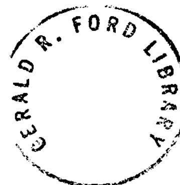
FOR ACTION: Michael Duval
NSC/S
Fred Buzhardt
✓Bill Timmons

cc (for information): Warren K. Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Wednesday, August 14, 1974 Time: 2:00 p.m.

SUBJECT: Enrolled Bill S. 3669 - Omnibus Atomic Energy Bill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ACTION REQUESTED:

____ For Necessary Action XX For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Kathy Tindle - West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President