

U.S. Law, Advance Consents for Reprocessing and the “Timely Warning” Standard

By

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One of the most controversial policies under the U.S. Atomic Energy Act of 1954 (the “Act”),¹ as amended by the Nuclear Non-Proliferation Act of 1978 (the “NNPA”),² has been the policy of the U.S. Government to include within agreements for nuclear cooperation with certain of our trading partners its advance, long-term consent to the retransfer and reprocessing of “spent” nuclear reactor fuel. This paper examines the lawfulness of this policy and the history of its implementation, with particular reference to the applicability of the “timely warning” standard embodied in U.S. law. The story, which runs basically from 1978 to 1996, is one of 20 years of systematic dismantling by the Executive Branch of statutory restrictions on reprocessing approvals, with the result that, at the end of the day, the United States has been left with little control over the back end of the fuel cycle, in particular in Japan and EURATOM. The paper concludes that, while principles of judicial deference and Congressional acquiescence in the Executive Branch’s policy undoubtedly insulate it from court challenge, there nonetheless remain good reasons for reconsidering the wisdom and utility of the policy.

I. The Pre-NNPA Landscape.

In the years prior to the passage of the NNPA, there was a growing recognition of the risks associated with the reprocessing of nuclear fuel and the use of recycled plutonium. Nonetheless, U.S. practice with respect to spent fuel transfers was haphazard at best, lacking adequate procedures and standards, and was more reminiscent of the legal process described in *Bleak House* than a modern, rationalized, bureaucratic operation. While agreements for nuclear cooperation generally required U.S. consent for the retransfer and reprocessing of spent nuclear fuel, such requests, submitted on the so-called “MB 10” form, were granted “almost as a matter of course.”³

As Congress proceeded to develop the NNPA, the issue of “subsequent arrangements” for retransfer and reprocessing was given increasing attention. Indeed, one observer has stated that control of subsequent arrangements became the “centerpiece of the new approach.”⁴ In 1977 hearings on bills which were eventually to become the NNPA, witnesses repeatedly stressed the absence of effective controls over subsequent arrangements and the need to assert

¹ 42 U.S.C. 2011, et seq.

² Pub. L. No. 95-242, 92 Stat. 120 (March 10, 1978).

³ See Note, Nuclear Proliferation and Subsequent Arrangements for Retransfer and Reprocessing, 20 Va. J. Int’l L. 99, 123 (1979).

⁴ Kaiser, “The Great Nuclear Debate”, 30 Foreign Policy 83, 101-102 (1978).

such controls.⁵ Chairman Jonathan Bingham of the House Subcommittee on International Economic Policy and Trade, one of the principal House sponsors of the NNPA, strongly noted the “inadequacy of present procedures,”⁶ and highlighted his concerns in an exchange of correspondence with then-Secretary of State Cyrus Vance.⁷

Ultimately, what emerged from Congress was a complex provision (Section 303 of the NNPA, Section 131 of the Act) designed to establish standards and prescribe procedures for control of subsequent arrangements. Congress, it deserves emphasis, was seeking to give form and substance to existing agency processes. It was not creating new categories or forms of subsequent arrangements. And, the existing framework to which it was responding did not include advance, long-term consents for reprocessing; it was a framework under which requests to retransfer and reprocess discrete numbers of irradiated fuel elements were submitted and considered on a case-by-case basis.⁸

II. The NNPA Regime.

The Act, as amended by the NNPA in 1978, establishes an elaborate system to assert effective controls over the back end of the nuclear fuel cycle. Under this regime, Congress authorizes nuclear commerce, in particular pursuant to agreements for nuclear cooperation negotiated by the State Department and entered into under Section 123 of the Act. These agreements, which provide the basic framework for nuclear cooperation between the United States and its bilateral trading partners, authorize, among other matters, the export of nuclear reactors and fuel from United States. When sales are made, reactors and fuel are subject to export licensing requirements administered by the Nuclear Regulatory Commission (the “Commission”) under Sections 126 through 128 of the Act. Finally, principal responsibility for decisions with respect to the disposition of spent reactor fuel under subsequent arrangements is vested in the Secretary of Energy under Section 131 of the Act.

A close analysis of the Act, in particular Sections 123 and 131, strongly indicates that advance, long-term consent arrangements are of questionable legality. Section 123 requires that agreements for cooperation preserve the “prior consent” of the United States over subsequent retransfers and reprocessing of nuclear fuel, while Section 131 establishes procedures and standards for subsequent review of specific retransfer and reprocessing requests as they arise. Taken together, the language and history of these two provisions cast grave doubt on any “policy approach” at odds with discrete, case-by-case reviews of requests to retransfer and reprocess fuel burned in U.S.-supplied reactors or exported in the first instance from the United States.

⁵ See, e.g., Hearings on S. 897 before the Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess. 55, 106, 453 (1977) (hereinafter “1977 Senate Hearings”).

⁶ See Hearings and Markup on the Nuclear Anti-Proliferation Act of 1977 before the Subcommittees on International Security and Scientific Affairs and International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess. 63 (1977) (hereinafter “1977 House Hearings”).

⁷ 1977 House Hearings at 273, 275.

⁸ See 1977 House Hearings at 29-33.

A. The Requirements of Section 123 of the Act.

The Act, as amended by the NNPA, is perhaps unique among federal statutes in imposing strict substantive standards governing the terms of United States international agreements. Section 123 of the Act authorizes the President to enter into agreements for cooperation only subject to the criteria and restrictions specified therein.⁹ Section 123a. lays down nine binding requirements which *must* be included in each agreement. Two of these are relevant to the present inquiry. Section 123a.(5) restricts retransfer of covered material “beyond the jurisdiction or control of the cooperating party without the consent of the United States.” Section 123a.(7) of the Act further provides that each agreement for cooperation must include a requirement that there shall be no reprocessing “without the prior approval of the United States.” When one examines the language of these two provisions, the structure of Act and its legislative history, the conclusion is inescapable that Congress intended consent rights over retransfer and reprocessing of nuclear material to be secured, not given away for the long-term, in agreements for cooperation.

1. The Language of Section 123.

It is important to stress at the outset that the requirements to include provisions for prior consent in agreements for cooperation are mandatory, and not merely provisions which, absent a specific Presidential waiver, can be eliminated from an agreement for cooperation.

It is equally important to understand that the phrases “without the consent of the United States” in subsection a.(5) and “with the prior approval of the United States” in subsection a.(7) are best read to refer to actions which will take place at a date later than the conclusion of the agreements for cooperation themselves. Were it otherwise, this would render the requirement essentially without effect, for there is no real distinction between an agreement which says “reprocessing is permitted” and one which contains no requirement for approval of future reprocessing. “Consent”, in short, cannot mean the abdication of future consent rights in an agreement for cooperation itself.

Finally, the interpretation of Section 123 as requiring agreements to preserve *future* consent rights is reinforced by the remaining language of the provisions. Both subsections refer to the “consent” and “prior approval” of the United States being required in connection with transactions to take place in the future. Subsection a.(5) requires that material “transferred pursuant to the agreement . . . *will* not be retransferred . . . without the consent of the United States;” similarly, subsection a.(7) provides that no material “*will* be reprocessed . . . without the prior approval of the United States” (emphasis added). The language of the Act thus would appear to contemplate that several subsequent actions, including initial transfer of material from the United States and then indication of intent that a further retransfer to another nation and/or

⁹ Section 123 does allow the President to exempt agreements from its requirements, subject to a joint resolution of approval by Congress, but this waiver authority has not been exercised in the development and implementation of the advance, long-term consent policy.

reprocessing are desired, must take place before the consent and approval rights are called into play.

2. The Structure of the Act.

This reading of the language of the Act is confirmed by an examination of the structure of the Act and, more particularly, Sections 127 and 131. The interrelationship of Sections 123, 127 and 131 leaves little doubt that Congress intended to establish a process that would guarantee a second look, at an appropriate time, at later retransfers or other uses of U.S.-supplied nuclear equipment, materials and technology. This iterative process allows the United States to have a free hand to pursue its non-proliferation objectives as and if circumstances and/or understandings change. The elimination of subsequent reviews through long-term, advance consent arrangements thus subverts one of the central purposes of Congress in enacting the NNPA.

Under the Act, the next key step in the export process, after entry into an agreement for cooperation, is licensing. Sections 127(4) and (5) of the Act require that, as conditions to the licensing of reactors and fuel exports by the Commission under an agreement for cooperation, consent over retransfers for purposes of reprocessing will be preserved. These Sections refer to materials “proposed to be exported” and indicate that a license may not be issued if there is a possibility that such materials *will* be “retransferred” or “reprocessed” without obtaining the prior approval of the United States.

Likewise, Section 131 of the Act reinforces the notion that consent rights cannot be exercised *in futuro*. Simply stated, this provision contemplates the exercise of approval and consent rights “subsequent” to and “under” agreements for cooperation – an exercise coming not only after initial decisions to enter into nuclear cooperation agreements are made, but even after the initial licensing of reactor and fuel exports by the Commission.

In short, when read as a whole, the Act is best understood to require that agreements for cooperation secure prior consent rights to the United States over retransfers and reprocessing and that actual consent will be provided and individual judgments with respect to the applicability of the Act’s standards will be made at such time as particular requests are submitted to and processed by the Secretary of Energy.

3. The Legislative History of Section 123.

The legislative history of Section 123, as revised by the NNPA, underscores the Congressional intent that there be clear and unequivocal retention of U.S. control over subsequent arrangements.

From the outset of discussion of possible non-proliferation legislation, substantial attention was paid to upgrading and clarifying the requirements for agreements for cooperation. In particular, during House hearings, extensive discussion of the absence of adequate controls in certain agreements confirmed Congressman Bingham’s view that “one of the main purposes of this entire piece of legislation is to remedy the vagueness that has characterized the agreements

in the past, which had no criteria, and which were very unspecific.”¹⁰ As Congressman Bingham stated, there was “a need for legislation that mandates clear, prudent and unambiguous criteria which would, in turn, be applied consistently and evenly to all importing states.”¹¹

The reports on the legislation confirmed the Congressional intent to ensure that agreements for cooperation preserved U.S. consent rights. The Senate Report is explicit on this question. It states, for example, with respect to control over retransfers, that the new language represents an improvement over “[c]urrent law [which] requires a guarantee that any transferred material . . . will not be retransferred to unauthorized persons or beyond the jurisdiction of the cooperating party, except as specified in the agreement.”¹² Necessarily, it intended by this language to mean that it would not be permissible to allow for retransfers in an agreement itself.

For its part, the House Report noted particularly the problems associated with what it characterized as the “variable controls” over reprocessing found in existing agreements and explained that “[t]hese confusing provisions are replaced in the new legislation by a *clear and simple right* to approve the retransfer and reprocessing of U.S. materials.”¹³ It stated, “The ambiguity of past agreements and policies has not only led to genuine confusion, but has provided a pretext for distortion as well. The codification of consistent standards accomplished by this legislation will help to eliminate such possibilities in the future.”¹⁴ The House Report emphasized that prior consent requirements were meant to “augment” U.S. controls over retransfers and reprocessing and the Congress intended that U.S. consent rights “be unqualified and set forth in the agreement unambiguously.”¹⁵ It is difficult to square advance, long-term consents with the Congressional desire for “clear,” “simple”, “unqualified” and “unambiguous” rights of prior consent which the House Report deemed so necessary to achieve non-proliferation objectives.

B. The Requirements of Section 131 of the Act.

An analysis of Section 131 of the Act confirms that Congress intended that reviews of reprocessing requests would not only take place subsequent to development of agreements for cooperation but also that advance, programmatic consents would be impermissible.

In order to control the disposition of spent fuel, Section 131 of the Act provides procedures and standards for reviewing retransfer and reprocessing requests. In summary, Section 131 calls for:

- Consultation among the Secretaries of Energy, State and Defense, the Director of the Arms Control and Disarmament Agency (“ACDA”) and the Commission concerning the lawfulness, appropriateness and desirability of such actions;
- Publication of notice in the *Federal Register* of such actions;

¹⁰ 1977 House Hearings at 253.

¹¹ *Id.* at 347.

¹² S. Rep. No. 467, 95th Cong., 1st Sess. 22 (1977).

¹³ H.R. Rep. No. 587, 95th Cong., 1st Sess. 4 (1977) (emphasis added).

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 13-14.

- Written determinations by the Secretary of Energy that such actions “will not be inimical to the common defense and security;”
- Delay in the effectiveness of such actions for period of 15 days following *Federal Register* publication;
- Discretionary preparation of an unclassified Nuclear Proliferation Assessment Statement concerning such actions;
- Submission by the Secretary of Energy to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations, at least 15 days of continuous session in advance of entry into any subsequent arrangement, of a report containing his or her reasons for approving such actions; and
- Determination by the Secretary of Energy, in consultation with the Secretary of State, that such actions “will not result in a significant increase of the risk of proliferation beyond that which exists at the time that approval is requested,” giving “foremost consideration . . . to whether or not the reprocessing or retransfer will take place under conditions that will ensure timely warning to the United States of any diversion well in advance of the time at which the non-nuclear-weapon state could transform the diverted material into a nuclear explosive device.”

This finely wrought scheme is largely frustrated by advance, programmatic consents, and the language and history of Section 131 of the Act leave little doubt that such consents were not contemplated by the framers of the NNPA and are inconsistent with their intent.

1. The Language of Section 131.

The language of Section 131 is at odds with advance, programmatic consents in a number of ways.

First, the very use of the term “subsequent” to describe the arrangements would seem to mean that arrangements must be “subsequent” to something, namely initial U.S. decisions to embark upon a course of cooperation with a country or group of countries.

Second, Section 131 deals with subsequent arrangements entered into “under an agreement for cooperation.” Plainly, this is not the same thing as a subsequent arrangement embodied in an agreement itself. The essence of what Congress was contemplating was a follow-on activity after entry into the basic framework agreement.

Third, Section 131b. unequivocally contrasts the decision to enter into any subsequent arrangement with the material subject to that arrangement, that is, material which has already been “exported by the United State or produced through the use of any nuclear materials or equipment or sensitive technology exported by the United States.”

Fourth, Section 131b.(2) calls for a determination that a particular transaction “will not result in a significant increase of the risk of proliferation *beyond that which exists at the time that approval is requested*” (emphasis added). By the use of this phrase, Congress was certainly envisioning a discrete series of timely reviews, not long-term or programmatic arrangements. Agencies may well be able to determine that the approval of reprocessing that is to take place in

2019 will not result in a significant increase in the risk of proliferation beyond that which exists when a request is made in 2019. However, it seems patently impossible and arbitrary on its face for an agency to determine, based upon a request made this year, that reprocessing 10, 15, 20 or 30 years hence would not result in a significant increase in the risk of proliferation beyond that which exists today.

2. The Legislative History of Section 131.

The legislative history of Section 131 supports the interpretation just outlined. As noted above, in enacting this provision, Congress was responding to the existing MB 10 process. It intended to rationalize existing practice, by providing procedures and standards. There is no indication that it intended to authorize any new forms of advance, long-term or programmatic consent arrangements for reprocessing or sanction any approach other than careful, case-by-case scrutiny of proposed transactions as they arose. Yet, given the importance attached to bringing the subsequent arrangement process under control, had Congress contemplated that additional sorts of arrangements would be carried out pursuant to the new authority embodied in the NNPA, it surely would have stated so explicitly.

The House and Senate Reports on the legislation make clear the Congressional intent. The primary thrust of the Congressional action was simply to “mandate a formalized process of interagency review and consultation in order to ensure that these decisions receive the thoughtful and systematic review they so obviously deserve.”¹⁶

The language of the House Report underscores the Congressional vision of specific, implementing decisions under an agreement for cooperation, rather than embodied in an agreement for cooperation: “These subsequent arrangements are specific contracts, approvals, authorizations and other arrangements required to implement an agreement for cooperation.”¹⁷ The Committee particularly noted that, at least on an interim basis until existing facilities were upgraded, the United States should not enter into reprocessing arrangements except “where a compelling need can be demonstrated, as for instance, to alleviate an extremely difficult spent fuel storage situation for which no other alternative seems reasonable.”¹⁸ Such a demonstration is obviously time-limited, inconsistent with the notion of approving all reprocessing within a country or group of countries over a period of 30 years.

The Senate Report contains similar language. Noting that subsequent arrangements are “extremely important,” it describes them as being “pursuant to an agreement for cooperation.”¹⁹ The plain reading of this language, as noted above, is that subsequent arrangements will be approved sometime after the United States enters into an agreement for cooperation. Moreover, while the Senate Report refers to the possibility of entering “into an agreement . . . with a recipient nation setting forth conditions that would be required to obtain U.S. approval for

¹⁶ H.R. Rep. No. 587, *supra*, at 18.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 20.

¹⁹ S. Rep. No. 467, *supra*, at 10.

reprocessing,”²⁰ there is no indication that such agreement could actually provide for approval itself. Indeed, as Senator McClure observed during the Senate debate, “The term ‘subsequent’ is a direct reference to the fact that these U.S. Government activities will occur ‘subsequent’ to an agreement for cooperation . . . and generally will be carried [out] pursuant to such agreement.”²¹

Finally, the legislative history of the NNPA underscores two other aspects of Section 131.

First, Congress expected that it would be involved in subsequent stages of review in the export process. This Congressional involvement, including an ability to scrutinize the Secretary of Energy’s judgments concerning proliferation risks of particular subsequent arrangements, is crucial to the statutory scheme.²² Long-term programmatic approvals of reprocessing essentially eliminate the ability of Congress to oversee and direct the Executive Branch on a periodic basis.

Second, Congress elevated the “timely warning” standard to a position of central prominence.²³ As Senator Glenn, a principal sponsor of the NNPA, stated, “[T]here is no part of this bill that is of more significance for the prevention of nuclear proliferation than the elevation of the ‘timely warning’ standard to statutory force.”²⁴ The “timely warning” criterion, to be effective, must be applied on a periodic basis. This is so because, as Congress recognized, both technology and world conditions, including proliferation threats, are not static but are constantly changing. The House Report, for example, expressly notes that the availability of weapons-useable material in commerce is dangerous precisely because “a sudden political shock might be sufficient to push states overtly from non-weapons status to weapons capability.”²⁵ The timely warning criterion was meant to give the United States some chance to respond to such an eventuality. Long-term, programmatic consent arrangements are incompatible, however, with effective application of this standard.

III. Timely Warning: Further Considerations.

As just noted, the “timely warning” standard is central to the proper functioning of the Act’s provisions governing subsequent arrangements. This is not to say that its meaning is entirely free from doubt. In order better to understand the standard and how it was meant to apply, several points deserve mention.

In the first place, the provision of “timely warning” cannot be equated with the job that International Atomic Energy Agency (“IAEA”) safeguards perform. The IAEA affirms that it does not consider its task to deliver time warning. Rather, what it delivers is “timely detection,” *i.e.*, the detection of a diversion within “within the conversion time of the material being

²⁰ *Id.*

²¹ 124 Cong. Rec. S. 2448 (daily ed. Feb. 27, 1978).

²² See, e.g., 123 Cong. Rec. 30295 (Sept. 22, 1977) (statement of Rep. Zablocki); 124 Cong. Rec. S. 1310 (daily ed. Feb. 7, 1978) (statement of Sen. Glenn).

²³ See S. Rep. No. 467, *supra*, at 10-12.

²⁴ 124 Cong. Rec. S.1310 (daily ed. Feb. 7, 1978).

²⁵ H.R. Rep. No. 587, *supra*, at 4. See also 124 Cong. Rec. S. 1068-1069 (daily ed. Feb. 2, 1978) (statement of Sen. Ribicoff).

safeguarded.”²⁶ However, as described by Professor Gary Milhollin, “[T]he basic goal of timely warning . . . [is to ensure] that plutonium must be held and processed in such a way that, if a diversion occurs, the United States will be warned of the diversion well before the plutonium can be made into a weapon.”²⁷

Second, even among critics of advance, long-term programmatic consents, there has been a debate about whether the standard is a purely technical one or not. Leonard Weiss, a key non-proliferation staffer of Senator Glenn, concluded, after extensive analysis, that “timely warning” was a standard that was meant to be “essentially” technical in nature.²⁸ The U.S. General Accounting Office (“GAO”), in the same period, would not go quite so far, but it did conclude that the “technical assessment of conversion time is crucial to the timely warning determination.”²⁹ In any event, both Leonard Weiss and the GAO (even though it did not absolutely rule out the possibility that some long-term consents might pass legal muster) reached the same conclusion regarding the lawfulness of the advance, long-term programmatic consent arrangements embodied in the Japan agreement then under consideration: they were not consistent with the timely warning standard.

The statutory reasons for reaching such a conclusion, in addition to those discussed above, are very straightforward. Simply put, it must be the case under Section 131 of the Act that “timely warning” involves something different than and apart from the ordinary array of political, social and economic factors that bear on proliferation risks. If it simply were a reflection of those factors, then there would be no need to break out timely warning as a separate and independent factor to which “foremost consideration” must be given in the Secretary of Energy’s “significant increase of the risk of proliferation” determination. Indeed, the reference to “timely warning” would be redundant in Section 131, if the same non-technical factors were being assessed both in connection with “proliferation risk” finding and the “timely warning” analysis.³⁰ Statutes are not to be read this way; to the contrary, they must be read to avoid redundancy and “mere surplusage.”³¹

Finally, whether “timely warning” is a purely technical standard or not, what is of fundamental importance is that its application is inconsistent with making decisions that extend 30 years into the future. No matter how wise or clairvoyant the Secretary of Energy may be, it defies credulity to assert that he or she can meaningfully “crystal ball” the timeliness of future warnings that a proliferation break-out may be about to occur. As the GAO concluded in 1988, “[It cannot be asserted with any degree of confidence that, over a thirty year period, technical

²⁶ See Testimony of Gary Milhollin before the House Committee on Foreign Affairs, Subcommittees on International Security and Scientific Affairs and International Economic Policy and Trade, 99th Cong., 1st Sess. 2-3 (June 12, 1985) (hereinafter “Milhollin Testimony”).

²⁷ *Id.* See S. Rep. No. 467, *supra*, at 11.

²⁸ See Leonard Weiss, “The Concept of ‘Timely Warning’ in the Nuclear Non-Proliferation Act of 1978”, reprinted at 134 Cong. Rec. 4518-4520 (March 21, 1988).

²⁹ See GAO, Report No. B-230201, at 8 (Feb. 29, 1988), reprinted in part at 134 Cong. Rec. 4521-4522 (March 21, 1988).

³⁰ See Milhollin Testimony at 3.

³¹ *E.g.*, *Hibbs v. Winn*, 542 U.S. 88 (2004).

capabilities of a cooperating party, anticipated conversion times, safeguard capabilities, United States political relationships with the cooperating party, etc. would all be such to assure the existence of timely warning at all times or even ensure there would be no increase in proliferation risks over the 30-year period.”³²

IV. The Great Unraveling.

Whatever the language of the law may be or intent of Congress in enacting the NNPA may have been, the history of implementation of the NNPA has been such that, in 2019, little is left of that language or intent. Indeed, over three successive Administrations, from President Ronald Reagan to President George H.W. Bush and through President Bill Clinton, the guardrails of the NNPA were progressively eroded, and Executive Branch policies, reflected in new agreements for cooperation, overwhelmed original understandings of the law. The story is readily told in four brief, if disheartening, chapters.

A. The Reagan Administration Policy.

After the enactment of the NNPA in 1978, the initial approach to implementation of the Carter Administration involved strict, case-by-case review of proposed transactions.³³ As Carter Administration officials explained to Congress in House hearings held in September and October of 1978, all requests for retransfers for reprocessing would be considered “on a case-by-case basis,” since such an approach “reinforced” the intent of the Act by assuring that “in each case we would look at the criteria of our own Act.”³⁴ This approach did not survive past the Carter Administration.

Six months into his first term, on July 16, 1981, President Reagan issued a Policy Statement on Non-Proliferation and Peaceful Nuclear Cooperation Policy which announced that the United States “will . . . not inhibit or set back civil reprocessing . . . abroad in Nations with advanced nuclear power programs where it does not constitute a proliferation risk.”³⁵ The President directed the Executive Branch “to undertake expeditious action . . . on approval requests under agreements for peaceful nuclear cooperation where the necessary statutory requirements are met.”³⁶

Following almost a year of review, the State Department announced the details of the new policy in a press conference held on June 9, 1982. At the press conference, State Department officials indicated that the United States, instead of proceeding on a “case-by-case” basis, had adopted a “new approach to granting long-term approvals in certain cases for the life of specific, carefully defined programs.”

³² See GAO, Report No. B-230201, *supra*, at 8.

³³ See GAO, *The Nuclear Non-Proliferation Act of 1978 Should Be Selectively Modified 69-70* (OCG-81-2, May 21, 1981).

³⁴ See Hearings on Nuclear Fuel Transfer for Reprocessing before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess. 49, 53, 64, 76 (1978).

³⁵ See 17 Weekly Comp. of Pres. Doc. 768-770 (July 16, 1981).

³⁶ *Id.*

The Administration elaborated its approach at two Congressional hearings held in September 1982. There Executive Branch officials explained that the Administration had dropped the process of “case-by-case” review in certain cases. Instead, as Ambassador Richard T. Kennedy explained, “[W]e are offering Japan and the countries of EURATOM new, long-term arrangements for implementing U.S. consent rights over the reprocessing of materials subject to our agreements for peaceful nuclear cooperation.”³⁷ He further stated, “For other countries with which we have cooperation agreements, we will be working to provide advance, long-term consent for retransfers of U.S.-origin spent fuel to the United Kingdom and France for reprocessing in facilities which meet the applicable statutory criteria.”³⁸ The die was cast.

B. The Swedish and Norwegian Agreements.

The first countries to benefit from the new policy were Sweden and Norway. New agreements for cooperation with these two countries were transmitted to Congress on January 26, 1984.³⁹ Both agreements became effective April 6, 1984. While the saving grace of these agreements was that they were limited in scope – reprocessing for which consent was given was limited to specified facilities (La Hague and Sellafield) in two weapon states, France and the United Kingdom, and consent was not given in advance to the return of separated plutonium to Sweden and Norway – they established the precedent that advance long-term consents were permissible under the Act, and they represented a major step in the legitimization of reprocessing and plutonium use, opening the door to pressure by other countries, whose non-proliferation credentials are far less acceptable, for similar treatment.

The critical element of both agreements is found in “agreed minutes” which are declared to be an “integral part” of the agreements themselves. Each Agreed Minute states, *inter alia*, under the heading “Spent Fuel Disposition”, “The parties agree that materials subject to [the relevant articles concerning retransfer and reprocessing] may be transferred . . . to the United Kingdom or France and reprocessed at the Sellafield or La Hague reprocessing facilities” Thus, while both agreements contain provisions pursuant to which each party “guarantees” that spent nuclear fuel will only be retransferred or reprocessed if the parties agree, as a practical matter, absent termination on the grounds that “exceptional circumstances of concern from a non-proliferation or security standpoint so require,” the advance, long-term consent given by the United States for reprocessing was to last for the life the agreements, that is, 30 years. Throughout that period, the United States would not, and did not, exercise case-by-case review and control of shipments of spent fuel for reprocessing at Sellafield and La Hague, nor were any further consents required for such retransfers and reprocessing to take place.

The Swedish and Norwegian agreements were challenged in court.⁴⁰ However, the U.S. District Court which heard the case did not reach the merits. Instead, the Court dismissed the

³⁷ See Hearings on Plutonium Use Policy before the Subcommittee on Energy, Nuclear Proliferation and Government Processes of the Senate Committee on Governmental Affairs, 97th Cong., 2d Sess. 3 (Sept. 9, 1982).

³⁸ *Id.* at 215. See also Hearings on U.S. Non-Proliferation Policy before the Senate Committee on Foreign Relations, 97th Cong., 2d Sess. 2-19. (Sept. 29, 1982).

³⁹ See H. Doc. No. 163, 98th Cong., 2d Sess. (Jan. 26, 1984); H. Doc. No. 164, 98th Cong., 2d Sess. (Jan. 26, 1984).

⁴⁰ See *Cranston v. Reagan*, 611 F. Supp. 247 (D.D.C. 1985).

matter as presenting a non-justiciable, “political question.” No appeal was taken from that decision, with the result that the agreements would continue to stand for the proposition that advance, long-term arrangements were permissible under the Act.

C. The Japan Agreement.

Three years later, at the end of 1987, a much more far-reaching agreement, that with Japan, was submitted to Congress.⁴¹ In this agreement, reprocessing was not limited to weapon states but was permitted in Japan, a non-weapon state, and by, extension, subsequent plutonium use was allowed without restriction. Further, the advance consent given was for an ill-defined program, including facilities not yet even in existence. While the body of the agreement nominally contained the required text outlining U.S. consent rights over retransfers and reprocessing, an “implementing agreement” exercised those rights for the life of the agreement.

The Administration’s treatment of the timely warning factor was particularly notable in the Japan case. In the Administration’s judgment, the timely warning determination was based on a mixture of factors, including Japan’s research, development and production programs’ relevant capabilities; Japan’s industrial capabilities; Japan’s scientific and technical capabilities; the availability of special nuclear material in Japan; and indicators of diversion-relevant activities, including safeguards, nuclear explosive-related indicators and political and trade indicators.⁴² It was, in short, a determination based upon “the whole ball of wax,” in which the Administration was saying “trust us,” and any need for a technical timely warning determination, separate and apart from the determination regarding general proliferation risk, was essentially ignored.

At the same time, the last vestiges of U.S. control via an ability to suspend consents was vitiated through a series of convoluted and complex provisions that as a practical matter made such suspension an essentially unworkable option. For example, the agreement states, “Any decision on such suspension would only be taken in the most extreme circumstances of exceptional concern from a non-proliferation or national security point of view, would be taken at the highest levels of government, and would be applied only to the minimum extent and for the minimum period of time necessary to deal in a manner acceptable to the parties with the exceptional case.”⁴³ Such examples of “equivocality” in international agreements are sure signs that the negotiators are simply papering over their difference rather than truly designing meaningful solutions to the problems they are facing.⁴⁴

Finally, there was a vigorous debate in the Senate over the lawfulness of the Japan agreement.⁴⁵ Both the GAO report and the analysis of Leonard Weiss, which forcefully set forth the argument that the agreement could not be squared with the requirements of the Act, as well as opposition to the agreement from the Commission and Defense Department, featured

⁴¹ See H. Doc. No. 128, 100th Cong., 1st Sess. (Nov. 9, 1987).

⁴² Id. at 369-386.

⁴³ Id. at 44.

⁴⁴ See Fred Ikle, *How Nations Negotiate* 15 (Harper and Row 1976).

⁴⁵ See 134 Cong. Rec. 4503-4558 (March 21, 1988).

prominently in the debate. Senator Glenn was, in particular, a fierce opponent of the agreement. At the end of the day, however, a resolution of disapproval failed by a vote in the Senate of 53-30. The advance consent paradigm was established more firmly than ever.

D. The EURATOM Agreement.

The final chapter in the history of the adoption of the policy of advance, long-term programmatic consents and Congressional acquiescence in that policy occurred at the end of 1995 and in early 1996 with the presentation of a new EURATOM agreement to Congress.⁴⁶ There is little really to be said about the EURATOM agreement, except that it gave up the last fig leaf of retention of consent rights in the agreement itself. Whereas the Japan agreement nominally contained provisions mirroring the requirements of Section 123a.(5) and 123a.(7) of the Act (though it negated them in the implementing agreement), the EURATOM agreement abandoned all pretense of statutory compliance. No consent rights are provided for the agreement. Instead, the agreement, in Article 8, simply authorizes relevant fuel cycle activities, including reprocessing at any and all facilities EURATOM in its discretion may designate at any time of its choosing, for the full, 30 year term. In short, the scheme elaborated by Congress in the NNPA in 1978 can be said to be only a distant memory by 1996.

V. Conclusion.

Some forty years after enactment of the NNPA's consent rights regime, given the nature of its implementation by the Executive Branch, it may seem that a discussion of what the NNPA might or might not require, or of what its framers intended, is something only of quaint antiquarian interest, with little in the way of real world policy implications. The principle of judicial deference to agency interpretations of all but the most crystal clear statutes is strong.⁴⁷ Moreover, the years of Congressional acquiescence to Executive Branch enunciated policy and signed agreements mean that any Administration would today have a strong legal argument that, whatever the NNPA might seem to say, the doctrine of Congressional ratification is more than enough to stand on in defending long-term, programmatic, advance consent arrangements or a very loose application of the "timely warning" standard under the Act.⁴⁸ Still, even viewed from 40 years' distance, the interpretations of the Act outlined above continue to have force and a certain intellectual attraction. And, of course, there is absolutely nothing to bar any Administration from moving away from a policy that one can legitimately view as mistaken and reverting to original interpretations of the Act dating from the era of President Jimmy Carter. Whether, after 40 years of history, any Administration would be disposed to do so is another matter.

⁴⁶ See H. Doc. No. 138, 104th Cong., 1st Sess. (Nov. 29, 1995).

⁴⁷ See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 537 (1984).

⁴⁸ See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983).

