Nuclear Power Plant Licensing - Jurisdiction to Consider Foreign Impacts

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NUCLEAR POWER PLANT LICENSING—JURISDICTION TO CONSIDER FOREIGN IMPACTS

The United States Court of Appeals for the District of Columbia held that exportation of a nuclear power plant and nuclear matter to the Philippines, an exclusively foreign jurisdiction, is not inimical to the common defense and security of the United States or to the health and safety of the public and that no environmental impact statement (EIS) is required. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 647 F.2d 1345 (D.C. Cir. 1981).

INTRODUCTION

On June 17, 1974, the Philippine government, acting through its wholly-owned National Power Corporation, began procedures to buy a nuclear power plant from Westinghouse Electric Corporation (hereafter “Westinghouse”).¹ The 620 megawatt plant would be constructed at Napon Point, on the island of Luzon in the Philippines. Napon Point is about twelve miles from the Subic Bay Naval Base and forty miles from Clark Air Force Base where a total of 32,000 armed American service members are stationed. The area is seismically active.

In January 1976, the Export-Import Bank of the United States authorized $600 million in loans and loan guarantees to finance the proposed Philippine nuclear power plant. Pursuant to Section 103² of the Atomic Energy Act of 1954,³ Westinghouse filed with the NRC an export application for the reactor.⁴

3. The NNPA sets out a regulatory scheme, Act of Mar. 10, 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified in scattered sections of 22 & 42 U.S.C.). The NRC must forward export applications to the Department of State, which triggers review by the Departments of State, Defense, Commerce, and Energy, as well as the Arms Control and Disarmament Agency. The executive branch then recommends to the NRC whether or not the license should issue. 42 U.S.C. § 2155 (Supp. II 1978).
4. The Commission then must act within 60 days, or inform applicant of the reasons for delay, and provide follow-up reports. If the NRC has not issued an export license within another 60 days, the President may withdraw the application from the NRC, and may authorize the export by executive order.

Within 60 days of a presidential decision, Congress may block a nuclear export authorized by the President. Congress, however, has no power to block an NRC authorization. The Commission also has authority to order public proceedings, which gives the NRC a 60 day extension after the termination of the proceedings.

3. Id.
4. The NRC “is authorized to issue licenses to persons applying therefor to . . . export under the terms of an agreement for cooperation arranged pursuant to section 23 (42 U.S.C. § 2153), utilization or production facilities for industrial or commercial purposes.” 42 U.S.C. § 2133(a) (1976).
On December 12, 1977 the State Department recommended approval of the application. A month later, however, the State Department asked the NRC to defer action on the Westinghouse application while the department studied the impact of the proposed power plant on American troops stationed at the naval bases and the problems of locating the plant in a seismically active area.

The Philippines had no experience owning or operating a nuclear power plant. Its government, however, as a party to the Treaty on the Non-Proliferation of Nuclear Weapons, must place all nuclear facilities in the Philippines under International Atomic Energy Agency (IAEA) safeguards. The IAEA's principal objective is to accelerate and enlarge the peaceful contribution of atomic energy throughout the world. In accordance with the treaty, the Philippines sought help from the IAEA, and requested an IAEA Safety Mission, on two separate occasions, to review safety aspects of the proposed nuclear reactor site. Additionally, the Philippines sought outside expertise from a United States firm in selecting the site. Further, the Philippines has its own regulatory commission, similar to the NRC, called the "Puno Commission," which works in cooperation with the Philippine Atomic Energy Commission (PAEC) and with the IAEA.

These combined governmental efforts indicated the Philippines' ability to comply with international law. Under international law, the recipient nation is responsible for the health and safety of all individuals living in its territories. The Philippine government, therefore, appeared to be responsible for health and safety impacts from the nuclear power plant upon all residents of their country, including the American service members.

The Philippines allayed the State Department's concerns, and on September 28, 1979, the executive branch recommended issuance of the license for the proposed reactor's component parts. At the same time the executive branch submitted to the NRC a "Concise Environmental Review" discussing siting and environmental considerations and the Philippines nuclear regulatory process. The NRC next held public hearings.

5. 647 F.2d at 1369 n. 6.
9. Id. The Puno Commission conducted several weeks of public hearings, receiving testimony from 64 witnesses. These witnesses included two well known seismic experts.
to solicit comments on possible effects to "global commons, United States territory, and the common defense and security of the United States." \(^{11}\)

Seven months later, on May 6, 1980, the NRC issued two orders authorizing Westinghouse to export to the Philippines a nuclear reactor and complementary nuclear materials. The Natural Resources Defense Council (NRDC) and other public interest groups petitioned the District of Columbia Court of Appeals to order temporary suspension of materials shipments. On December 10, 1980, the court denied the motion.

In a subsequent proceeding, the NRDC challenged the NRC decision not to prepare an EIS before granting export licenses to Westinghouse. In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*,\(^ {12}\) the District of Columbia Court of Appeals upheld the NRC's May 6, 1980 orders.

**BACKGROUND**

The issues in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* arise from two national acts, the Nuclear Non-Proliferation Act of 1978 (NNPA)\(^ {13}\) and the National Environmental Policy Act of 1969 (NEPA),\(^ {14}\) and the respective obligations these acts impose upon the Nuclear Regulatory Commission (NRC). Implicit in the controversy are questions of NRC jurisdiction and political ramifications of imposing an environmental impact statement (EIS) requirement on a foreign country and of the particular ability of the Philippines to self-regulate a nuclear power facility within its country.

The Nuclear Non-Proliferation Act of 1978: Export Licensing Procedures

The Atomic Energy Act of 1954 (the Act), as amended by the Nuclear Non-Proliferation Act of 1978 (NNPA), contains licensing procedures for exportation of nuclear power plants and complementary materials. The Act requires the executive branch to review all export applications before the NRC may issue an export license.\(^ {15}\) Concurrently, under Section 103(d) of the Act, the Commission must determine that the proposed reactor "would [not] be inimical to the common defense and security or

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11. The Commission defined "U.S. territory" to mean the territory of the 50 states plus the trust territories and possessions of the United States. 11 N.R.C. 631, 656 n. 63 (1980). "Global commons" signified the high seas (further than 12 miles from territorial shores), Antarctica, and portions of the atmosphere outside the sovereign jurisdiction of a single nation. *Id.* at 636 n. 15.
15. See *supra* note 2.
to the health and safety impacts of the public." Congress did not provide definitions for the terms contained in Section 103(d). In light of the lack of definitive guidelines, therefore, the NRC has had to examine prior judicial decisions, the legislative history of the NNPA, and other provisions of the Act in order to determine NRC duties.

Prior Judicial Decisions

Prior to this case, no United States court had decided the meaning of the phrase "inimical to the common defense and security or to the health and safety impacts of the public" as provided in Section 103(d). In the four years preceding Westinghouse's applications to export nuclear materials and a nuclear reactor to the Philippines, however, the NRC had addressed this question. The NRC consistently determined that Section 103(d) did not give the NRC authority to review health, safety and environmental impacts in foreign jurisdictions resulting from nuclear exports to that jurisdiction.

Legislative History of the NNPA

The NRC decisions, alluded to in footnote seventeen above, were made prior to the enactment of NEPA. However, Congress was aware of these decisions and noted them during floor debates before the NNPA was passed. Thus, it is significant that when Congress amended the Act with the NNPA, it did not admonish the NRC for not reviewing health, safety and environmental impacts in foreign jurisdictions. By not requiring the NRC to alter its procedures, Congress tacitly approved of the NRC's past policy with respect to exports. Furthermore, Congress in other legislation enacted health and safety review procedures for consumer product exports, such as children's clothing.

16. 42 U.S.C. § 2133(d) (1976). In full, § 103(d) reads:

(d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. No license may be issued to an alien of any [sic] corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

17. Edlow International Co. (export of special nuclear material to India), 5 N.R.C. 1358 (1977); Babcock & Wilcox (export of reactor components to West Germany), 5 N.R.C. 1332 (1977); Westinghouse Electric Corp. (export of reactor parts to Spain), 3 N.R.C. 739 (1976); Edlow International (export of special nuclear material to India), 3 N.R.C. 563 (1976).

18. 11 N.R.C. at 639 n. 20.

procedures into other legislation shows clearly that Congress does speak in favor of review when it perceives the need to do so. Significantly, Congress did not include within the NNPA a similar review for nuclear exports.

Other Provisions of the NNPA

In 1978 Congress amended the Atomic Energy Act primarily to give the NRC clear guidance on the criteria to be applied in its export licensing determinations. Congress determined that “forbearance from nuclear weapons capability depended on the satisfaction of (seemingly irrepressible) world demand for nuclear generating capability.” By becoming the world’s routine and regular supplier of fuel for nuclear light water reactors, the United States hoped to diminish the world-wide need for technologies, such as conventional reprocessing, that lead quickly to nuclear weapons capability. To enhance the United States’ position as a reliable supplier of nuclear fuel, Congress provided the NRC with a streamlined procedure, and a less arduous and less time consuming licensing process, for considering export applications. Section 103(d), therefore, has been interpreted in light of the NNPA’s specific non-proliferation criteria.

In 1977, while discussing procedures for amendment of the Atomic Energy Act, the House Committee on International Relations issued a report which stated that “in the absence of unusual circumstances, the committee believes that any proposed export meeting the non-proliferation safeguards criteria set forth in subsection 127a and . . . subsection 128a. [sic], would also satisfy the common defense and security standard.” Subsections 127(a) and 128(a), therefore, could subsume the inimicality requirement absent a finding by the NRC of “unusual circumstances.” However, the House Committee did not specify what constitutes an unusual circumstance, making it unclear whether or not the NRC had to look beyond the non-proliferation safeguards to determine whether the defense and security standard was met.

The NRC has never considered health and safety impacts to citizens of the foreign nation which will receive nuclear materials, because NRC “health and safety impacts on the public” had generally been interpreted to mean impacts on the “American public.” Although Americans frequently live in recipient nations, the health and safety interests of those

20. 11 N.R.C. at 639.
21. 647 F.2d at 1360.
23. Id. at 21.
Americans have not compelled the NRC to prepare full-scale environmental reviews comparable to NRC domestic licensing proceedings.

Even if the NRC interpreted "public" to mean "American citizens residing abroad," other provisions of the NNPA may inhibit NRC authority to prepare an EIS. Section 2(d) of the NNPA stresses cooperation with foreign nations in identifying and adopting suitable nuclear programs "consistent with the economic and material resources of those nations and environmental protection." Pursuant to this policy, section 501 of the Act requires the President to report annually to Congress on how this section of the Act is being implemented. By stressing cooperation with recipients rather than unilateral United States' review, these sections may act as limits on NRC authority to interfere in foreign nuclear programs. Finally, Congress set short time limits for processing nuclear export licensing applications. These limits were inconsistent with the estimated two years needed for a full-scale environmental review.

National Environmental Policy Act of 1969 (NEPA)

NEPA requires

to the fullest extent possible . . . [that] all agencies of the Federal Government . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement [an EIS] by the responsible official on . . . the environmental impact of the proposed action. . . .

This mandate arises from a federal policy "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . . ." Legislative history does not reveal whether NEPA requires the NRC to include an environmental impact statement with its recommendations for nuclear exports to exclusively foreign jurisdictions. NEPA's stated purpose, other provisions of NEPA, and judicial precedents are not dispositive of the issue.

Congress appeared to be addressing only Americans when it stated in NEPA its desire to enrich the understanding of the natural resources important to "the Nation." In the same paragraph, however, Congress voices its concerns for the "biosphere" and for the "welfare of man," which may be interpreted as international problems. Further, NEPA

27. See supra note 2, 647 F.2d at 1366, 1386.
30. Id.
31. Id.
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requires federal agencies to “maximize international cooperation” to prevent deterioration of the world-wide environment.\textsuperscript{32} Federal courts resolved the few pertinent cases without determining whether Congress intended to apply NEPA extraterritorially.\textsuperscript{33}

Effects of Imposing an EIS on a Foreign Country

If the NRC must prepare an EIS for nuclear exports to foreign countries, NRC’s jurisdiction would be extended beyond a traditional reading of United States statutory law. Statutory law applies only to conduct occurring within, or having effects within, the territory of the United States, unless the contrary is clearly indicated in the statute.\textsuperscript{34} Supreme Court decisions base this approach on the assumption that Congress is primarily concerned with, and capable of dealing with, domestic conditions.\textsuperscript{35} Further, the President has the last word on nuclear exports and on the conduct of foreign relations between the United States and other countries.\textsuperscript{36} Finally, no state has “jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.”\textsuperscript{37} Since NEPA does not explicitly require application of the EIS requirement abroad, there is a presumption that this requirement is applicable only within the territory of the United States. To find otherwise runs contrary to the general rule enunciated by the Supreme Court concerning United States’ statutory law as applied to its foreign relations.

If the EIS requirement applied to exports of nuclear materials to a foreign jurisdiction, certain results might follow. To ensure that domestic health and safety standards were met and maintained, the United States, through the NRC, would likely proscribe activity in the foreign jurisdiction. Such action might be considered as United States’ interference, and might result in (a) hampered activities between the United States and the foreign nations; (b) added costs to recipient nations; (c) intrusion into matters that should be protected for security reasons; and, ultimately, (d) decreased likelihood that the United States would attain its security and nuclear non-proliferation goals.\textsuperscript{38}

\textsuperscript{33} Sierra Club v. Adams, 578 F.2d 389, 392 n. 14 (D.C. Cir. 1978) (the court assumes NEPA application to federal construction in Panama; but left “resolution of this important issue to another day”); National Org. for Reform of Marijuana Laws (NORML) v. United States Dep’t. of State, 452 F. Supp. 1226, 1232 (D.C. 1978).
\textsuperscript{34} RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §38 (1965).
\textsuperscript{36} 42 U.S.C. § 2155 (Supp. II 1978); 647 F.2d at 1364.
\textsuperscript{37} RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §30.2 (1965).
\textsuperscript{38} 647 F.2d at 1357 N. 52; see Almond, The Extraterritorial Reach of United States Regulatory Authority Over the Environmental Impacts of Its Activities, 44 ALB. L. REV. 739 (1980).
Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission

In Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, the United States Court of Appeals for the District of Columbia determined whether the NRC had authority to issue a nuclear export license without first preparing an EIS when the export was destined for a country nonadjacent to the United States. The court agreed with the NRC that (1) the NRC had no jurisdiction to apply NEPA's mandates to the Philippines; (2) the existence of 32,000 Americans in the Philippines does not require the NRC to produce an EIS of a nearby nuclear reactor site; (3) the NRC could defer to the executive branch's determinations on whether an application for a nuclear export license was "non-inimical to the common defense and security or to the health and safety of the public"; (4) the NRC could rely on generally available literature and analytical models in lieu of an EIS in finding that issuance of an export license would not be inimical to the "global commons"; and (5) the Philippine government has responsibility for regulating its nuclear power plant, so that the NRC should not impose its regulatory opinions on this foreign government.

The court of appeals also agreed with the NRC's reasoning in support of the above conclusions. The court agreed that United States' law mandates that federal statutes apply only to conduct within, or having effect within, the territory of the United States, unless the particular statute clearly indicates it is to apply extraterritorially. By applying this concept to the NNPA and NEPA, the court concluded that the NRC has no obligation to evaluate foreign impacts to find "noninimicality." Further, although the NRC has discretion to consider these impacts and possible effects on U.S. foreign interests and citizens, the NRC is under no obligation to consider those interests. Finally, the court concluded that NEPA imposes no requirement that the NRC prepare an EIS for nuclear exports which will exclusively affect foreign jurisdictions.

The court was faced with a controversy between two groups. The NRDC and others argued that the NRC must not be allowed to issue nuclear export licenses without first considering whether the foreign activity would be inimical to the United States' "common defense and security," and that the NRC should be required to prepare an EIS before issuing the export licenses. The NRC, in turn, argued that it could defer to the executive branch in its determinations of "non-inimicality to common defense and security," and restrict its own jurisdiction to determinations of "non-inimicality to the 'global commons.'" Further, NRC argued that NEPA's mandates did not extend to foreign jurisdictions, because overriding foreign policy considerations, as stated in NNPA,
encourage the United States to expedite the exportation of nuclear materials.

The Court of Appeals for the District of Columbia determined that the issues before the court were questions of law: interpreting statutory terms like “common defense and security” and “health and safety” of the public, and interpreting the jurisdictional reach of NEPA.

After an extensive examination of the legislative history of NNPA, the court concluded that the entire thrust of the legislation was to standardize and expedite the nuclear licensing process, especially for materials intended for shipment to foreign countries. The court accepted the NRC’s finding of no “unusual circumstances,” even though Americans were stationed near the planned nuclear site and the area was seismically active. Since the objective of the NNPA was to see “opportunities for proliferation quashed,” the court found such objective was best met by cooperation and by limiting the NRC’s role to that of expediting nuclear export licensing procedures, as it had limited its own role in the past. The NNPA scheme, therefore, requires that the United States stress its reliability as a supplier of nuclear material over any desire to exercise control over its use. The hope of the NNPA is that the United States’ “hands-off” attitude will encourage non-proliferation of nuclear weapons.

The court’s reluctance to find that NEPA applies to NRC nuclear export licensing decisions is based on the same anti-extraterritorial policy arguments. The non-proliferation and foreign policy objectives of NNPA override the goals of NEPA, which serves a wholly domestic context. As the court stated, “[f]or international nuclear transactions, it appears to be the will of Congress that bilateral or multilateral cooperation respecting the environment take precedence over unilateral American efforts.” Therefore, even though NEPA contains language concerning the “biosphere” and the “welfare of man,” the court of appeals concentrated on the likely spectre of litigation over the adequacy of the EIS and on how such delay would frustrate the United States’ foreign relation objectives.

By deciding this controversy, the court shaped a clearer role for the United States in the international community. At issue was whether the United States would freely provide nuclear materials to friendly foreign nations unhampered by the U.S. domestic regulatory scheme. The court decided that the NRC could defer to the executive with respect to “non-inimicality” findings and that the NRC was under no obligation to prepare

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39. 647 F.2d at 1361.
40. Id. at 1362.
41. Id. at 1365.
42. Id. at 1364.
43. Id. at 1366.
44. Id. at 1348.
45. Id. at 1348.
an EIS for the nuclear plant in the Philippines. It clearly decided that, absent "unusual circumstances," furtherance of non-proliferation goals complied with Section 103(d)'s non-inimicality requirements. Notably, environmental concerns and concerns about the ability of foreign countries to regulate their industries were of secondary importance.

ANALYSIS

Positive Aspects of this Decision

The decision in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* helps the United States to achieve its nuclear non-proliferation goals by streamlining U.S. export procedures and making U.S. nuclear exports more competitive on the international market. Further, this court approved an NRC decision to defer to the executive branch. To the extent that the President and his cabinet are more fully informed of foreign affairs than the NRC, such deference may be desirable. Ultimately, the President is responsible for United States' foreign policy decisions.46

The decision of the court of appeals also comports with the international community, as stated in The Stockholm Declaration on the Human Environment.47 The Declaration consistently proclaims that governments should not transfer the burdens of the environmental policies of the industrialized countries to the developing countries. Instead it will be essential in all cases to consider the systems of values prevailing in each country and their economic burdens.48 Developing countries, like the Philippines, will not be burdened by NEPA standards in their quests to begin electrical generation by nuclear power.

Problems with this decision

Arguably, by freely selling nuclear materials to foreign countries, the United States is increasing rather than decreasing the threat of nuclear proliferation by increasing the availability of nuclear materials and technology.49 Even if the threat of nuclear armament build-up may be lessened,

48. Id.
49. J. McPHEE, THE CURVE OF BINDING ENERGY (1976); M. WILLRICH, T. TAYLOR, NUCLEAR THEFT: RISKS AND SAFEGUARDS 170 (1974); E.g., in Edlow International Co., 7 N.R.C. 436, 443-44 (1978), NRC Commissioners Victor Gilinsky and Peter Bradford voted against approval of an export application to sell nuclear materials to India. They objected to the sale, because they had not been fully assured that India would not reprocess the fuel or use it for "peaceful" nuclear explosions at some future date. In spite of the NRC's stalemate, President Carter approved the license and the House voted to reject a resolution that would have blocked the export. Exec. Order No. 12,055, 3 C.F.R. 177 (1979), *reprinted in* 42 U.S.C. § 2155 app. at 1484–85 (Supp. II 1978); H.R. CONG. REC. 599, 95th Cong., 2d Sess., 124 CONG. REC. 20, 520 (1978).
there remain health and safety impacts of nuclear power plants. Newly-trained personnel, in nations undergoing rapid development and changing forms of government, lack the expertise and experience to fully evaluate possible health and safety problems in their nuclear power plants.\textsuperscript{50} If the NNPA is a workable means to achieve nuclear non-proliferation, then arguably the NRC should not lightly regard its role in that scheme, whereby it is authorized "to provide a strong individual check" on the judgment of the executive branch.\textsuperscript{51} The NRC, however, chose to rely on the State Department's determinations of reliability in the Philippines rather than to make its evaluation by drawing on its own technical expertise.\textsuperscript{52} As Justice Robinson noted in his concurrence, factors which seemed to beg greater NRC technological involvement in determining health and safety aspects included: (1) the Philippines' lack of experience with nuclear energy; and (2) the site of the proposed plant in "the shadow of four volcanoes in a known earthquake zone."\textsuperscript{53} The decision is also unsettling because the term "unusual circumstances" remains undefined. It is difficult to understand why the exportation of a nuclear plant to a country with no experience operating a plant of its own, on a seismically active site, with 32,000 American servicemen nearby, does not create an "unusual circumstance."\textsuperscript{54}

The goals of NNPA may not be met by such minimal NRC involvement, because Congress enacted the NNPA not only to speed up the export process but also to formulate a reliable procedure. Justice Robinson agreed with NRC Commissioner Bradford that the NRC could have expanded its reading of activities which might be inimical to "the common defense and security of the United States."\textsuperscript{55} "Nuclear licensing around the world is clearly affected by a major accident."\textsuperscript{56} If the United States exports a faulty plant or a design which it would not allow to be licensed domestically, any future accident at that plant is likely to be attributed, in part, to the negligence and carelessness of the U.S. export business.\textsuperscript{57} International critics may not separate problems originating at the site from the quality of the exported product, so the safety of the plant in a particular location is a concern which demands NRC site specific review. A major nuclear accident could ruin the reputation of the United States as an exporter of nuclear material and equipment. This in turn would defeat

\textsuperscript{50} 647 F.2d at 1380 n. 94 (Robinson, J., concurring).
\textsuperscript{51} Id. at 1378 n. 83 (Robinson, J., concurring).
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 1370.
\textsuperscript{54} Id. at 1382; 11 N.R.C. 631, 666 (Comm'r Bradford dissenting).
\textsuperscript{55} 647 F.2d at 1381 n. 116 (Robinson, J., concurring).
\textsuperscript{56} 11 N.R.C. at 667 (Comm'r Bradford dissenting).
\textsuperscript{57} Id. at 644 (views of the public interest groups).
the nation's non-proliferation goals announced in the Nuclear Non-Proliferation Act.

Official foreign resentment of U.S. intervention may have caused the NRC and the Court of Appeals to overlook the fact that many of the petitioners asking for an EIS were Filipinos. The Philippine Movement for Environmental Protection, among other Filipino public-interest groups, petitioned the court for a review of the NRC May 6, 1980 decision.58 Moreover, as Justice Robinson indicated, the court may have put too much emphasis on the precepts of international law, since "neither courts nor agencies may adhere to international law if to do so would create any conflict whatsoever with the positive statutory laws of this country."59

Allowing the NRC to exercise discretion on whether to thoroughly review environmental impacts in foreign jurisdictions may set a precedent which will lead to lessened NRC initiative and responsibility. As Justice Robinson warned, in the future the NRC might become so lax as to rely on outdated materials. Ultimately, the courts may find that the NRC abused its discretion in relying on those materials.60 Further, the NRC may neglect to produce an EIS for a foreign site even when that foreign country has not raised questions of intrusions to their sovereignty.61

The commission's deference to the executive branch makes such future nonaction more probable than not. Congress specifically gave the NRC the responsibility to issue licenses and to use its technical expertise in reviewing nuclear export applications.62 By deferring to the executive branch, however, it appears that the NRC is abandoning its technical considerations to the executive's political considerations. As Judge Robinson criticized, "the NRC should adhere to executive judgments on international relations, but not on technological subjects. . . ."63 The NRC thereby risks issuing licenses which are politically and economically advantageous to the United States, but which are possibly creating unreviewable health and safety risks abroad.

CONCLUSION

Although this decision appears to be adverse to environmentalists worldwide, it need not be precedent for abandoning health and safety reviews of United States' nuclear exports. In the instant case the Philippines cooperated closely with IAEA, which is staffed, in part, by NRC

58. 647 F.2d at 1378 (Robinson, J., concurring).
59. Id. at 1377 (Robinson, J., concurring).
60. Id. at 1388 (Robinson, J., concurring).
61. In the instant case, petitioners included some Philippine nationals, including the Philippine Movement for Environmental Protection, who wanted the NRC to "intrude" in their country to the extent that was needed to produce a full EIS review. 647 F.2d at 1378.
63. 647 F.2d at 1378 n. 83 (Robinson, J., concurring).
personnel. The Philippine government produced reports and analyzed the safety aspects of the proposed nuclear reactor site. They did not hastily decide to provide nuclear power to the nation, nor did the Philippine government balk at cooperating with an international agency. This case still leaves the NRC free to produce an EIS when the foreign government so requests, when NNPA’s Sections 127(a) and 128(a) are not met, or when the NRC or the courts define and find “unusual circumstances.”

MELINDA SILVER