



United States Department of State

R32

Washington, D.C. 20520

July 20, 1987

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MEMORANDUM

URGENT

TO: NEA - Mr. Peck
OES/N - Mr. McGoldrick
S/NP - Mr. Samore
ACDA - Mr. Sloss ✓

FROM: L/N - Ted A. Porek *TAP*

SUBJECT: Solarz Amendment: Legal Memorandum for Mr. Armacost

The attached information memorandum analyzing the Pervez case in terms of the legal issues presented by the Solarz amendment has been prepared at Mr. Armacost's request, and must be up to him as soon as possible today. Judge Sofaer has cleared.

Please let me know by 2:00 PM today if you wish to be shown as clearing the attached, and if so, whether you do clear it. I apologize for the extremely short fuse.

Thanks in advance.

Attachment:

As stated.

REVIEW AUTHORITY: Sharon Ahmad, Senior Reviewer

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M200800012
383-00-0031
Box 3

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INFORMATION MEMORANDUM
S/S

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TO: P - Mr. Armacost
FROM: L - Abraham D. Sofaer
SUBJECT: Applicability of the Solarz Amendment to
the Current Pakistan Cases

DECONTROLLED

You have asked for a brief analysis of the requirements of the Solarz Amendment and their applicability to the current cases involving alleged illegal procurement of materials for the Pakistan nuclear program.

We understand that you have been provided with a compilation of relevant intelligence and other technical information concerning the Pervez case, the only ^{current} one raising serious questions under the Solarz Amendment. The law enforcement agencies have not yet made available to this Department the information gathered in the course of their investigation of the Pervez case, which we understand to include hundreds of documents seized by Canadian authorities and a number of tape recordings of conversations between Pervez and U.S. undercover agents. As a result, it is difficult to draw any reliable conclusions at this time as to the applicability of the Amendment. When the process of gathering and analyzing the evidence is complete, we will be in a better position to address this question. In the meantime, the following is an analysis of the legal factors involved.

A. Elements of the Amendment. The Solarz Amendment was added in August 1985 to Section 670 of the Foreign Assistance Act (the so-called Glenn Amendment), which deals with the consequences, for recipients of U.S. assistance, of agreements for nuclear reprocessing, transfers of nuclear explosive devices, and nuclear detonations. The Solarz Amendment was the product of the Vaid episode, in which a Pakistani national was convicted in connection with an effort to export krytrons without the necessary export licenses, possibly for use in the Pakistani nuclear program.

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The Solarz Amendment changed Section 670 to read as follows with respect to such illegal exports:

(1) (a) Except as provided in paragraph (2) of this subsection, no funds authorized to be appropriated by this Act or the Arms Export Control Act may be used for the purpose of providing economic assistance (including assistance under chapter 4 of part II), providing military assistance or grant military education and training, providing assistance under chapter 4 of part II, or extending military credits or making guarantees, to any country which . . . (B) is a non-nuclear state which, on or after the date of enactment of the International Security and Development Cooperation Act of 1985, exports illegally (or attempts to export illegally) from the United States any material, equipment, or technology which would contribute significantly to the ability of such country to manufacture a nuclear explosive device, if the President determines that the material, equipment, or technology was to be used by such country in the manufacture of a nuclear explosive device. For purposes of clause (B), an export (or attempted export) by a person who is an agent of, or is otherwise acting on behalf of or in the interests of, a country shall be considered to be an export (or attempted export) by that country. . . .

(2) Notwithstanding paragraph (1) of this subsection, the President may furnish assistance which would otherwise be prohibited under that paragraph if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that the termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. . . .

(The text of Section 670 also contains a provision for disapproval of a Presidential waiver by concurrent resolution, but this is probably unconstitutional in light of the Supreme Court's 1983 decision on legislative vetoes. As a result, any attempt by Congress to overturn a Presidential waiver would have to take the form of a joint resolution or other form of legislation that would be submitted to the President for signature or veto.)

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The Solarz Amendment thus consists of a number of elements, all of which must be satisfied to trigger the Amendment:

1. Nuclear status of the country in question. The country in question must be a "non-nuclear-weapon state". Section 670(c) defines this term as "any country which is not a nuclear-weapon-state, as defined in article IX(3) of the Treaty on the Non-Proliferation of Nuclear Weapons." The NPT in turn defines the term "nuclear-weapon State" as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967" -- namely, the US, UK, USSR, France and China. Accordingly, Pakistan is a "non-nuclear-weapon state", whatever assumption one makes about the state of its nuclear program.

2. Date of the activities in question. The illegal activities in question must have taken place on or after the date of enactment of the statute that adopted the Solarz Amendment -- namely, on or after August 8, 1985. We understand that the activities in the California case (involving the transfer of electronic equipment through Hong Kong) took place during 1982 and 1983, which would render the Solarz Amendment inapplicable. On the other hand, we understand that the activities in the Philadelphia case (involving efforts to export maraging steel and beryllium) took place from October 1986 through June 1967, within the time period to which the Amendment applies.

3. Whether an illegal export or attempt to export occurred. The public complaint against the defendant in the Philadelphia case, Arshad Pervez, alleges conspiracy to defraud the United States, bribery of public officials, and violations of U.S. export laws (in this case, the Export Administration Act). Attached to the public complaint was the affidavit of the undercover Customs agent who posed as an employee of the U.S. company from whom Pervez allegedly sought to purchase 50,000 pounds of maraging steel for use in Pakistan. That affidavit (at Tab 1) alleges, among other things, that Pervez paid another undercover agent (whom he thought to be the Commerce licensing officer) \$1000 and promised another \$2000 after the approval of the necessary export license, which he was told could not be legally granted; that Pervez stated on the license application that the end use was for turbines and compressors, but acknowledged in the presence of the undercover agent (by nodding his head) that its real use was for gas centrifuge enrichment equipment to make nuclear weapons; and inquired about the possibility of acquiring beryllium.

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If these allegations are correct, then illegal conduct by Pervez clearly occurred. The question then would be whether this illegal conduct amounted to either an export or attempted export for purposes of the Amendment. Evidently no actual export occurred, and Justice is apparently unsure as to whether Pervez will be charged with attempt to export, which technically requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime in question. Even in the absence of a formal charge of attempt to export in violation of the Export Administration Act, Congressman Solarz will presumably take the position that: (1) Pervez' conduct clearly constitutes an attempt to export, whether Justice formally charges him with it or not; and (2) the Solarz language was not necessarily intended to be limited to conduct that technically constitutes an attempt under the criminal code, but more generally any serious effort, involving illegal acts (such as bribery or defrauding the government), to export an item that could not lawfully be exported. We could insist on a reading of the statute that used the criminal law standards, but we may be attacked for doing so.

4. Whether the Pakistani Government conducted the export or attempted export. The Amendment states that an attempted export "by a person who is an agent of, or is otherwise acting on behalf of or in the interests of, a country" shall be considered to be an attempted export by the country itself. This is not an element of the offenses with which Pervez has been charged, and the complaint makes no allegation about the connection of Pervez to the Pakistani Government except to note his statements that the material was intended for use in Pakistan. The USG has intelligence information bearing on this question, which has been provided to you separately.

The language quoted from the Amendment could be read literally to apply to a case where an individual is acting "in the interests of" Pakistan, even if Pakistani authorities were hypothetically unaware of his activities. We doubt that this is the intended meaning; a more reasonable interpretation would at least require some knowledge of and assistance by Pakistani officials in his efforts. This is also indicated by the further requirement in the statute (as described below) that the government intended to use the items in its nuclear explosive program.

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5. The significance of the material for manufacture of nuclear devices. The material must contribute significantly to the ability of Pakistan to manufacture a nuclear explosive device. Again, we understand that information bearing on this question will be provided separately to you.

One might hypothetically argue that Pakistan already has the fissile material needed to manufacture a nuclear device, and therefore that materials intended for the purpose of producing additional enriched uranium cannot contribute significantly to such a capability. Congressman Solarz would probably consider this an unreasonably narrow interpretation of the Amendment, and insist that anything which significantly contributes to the number or sophistication of nuclear devices which Pakistan could manufacture, or makes their manufacture significantly easier or less costly, would be covered.

6. The intended use of the material. The President must determine that the material was to be used by Pakistan in the manufacture of a nuclear explosive device. Again, the other bureaus have information on this question, which is being provided to you separately.

B. Application of the Amendment. The function of carrying out Section 670 as a whole has been delegated by Executive Order to the Secretary of State, except that the waiver authority in Section 670(a)(2) has been reserved to the President. Nonetheless, the President can always exercise personally any delegated function.

As to when the Secretary or President must act on the Amendment, we believe that he is entitled to a reasonable period in which to evaluate all relevant facts and circumstances, including the time necessary to seek explanation from the government in question. At present, as indicated above, we have not yet had access to all potentially relevant material, and it would be within the President's discretion to wait until all the facts are properly evaluated. As to whether the President is required or entitled to withhold action on the Amendment pending the completion of ongoing criminal proceedings, the House Report on the Solarz Amendment states:

Illegal exports (or attempts to export) in this instance refer to cases where a person has been convicted of a violation of U.S. export laws or where, absent a conviction, the President has determined based on all available evidence that there occurred an illegal export or attempted export.

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This passage arguably suggests that the President may act on the Amendment in the absence of a conviction where all the available evidence indicates that the illegal conduct has occurred. But the manner in which the report is written indicates that the President would normally act after conviction, but could find that the Amendment was violated even in the absence of a conviction - i.e., even after an acquittal.

We have argued to Solarz that the President should be regarded as having the discretion to withhold action while criminal proceedings are in progress, if he believes that to act would prejudice the criminal proceeding or that the outcome of the proceeding should be taken into account in his ultimate judgment under the Amendment. We have told Solarz that: (1) the criminal proceedings, including the presentation of the defendant's case, may well clarify important aspects of the situation; and (2) that action by the President on the Amendment could prejudice the criminal proceedings, either by prejudicing the possibility of a fair trial for the defendant or by exposing the Government to discovery into the process leading to the President's decision.

Justice strongly supports these points. Solarz, however, says he disagrees. He argues that the U.S. Government has already pronounced that it believes Pervez to be guilty by reason of the complaint filed against him, and that a further such pronouncement in the form of a Presidential determination under the Amendment cannot further prejudice the criminal proceedings. He will argue that Congress did not intend that Presidential action be contingent on the outcome of criminal proceedings, and that it intended the President to act if he believed on the basis of a preponderance of the evidence that the illegal conduct occurred, rather than insisting on proof beyond a reasonable doubt that would be the standard in a criminal proceeding. He may also argue that the proceedings in the Pervez case could take months before final resolution, and that Congress did not contemplate that the Executive Branch could delay invocation of the Amendment for such an unreasonably long period.

We believe that the President would be entitled to exercise this discretion, but he also has the power to act before the trial. We should advise Congress that we have not yet completed our evaluation of the relevant facts, and that we regard the President as entitled to withhold action for a reasonable time before making a determination.

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Drafted:L:MJMatheson:edk
7/20/87, 7-8460
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Clearances: