U.S.-India Nuclear Cooperation Agreement: Can President Bush Refuse to Follow the Expressed Will of Congress Concerning Nuclear Exports to India?

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The purpose of this memorandum is to question President George W. Bush’s reasons for refusing to follow a number of provisions of the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006 (hereinafter “U.S.-India Peaceful Atomic Energy Cooperation Act”). An earlier memorandum described the history of the U.S.-India nuclear cooperation agreement. 1 This memorandum describes President Bush’s written justification for refusing to follow several provisions of the Act, and our analysis of that justification. 2

In his oral bill-signing statement to reporters and members of the public, President Bush praised the bill he was signing. 3 He did not mention his disagreements with Congress on several of the provisions of the bill. However, in a separate written signing statement not referred to in his oral statement to the press and public, he made clear that he, not Congress, conducts foreign policy and therefore has the greater say on what that policy should be. Referring to the statute’s §103, entitled “Statements of Policy,” Bush declared: “Given the Constitution’s commitment to the presidency of the authority to conduct the Nation’s foreign affairs, the executive branch shall construe such policy statements as advisory.” Thus, he concluded, he will not follow some of the provisions of the new statute: “My approval of the Act [by signing it] does not constitute my adoption of the statements of foreign policy in the Act as U.S. foreign policy.” 4

Some of his disagreements were with initial sections of the Act which were described by Congress as “Sense of the Congress” and “Statements of Policy.” 5 President Bush indicated that the executive branch would give these “due weight” but did not have to follow them. 6 He described other disagreements with specific requirements of the Act. For example, the Act contains a long list of international nuclear policies “which,” the Act says, “shall be the policies of the United States,” including acting “in a manner fully consistent with the Guidelines for Nuclear Transfers … developed by the NSG [Nuclear Suppliers’ Group] and decisions related to these guidelines….” 7 The NSG was organized by the United States many years ago and has been important for establishing common export policies of its members in an attempt to avoid specified nuclear exports to countries likely to use them to make nuclear weapons.

Based on its list of nuclear policies Congress said the United States should follow, the United States should deny U.S. shipments of nuclear fuel to India if the NSG does not first approve the shipments. The president’s written signing statement indicated his position that he does not have to accept such an NSG decision if he does not want to. In his view, he, not the NSG or the Congress, is responsible for U.S. foreign policy in nuclear matters, and he, therefore, can decide to export uranium and other nuclear supplies to India even if the NSG fails to approve the shipments. Construing the Act as requiring approval by the NSG would raise “a serious question…as to whether the provision unconstitutionally delegated legislative power to an international body [the NSG],” President Bush’s written signing statement said. It added: “In order to avoid this constitutional question, the executive branch will give [this and provisions of the new law prescribing foreign policy only the] due weight that comity between the legislative and executive branches should require to the extent consistent with U.S. foreign policy.” According to the President, the foreign policy of the United States is set by the president and his executive branch, not by the Congress.

In addition, President Bush’s written signing statement said, “the executive branch shall construe this and other provisions of the Act that mandate, regulate, or prohibit submission of information to the Congress … or the public, … in a manner consistent with the President’s constitutional authority to protect and control information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.” 8 In other words, the President not
the Congress sets foreign policy, and the President not the Congress decides what information can be disclosed consistent with that foreign policy as well as with the national security and other policies of the executive branch. Note that in this broadly inclusive statement, the President also said that he might not have to provide even Congress with some of the information about U.S.-India nuclear cooperation that his administration possessed.

Another provision of the new statute is designed to prevent nuclear weapon testing by India. It is more than a statement of policy. It says that benefits to India from the statute “shall cease to be effective if the President determines that India has detonated a nuclear explosive device after the date of the enactment of this [Act].”

Like the United States, India has not tested for some years, and Congress wanted to be sure that this moratorium on nuclear testing continued. A leading Indian Member of Parliament, not of Prime Minister Manmohan Singh’s party, replied that India already had a “self-imposed moratorium on nuclear testing in perpetuity.” But, said Prime Minister Singh, India would not accept a prohibition on testing from the United States. President Bush, in his signing statement, did not say what he would do if India tested nuclear weapons.

As mentioned above, in his signing statement, the president indicated that the executive branch would “construe,” presumably as being ineffective, some provisions of the Act that call for, or prohibit, submission of information to Congress, to an international organization or to the public. In his view, apparently, control of information on nuclear affairs is his responsibility, not that of Congress. He said he would control the relevant information “in a manner consistent with the President’s constitutional authority to protect and control information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.” This limitation on the statute’s requirement that the Executive provide information to Congress would seem to give the president authority to withhold information important to the establishment and governance of U.S. foreign policy -- not just from the public but from the Congress.

In past practice, much information kept from the public by the executive’s classification policies has nevertheless been supplied to congressional committees (which typically observe the executive’s classification policies). Is the president planning to cut back on the information supplied to those committees?

Going beyond the provision regarding the submission of information to Congress, can the U.S. president now pick and choose which provisions of the new law enacted by Congress to govern U.S.-India nuclear relations are to be observed by the executive branch, and which are not? Is this consistent with the U.S. Constitution? An expert panel of the American Bar Association (ABA) said recently: The original intent of the framers [of the Constitution] was to require the President to either sign or veto a bill presented by Congress in its entirety…. The plain language of Article I, §7, clause 2 (Presentment Clause) [of the Constitution] compels this conclusion…. There is not even a hint that the President could sign or veto part of a bill and elect to enforce a law that differed from the one passed by Congress.…. President George Washington confirmed the clear understanding of the [bill-signing] clause when he declared that a bill must be approved in all its parts or rejected in toto.

But what of the president’s supposed primacy in foreign affairs, looked to for justification of the apparent attempt to now pick and choose which provisions of a new law, enacted by Congress to govern U.S.-India nuclear relations, are to be observed by the executive branch, and which are not? This, too, is certainly not what the drafters of the Constitution intended, according to an expert who has examined historic records of our Constitutional Convention and its predecessor:

Any examination of the Articles of Confederation [that preceded the Constitution] and the records of the constitutional convention [that drafted the Constitution] makes clear the almost universal agreement [on the meaning of the text of the Constitution relating to U.S. foreign policy] among the Founding Fathers that the control of foreign affairs was a legislative, not an executive, function.
Executive practice in making and implementing foreign policy, and the frequent acceptance by Congress of that practice, have modified this broadly stated conclusion, but have certainly not gone as far as President Bush has gone in this and other bill signing statements.

An American president typically now has more to do with foreign policy than does the Congress. This is clearly true of the implementation of foreign policy. It is less true for the creation of foreign policy.

Often, but not always, the creation of foreign policy is in the hands of the executive branch. But Congress still has ultimate authority over major issues of foreign policy. Defiance of the will of Congress (as that will is expressed in a statute) while negotiating agreements with foreign governments is certainly unusual. Indeed, the anticipated U.S.-India nuclear cooperation agreement will be submitted to Congress for approval if President Bush follows the statute just passed by Congress and signed by him. If the U.S.-India agreement is clearly inconsistent with the statute that has just been enacted to authorize its negotiation, that could well make approval by Congress unlikely -- unless the U.S.-India agreement is modified or the decision of Congress is modified. Will the President simply refuse to submit such an agreement negotiated with India to the Congress for approval, and then authorize, without congressional approval, the implementation of the U.S. obligations created by the agreement? That would be clear defiance of the will of Congress.

The purpose of the U. S.-India Peaceful Atomic Energy Cooperation Act is to provide congressional authority for the president to negotiate an agreement with India that would otherwise have been prohibited by an earlier statute. As mentioned above, the anticipated U.S.-India agreement will probably be what is classed as a “congressional-executive agreement” if it fits the statute just enacted to authorize it. Under past State Department practice, the President may conclude such an agreement on the basis of existing legislation. The new statute provides the legislation. But it says that the agreement to be negotiated with India can come into effect “only if both Houses of Congress pass a joint resolution of approval within 90 days” of the submission of the agreement to Congress.

To use its provisions as authority to carry out his negotiations, the president must observe those provisions.

This requires that the negotiated agreement be submitted to Congress for a stated period while Congress decides whether to accept it without more, or to hold hearings to gain further information -- including other views than those of Executive Branch. If Congress decides to hold further hearings, the agreement cannot go into effect under the Act until Congress authorizes the president to put it into effect.

Will President Bush comply with these requirements?

1 A prior statement on this website described the U.S.-India Nuclear Cooperation Agreement. See G. Bunn, “U.S.-India Nuclear Cooperation Agreement: Final Congressional Approval is Conditioned on Future Steps by India and Two International Organizations.” http://www.cdi.org/laws/india-us-122006.cfm

2 For the text of President Bush’s written statement justifying his refusal to follow the will of Congress in this case, see “Statement by President Bush on Signing the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006” (Dec. 18, 2006), www.state.gov/p/sca/rls/2006/77960.htm.


4 See n. 2, supra., for the citation of the separate, written signing statement of President Bush.
See §§ 102 and 103 of the Act.

§§ 102 and 103 of the Act. §102 is entitled “Sense of the Congress” and §103 is entitled “Statements of Policy.”

See §103(a)(3) of the Act.


§106. The statute contains no similar prohibition on U.S. nuclear weapon testing. However, through its appropriations to the Departments of Energy and Defense, the Congress has continued the U.S. moratorium on testing begun during the Clinton Administration.


State Department Circular 175, Procedures on Treaties and Other International Agreements, class 2, describing the President’s authority to conclude an executive agreement on the basis of existing legislation such as the U.S.-India Peaceful Atomic Energy Act. See http://www.state.gov/s/l/treaty/c175/ and http://foia.state.gov/masterdocs/11fam/11fam0720.pdf


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