

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

Discussion of
Proposed Commission Legislative Program

Place -

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Friday, 3 June 1977

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Discussion of
Proposed Commission Legislative Program

Commission Meeting Room
11th Floor
1717 H. Street N.W.
Washington, D.C.

Friday, June 3, 1977

The Commission met pursuant to notice at 2:40 p.m.
Present: Chairman Rowden, Commissioners Gilinsky and Kennedy.

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P R O C E E D I N G S

1
2 MR. STOIBER: This is a continuation of the discus-
3 sion of the meeting you held on April 18 in which you considered
4 suggestions for legislative initiatives by the Commission. You
5 have the General Counsel office paper of June 1 with you, a
6 cover memorandum of five attachments with you contain the sub-
7 stance of the discussions. These attachments overlap and dupli-
8 cate to some extent the material you had in the previous memo
9 which was submitted back in March, subject to the comments
10 that you made to us back in April, we have refined some of the
11 memoranda and added a couple of additional topics.

12 The five matters that are contained in the paper
13 are a discussion of some additional matters involving civil
14 penalty authority, the protection of licensee and nonlicensee
15 personnel, exemption of safeguards information, a discussion
16 of the Commission quorum requirements, and the question of up-
17 grading the Director of Enforcements and Inspection to an
18 Executive Level 4 position.

19 As you will see from reading the attachments and the
20 cover memoranum, only two of these items, the fourth and fifth,
21 really have reached a stage where I think we could go forward
22 at present with legislative proposals to the Congress. With
23 respect to the civil penalty question, there is a major study
24 underway now by the Enforcement and Inspection office on the
25 entire question of incentives, vis-a-vis licensees. The due

1 date of that study is the end of September. We have recommended
2 that we now consider seeking new civil penalty authority or
3 amending our present authority now until the results of that
4 study are in.

5 CHAIRMAN ROWDEN: Would you explain why or are you
6 going to get back to these?

7 MR. STOIBER: I think it is largely reflected in the
8 attachments. But the basic reason is that there are two aspects
9 to the civil penalty legislation we would propose. No. one,
10 shifting from essentially a procedure by which civil penalties
11 are assessed through a court action brought by the Attorney
12 General, an administratively imposed system.

13 The second aspect is whether or not to increase the
14 penalty limit from the \$5000 per violation, which we presently
15 have in our regulations and statute, to a \$25,000 per viola-
16 tion. We have suggested that some consideration be given to
17 the increase in penalty and we feel that in order to wrap the
18 whole thing up into one ball of wax, it would be better to have
19 the support for the increase.

20 CHAIRMAN ROWDEN: That I understand. But how does
21 the matter of civil penalties relate to the study on incentives
22 that is underway? Is one of those incentives the penalty that
23 would attach to a violation?

24 MR. STRAUSS: I think so. John Davis may be able to
25 speak to that.

1 MR. DAVIS: It is a broadbased study looking at
2 total incentives, negative as well as positive incentives. One
3 of the incentives being reviewed now in some depth is the civil
4 penalty incentive. But it doesn't not just look at that one
5 sanction, but a range of sanctions. This may lead to some other
6 requests for legislative change also.

7 CHAIRMAN ROWDEN: What sort of sanctions, for any
8 old thing, in addition to civil penalties are you talking
9 about?

10 MR. DAVIS: We are looking at the range of orders
11 which we have, how they should be applied or not applied; in
12 other words, limited scope of orders, maybe recognize that
13 orders should be issued for punitive purposes, as well as
14 corrective purposes, this type of thing.

15 It is a very broadbased study at this time,
16 Mr. Chairman.

17 CHAIRMAN ROWDEN: And the target date for completion
18 is what, the end of September?

19 MR. DAVIS: That is really the midway point. We
20 believe we will have sufficient information to examine the
21 sanction portion by that time?

22 MR. STRAUSS: I guess that surprises me. I thought
23 I had been told the study would be finished in September.

24 MR. DAVIS: Not totally finished. We will have the
25 information in, but the evaluation continues for six

1 more months.

2 MR. STRAUSS: So we are talking about next March
3 then.

4 MR. DAVIS: No, by this September; we can come for-
5 ward with something by this September.

6 MR. STRAUSS: But the evaluation as a whole will
7 continue for six months beyond that?

8 MR. DAVIS: Right.

9 MR. STRAUSS: Which will be next March. I guess my
10 thought would be, viewing the congressional process with some
11 realism, if this is something that the Commission wishes to
12 seek, the legislative package put forward in the middle or
13 late fall will have a chance of catching the current Congress,
14 since bills will survive the winter recess. The legislative
15 package not put forward un-til the middle of next spring will
16 have no such chance. So you are talking about two years there.

17 CHAIRMAN ROWDEN: In my perspective that is
18 unacceptable. Is there any way the study on incentives can
19 be accelerated?

20 MR. DAVIS: We are accelerating it and we believe
21 we can come forth with something on that by September.

22 CHAIRMAN ROWDEN: When you say "by September," does
23 that mean you will only have finished that portion of the study
24 by the end of September? Because then there is a process of
25 Commission consideration and formulation of a legislative

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1 proposal, which get you into October at least.

2 MR. DAVIS: Our schedule now would be we would have
3 finished our portion of it. But in answer to your question,
4 it would be the initial portion you describe, not the total
5 legislative package.

6 CHAIRMAN ROWDEN: Is that the absolute irreducible
7 period of time for completion?

8 MR. DAVIS: We will look at that and see if we can,
9 sir.

10 CHAIRMAN ROWDEN: What are the views of my colleagues?

11 COMMISSIONER KENNEDY: I agree with Peter, if we are
12 looking at it in that light, we are talking about two years
13 from now. Just realistically looking at the way Congress works.
14 If you can't get something up by early or mid-fall, you probably
15 aren't going to get it through this Congress. Then you have to
16 go through the organization problem of the next congress.

17 CHAIRMAN ROWDEN: Victor?

18 COMMISSIONER GILINSKY: That sounds right to me.

19 CHAIRMAN ROWDEN: I guess I would like to make a
20 proposal, and that is to set up a schedule which would have a
21 legislative proposal before the Commission at some reasonable
22 time during the month of September, so that the process of
23 clearing a legislative measure could begin then. You know,
24 this the first of June, that is June, July and August. As
25 a matter of fact, couldn't that schedule be better? I don't

1 know what is entailed in the study of incentives, how complex
2 it is. You know, earlier is better as far as this particular
3 issue and several others are concerned.

4 MR. STRAUSS: I take it the question would be
5 identifying any measures other than civil penalties for which
6 legislative authority might be required?

7 MR. DAVIS: That is correct, yes.

8 MR. STRAUSS: We think we have a civil penalty
9 statute in redraft, in fairly decent form now.

10 CHAIRMAN ROWDEN: Could you work out, Bill, I think
11 you ought to coordinate this, work out with I&E and any other
12 staff units a schedule which will accelerate, I would urge,
13 considerably the present time frame for completion of that por-
14 tion of the study which is necessary.

15 COMMISSIONER KENNEDY: You need to have it by the
16 15th of September if you are realistically going to have it go
17 forward. We need to have it before the Congress recesses. And
18 one can't expect that to be much later than the first of Nov-
19 ember.

20 MR. DIRCKS: Okay.

21 MR. STOIBER: The second item on your list of pos-
22 sible initiatives is legislation to increase the protection or
23 the remedies which we can afford to licensee personnel or non-
24 licensee personnel who provide information to the Commission in
25 the course of its enforcement activities. This is another one

1 of those matters where we are anticipating the results of a
2 study shortly. This is being conducted by the Office of Stan-
3 dards, Developments in conjunction with EOD, and our indication
4 is now that study will be completed at the end of this month.
5 By that time we should be able to determine what kind of legis-
6 lation might be indicated.

7 Attachment 2 here is on the order of a status report
8 of where the thinking of this group apparently is heading now.
9 It points out four general areas which the study group feels
10 the Commission ought to be able to take action on and the kind
11 of remedial action or protection that should be afforded. That
12 is set forth on pages 1 and 2 of the attachment. So I would say
13 here is another matter where we should have guidance shortly.

14 CHAIRMAN ROWDEN: That will be available the end of
15 this month for consideration next month?

16 MR. STOIBER: Right.

17 The third item is one that Commission Gilinsky raised
18 during the discussion in April, and that was the question of
19 providing further protection for safeguards information either
20 from disclosure under the Freedom of Information Act or other
21 disclosure. Our discussions with the staff indicate that at
22 the present time we believe, because of judicial holdings on
23 exemption from the Freedom of Information Act, and certain
24 findings of the National Security Council on classification
25 that we are able to adequately protect the kind of safeguards

1 information with which we are concerned and at the present time
2 there is no need to seek additional legislative authority to do
3 that. This, I think, has to be mentioned in the context of the
4 extreme reluctance that we would face in Congress to try to
5 carve out new sort of special Freedom of Information Act exemp-
6 tions. That reluctance or hostility, I think, would be
7 particularly strong in view of the sort of breaking periods for
8 governing exemption.

9 We are now in the process of discussing with various
10 parts of the Congress the implementation of Government-in-the
11 Sunshine Act and there is great sensitivity to the openness in
12 government concept now, and I don't think that unless we can
13 show an awfully strong cause for seeking an exemption, we are
14 going to make much headway. And I think we would in fact per-
15 haps generate some hostility among the committees we have to
16 work with were we to try to seek it without firm support.

17 CHAIRMAN ROWDEN: It is my understanding that one of
18 the issues that the reactor licensees have raised, they are
19 concerned about our ability to protect security plans which are
20 required to be submitted under 7355. I also recall that we
21 have one piece, at least one piece of unfinished business, an
22 aftermath of 347 , and we wrote to NSC and said we ought to
23 now turn our attention to that. Originally our position was
24 let's wait and see what the outcome of GESMO is. I think that
25 is no longer a pacing item.

1 Is my understanding correct that the Staff is pre-
2 paring a paper on that subject now for Commission consideration?

3 MR. DIRCKS: Yes, sir.

4 CHAIRMAN ROWDEN: Do you know when that paper will
5 be ready?

6 MR. DIRCKS: I gather it will be -- I have to check,
7 but the way I saw it and heard it, it would be ready, it is in
8 the sort of draft stages now, not too much longer to get it
9 down.

10 COMMISSIONER KENNEDY: What does that mean?

11 MR. DIRCKS: I don't want to give you a date until
12 I check.

13 COMMISSIONER KENNEDY: Next week?

14 MR. DIRCKS: I am hoping it will be next week.

15 COMMISSIONER KENNEDY: Why not make hope be father
16 to reality?

17 MR. DIRCKS: I was going to get a date.

18 COMMISSIONER KENNEDY: Why don't you just set a date
19 now and then the Staff will follow your guidance?

20 MR. DIRCKS: Right.

21 CHAIRMAN ROWDEN: I would like to have it considered
22 sometime this month, which means we ought to have it pretty
23 soon.

24 MR. DIRCKS: Right. It was in a clearing process
25 yesterday.

1 CHAIRMAN ROWDEN: I asked about that paper before and
2 understand, or more than understand it will be completed within
3 the next week to 10 days, so we could get it up here for consi-
4 deration this month, which I still think is desirable.

5 MR. DIRCKS: I will push it and give you a firm
6 date.

7 COMMISSIONER KENNEDY: Which will be sometime next
8 week?

9 MR. DIRCKS: Yes.

10 CHAIRMAN ROWDEN: That ought to go on irrespective
11 of what position we take with respect to legislation. I guess
12 there are differing views on that.

13 COMMISSIONER GILINSKY: I am a little puzzled that
14 we take such a sanguine view of the proprietary rubric when
15 in writing to the NSC the Commission suggested that this was
16 really kind of a weak reed.

17 MR. STRAUSS: I think this morning's discussion is
18 something which is going to have to be watched in that respect.

19 CHAIRMAN ROWDEN: But now let's remember what the
20 totality of our concerns were with regard to the matter of
21 classifying this information. It is one thing to talk about
22 having the authority to withhold it from a requester under the
23 Freedom of Information Act. It is another thing to assure that
24 those people who have access to that security information, if
25 indeed it is sensitive information, are appropriately cleared.

1 That has always been more of a compelling consideration in this
2 area, talking about security.

3 COMMISSIONER GILINSKY: I thought we always agreed
4 we had to deal with the licensees, and the problem is how do
5 you protect them against the Freedom of Information Act. That
6 is where the alternative approach required some propping up.

7 CHAIRMAN ROWDEN: My own view has always been that
8 outside the MUF area, where there were persistent Freedom of
9 Information Act claims, when we got into the area of security
10 plans for facilities, be their research facilities or reactor,
11 that we had a concern which wasn't related to whether members
12 of the public could get access to this, but those who play a
13 role in the total construction and operation process and those
14 who participate in our licensing proceedings.

15 For example, as proprietary information now, under
16 our rules, it is a document that we would be obliged to make
17 available to a participant in a proceeding simply on that
18 participant's signing a piece of paper committing himself not
19 to disclose it. I think there is a question as to whether that
20 is an adequate protection, if indeed this is sensitive informa-
21 tion.

22 COMMISSIONER KENNEDY: Security.

23 CHAIRMAN ROWDEN: Security information. I think that
24 is a potential problem. I think there are other problems in
25 terms of who within a licensee's organization has access to

1 to this, or the architect/engineer organization.

2 COMMISSIONER KENNEDY: There is always something a
3 little anomalous to me that on the one hand we have been press-
4 ing, and rightly so, very hard to increase the level of physical
5 security and protection at all of the installations and activi-
6 ties, and at the same time argue that the information on which
7 all these physical protection and security arrangements are
8 based can be protected by other than security means. It just
9 seems to me an anomalous position.

10 MR. STRAUSS: It seems to me that is a different
11 question from the question of the Freedom of Information Act.
12 If one approaches it on the classification rubric, that takes
13 care of the problem.

14 COMMISSIONER KENNEDY: That is right. The Freedom
15 of Information question does not arise then.

16 MR. SHAPER: I think there is another point, irre-
17 spective of how we think we can protect it now is a different
18 question of getting the kinds of support you need in going to
19 the Congress with a request. You can classify the stuff, for
20 example, if you want to. So I am making a distinction between
21 feeling you are dissatisfied with the protection you have now,
22 as contrasted with feeling you have got the kind of a case
23 what would convince the Congress, that is all.

24 COMMISSIONER GILINSKY: There is a second point which
25 is how does this hostility manifest itself? What evidence is

1 there that there is hostility to approving an exemption?

2 MR. STOIBER: One of the best examples of this is
3 that last week there was a conference sponsored by the Federal
4 Bar Association at which some of the speakers were officials of
5 OMB, and the question was raised in a discussion from the audi-
6 ence, what about possible exemptions of this nature. And they
7 were extremely forceful in their expression that the Congress
8 was not receptive to that kind of what they would call "chip-
9 ping away" at these openness-in-government statutes, and they
10 just felt that they were not going to be willing to produce
11 these.

12 COMMISSIONER GILINSKY: Have we talked to anybody
13 in the Congress or their staffs?

14 MR. STOIBER: Not specifically, I haven't talked
15 with anyone, but I do know -- I have had some conversations
16 with the government-in-the-sunshine people, who was it?

17 MR. STRAUSS: Not specifically about this kind of
18 thing.

19 CHAIRMAN ROWDEN: I think we ought to address it on
20 the merits. We owe NSC our views, we owe ourselves a position
21 in this regard. Now I think we would be looking at it within
22 the context of proposed regulations for security clearance
23 which are out, and on which the Commission will ultimately have
24 to act. Obviously these two are related.

25 In any event, the paper ought to get before the

1 Commission.

2 COMMISSIONER KENNEDY: Next week.

3 MR. DIRCKS: Yes, sir.

4 MR. STOIBER: The fourth item here is something of
5 a hybrid. It flows from a legislative initiative to change the
6 Commission's quorum requirements. But if you read the attach-
7 ments, you will see that items 2 and 3 of that attachment raise
8 slightly different considerations. Your sunshine officer,
9 Mr. Ostrach has provided us with some interesting research in
10 part 3 of that memorandum. I wonder if you would like to come
11 up to the table in case there are questions about this subject.

12 What the memorandum includes is some additional
13 support in part 1 for seeking an amendment of the quorum require-
14 ment for the Commission, so that we can act in the absence of
15 a quorum present.

16 The second part of the memorandum discusses --

17 CHAIRMAN ROWDEN: By the way, that has utility
18 quite apart from the present composition of the Commission.

19 MR. STOIBER: Absolutely.

20 CHAIRMAN ROWDEN: In terms of efficiency of doing
21 business. It is nothing unique as far as government.

22 MR. STRAUSS: No. What is unique is the presence of
23 the word "Present." That was explained by the Atomic Energy
24 Commission, military responsibility really.

25 CHAIRMAN ROWDEN: We wouldn't be cast in a position

1 of trying to carve out for ourselves a special position to avoid
2 application of the Sunshine. As I read our exposition of the
3 legislative history, the form of notational voting was something
4 that was recognized as being appropriate.

5 MR. OSTRACH: The Sunshine Act does that, yes, sir.

6 COMMISSIONER GILINSKY: Has this happened in other
7 agencies?

8 MR. STRAUSS: Yes.

9 CHAIRMAN ROWDEN: We are unique, as I understand
10 it. It is an inheritance from the AEC.

11 MR. STRAUSS: It was a requirement that was put on
12 in light of the military responsibility.

13 MR. STOIBER: I think there was general agreement
14 at the last session that such an amendment should be sought.
15 The Commission wanted further guidance about how the system
16 would operate if such amendment were achieved. We went one
17 step further, because of the possibilities which will lie in
18 front of us shortly on quorum question. And that discussion
19 is contained in part 3 of the memorandum.

20 We have indicated here that this discussion is far
21 from exhaustive, that if you would like us to delve deeper into
22 this question we can.

23 COMMISSIONER KENNEDY: It says here, "A Commissioner
24 who has considered a particular issue by cast his vote by
25 notation may instruct assistant to act in the matter." In

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1 what form would the assistant's action be, and in what form
2 would the Commissioner instruct the assistant?

3 MR. STRAUSS: The Commissioner, having considered
4 the matter, would tell his assistant at a meeting which may be
5 forthcoming, from which he may have to be absent, you may do
6 thus and so.

7 COMMISSIONER GILINSKY: Then you have got "Deputy
8 Commissioners."

9 CHAIRMAN ROWDEN: Well, that is something the Com-
10 mission could decide on its own. I have difficulty with
11 anybody other than a Commissioner committing himself to a par-
12 ticular matter.

13 COMMISSIONER KENNEDY: I don't have, if the Commis-
14 sioner were to beforehand by notation indicate he has so advised
15 the Chairman and at the meeting his view on the matter will be
16 represented more fully, if desired, by his assistant.

17 CHAIRMAN ROWDEN: But there should be some documents.

18 COMMISSIONER KENNEDY: That is different from
19 deputizing the assistant to act for you.

20 MR. STOIBER: The law indicates fairly clearly that
21 is not a possibility.

22 COMMISSIONER KENNEDY: I wasn't sure what was
23 intended here, whether we were visualizing amending that in
24 some way.

25 MR. STRAUSS: No, it is the description you have

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1 given, a notation of general position on a particular matter,
2 not a free-range proxy, but on Section E768, say, my views are
3 as follows, my assistant is authorized to state them more fully.

4 COMMISSIONER KENNEDY: That sounds reasonable to
5 me.

6 MR. STOIBER: Section 2 of the memorandum is the
7 possible change in format of meetings that might result from
8 this recommendation, where the Commission would have to adopt
9 a procedure for deciding upon which matters it would want to
10 hold a meeting, and there are suggested in the memorandum a
11 series of criteria that the Commission might want to adopt to
12 give the Secretariat some guidance about that.

13 The question of whether or not a Commissioner can
14 request a meeting, whether or not the matter was one of first
15 impression within the Commission, whether significant new
16 events had arisen which might lead the Commission to alter its
17 prior determination, some kind of system of that nature would
18 have to be worked out if a system of notational voting was
19 adopted.

20 COMMISSIONER KENNEDY: Before leaving that, as a
21 practical matter, given the history of the Commission's acti-
22 vities and expressions, in consideration of the Sunshine Act,
23 since last fall, is it realistic to suggest a regime in which
24 the Commission would meet less frequently on fewer subjects?

25 MR. STRAUSS: In one respect, you would no longer

1 have affirmation sessions.

2 MR. OSTRACH: In another respect, you would no longer
3 have to vote to close meetings pursuant to the Sunshine Act.

4 CHAIRMAN ROWDEN: We would have to meet together once
5 a week to go over the agenda. We could do that on a notational
6 basis.

7 MR. STRAUSS: Yes.

8 COMMISSIONER KENNEDY: And that would mean we meet
9 to resolve differences.

10 MR. STRAUSS: If there were any.

11 COMMISSIONER GILINSKY: Would you still have to have
12 a quorum for meetings?

13 MR. OSTRACH: When you have a meeting, you still
14 have to have a quorum, yes, sir.

15 MR. STRAUSS: No, you wouldn't have to have three
16 bodies present because the word "present" wouldn't be there.

17 CHAIRMAN ROWDEN: It would be a meeting, but to act
18 you have to have three commissioners acting on an item.

19 MR. STRAUSS: That is right. But it could be, for
20 example, Commissioner Kennedy, Commissioner Rowe, and Commis-
21 sioner Gilinsky's paper vote.

22 COMMISSIONER KENNEDY: That was in part one of the
23 thoughts that ran through my mind when I asked the question.
24 We have had a history up until now of rather regular and fullsome
25 meetings discussing a broad range of the agency's business.

1 MR. SHAPER: Not fullsome.

2 MR. STRAUSS: Perhaps.

3 CHAIRMAN ROWDEN: I haven't noticed any amendment
4 of the remarks.

5 COMMISSIONER KENNEDY: A wide range of activities of
6 the Commission. And it seemed to me that a significant change
7 in that regime, which would certainly, or it could be implied
8 from what is written here, would be noted, and I would think
9 unfavorably and justifiably unfavorably by the public.

10 Secondly, you are right, Commissioner Gilinsky,
11 that indeed meetings may well turn out to be those convened by
12 the fellow who wants to have a meeting, everybody else having
13 written some notes, and we have a strange set of meetings. They
14 would all presumably be open. But if a briefing, for example,
15 which now might be conducted by an individual Commissioner, if
16 others indicated their interest in the subject, said that they
17 had certain views which their assistants would be asked to
18 inquire into during the meeting, briefings which heretofore have
19 been individual matters; I can see all kinds of ramifications
20 of this.

21 CHAIRMAN ROWDEN: Let's hope you have a chairman who
22 is going to be able to make order out of chaos here. I think
23 it is a question of the Commissioner's deciding how they want
24 to conduct their business and responsibility. Admittedly it
25 could degenerate into something that would be counterproductive

1 as far as the Commission's business is concerned and give a false
2 impression to the public.

3 For all of the inconvenience of our having to sit
4 down around the table, there is something to be said for hear-
5 ing each other out. I suspect that the desire to conduct a
6 goodly number of meetings in public session is going to be an
7 incentive for Commissioners to show up for these sessions. I
8 think that is going to be salutary. After all, all this does
9 is give you flexibility to exercise this authority in a re-
10 sponsible way.

11 MR. STRAUSS: It is certainly true that relation-
12 ships among commissioners at other agencies are often more dis-
13 tant and formal than they have been here. Whether one can
14 attribute that to their ability to dispatch business in the
15 privacy of their office or not, I can't say. But there is
16 nothing in here that requires that.

17 MR. SHAPER: Since the other agencies are now sub-
18 ject to the "Present" requirement, now subject to the Sunshine
19 Act, it might be instructive to see what differences there are
20 by virtue of this particular peculiarity among the other
21 agencies.

22 MR. STRAUSS: I move Howard Shaper be appointed a
23 committee of one to explore --

24 MR. SHAPER: I wouldn't think of transgressing on
25 your responsibilities, Peter.

1 COMMISSIONER KENNEDY: Could I change the motion and
2 then look for a volunteer. I think it would be instructive to
3 find out. I would vote that one of our extensive, enormously
4 capable legal staff somewhere in the organization will under-
5 take to find out.

6 CHAIRMAN ROWDEN: As a matter of fact, you did do
7 a canvass of other agencies about the practical situation, and
8 there has been -- I think someone in your office can do this
9 without too much difficulty. I mean not simply by attending
10 the meetings, but by talking to people on staff of other organi-
11 zations, the counsels' offices, for example.

12 I see somebody writing it down.

13 MR. STOIBER: The third section of the paper does
14 discuss some of the possibilities that might flow from the
15 reduction of the number of Commissioners below the quorum
16 level. I am sure that some of you might have been surprised to
17 see the statement on page one of that part 3 which indicated
18 that "As Commissioners, Commissioners remaining after the
19 quorum was lost, can exercise no formal authority." If you
20 are interested in a development of that idea, I think
21 Mr. Ostrach has examined the legal authorities fairly carefully
22 and can speak to that. If not, we can proceed.

23 MR. STRAUSS: I think there is a further question,
24 of whether the Commission would wish, prior to the first of
25 July, to develop and adopt any further or general delegation of

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1 responsibility to EDO --

2 CHAIRMAN ROWDEN: To do what?

3 MR. STRAUSS: The continuing conduct of the Commis-
4 sion's affairs in the absence of a quorum.

5 CHAIRMAN ROWDEN: What does that entail? What
6 categories of agency responsibility?

7 MR. STRAUSS: Necessary changes in the rules.

8 MR. SHAPER: Rulemaking would be the obvious one.

9 MR. STRAUSS: Just a general unanticipable fill-in
10 in authority.

11 CHAIRMAN ROWDEN: Presumably the adjudicatory
12 responsibility would simply disappear by default.

13 MR. STRAUSS: There is a possibility there. I
14 suppose their options would be by rule to provide that any
15 petition for search area filed after the first of July --

16 CHAIRMAN ROWDEN: When do those rules take effect?

17 MR. STRAUSS: They are effective.

18 CHAIRMAN ROWDEN: I haven't received any requests
19 yet.

20 MR. STRAUSS: Neither have we. I understand that
21 you will.

22 CHAIRMAN ROWDEN: The staff is leading the way.

23 MR. STRAUSS: Yes. The route is cleared at last.

24 That a petition filed after the first of July or within that
25 period of time, would have the effect of leaving the case open

1 until a quorum shall have been established. You could so provide
2 if you wished. That would be the possible action in the adjudi-
3 catory area. It wouldn't have any effect, other than to pre-
4 serve the possibility of Commission action once a quorum was
5 established.

6 CHAIRMAN ROWDEN: I can't believe that state of
7 affairs would be allowed to come to pass.

8 MR. SHAPER: Would it be helpful to have a list,
9 on the assumption it might, to have a list of possible actions
10 over the next, shall I say, three months.

11 CHAIRMAN ROWDEN: I think there ought to be some
12 contingency thinking done in this regard.

13 MR. STRAUSS: Well, the issue is whether you want to
14 have rules that you can have in place before the 30th of June.
15 That will require us to go draft them, Howard to go draft them.

16 MR. SHAPER: I will draft these.

17 MR. STRAUSS: You rather like these. You can be
18 known as the delegation of authority to the staff of 1977.

19 COMMISSIONER GILINSKY: We know who is going to
20 get the authority.

21 MR. STRAUSS: I would think the chief parameter
22 would be to make them self-defeating on the entry into
23 office of the quorum for some reason over a period of time.

24 CHAIRMAN ROWDEN: Are you assuming such rules are
25 necessary?

jeri 1 MR. STRAUSS: Assuming such rules are necessary,
2 they should provide the authority conferred by them terminates
3 in 15 days, or whatever. An emergency order on the order of
4 the national emergency declared at the beginning of the Korean
5 War.

6 COMMISSIONER KENNEDY: Before that, declared with
7 the Declaration of War in World War II.

8 CHAIRMAN ROWDEN: Well, again, I don't believe that
9 situation will be allowed to come to pass. But there are
10 logistical considerations that are fairly evident, including
11 the physical availability of two Commissioners. This is going
12 to say everybody is going to be immediately available the day
13 after.

14 MR. STRAUSS: I haven't believed that situation
15 would be allowed to come to past since January 19.

16 MR. STOIBER: The real problem is if you don't start
17 the drafting process now, it won't be in place.

18 CHAIRMAN ROWDEN: My own view is the seminal work
19 should begin at this stage so we will be prepared. Do you
20 have any different viewpoints?

21 COMMISSIONER KENNEDY: No, I agree with that.

22 There are a number of things in Mr. Ostrach's
23 memorandum which interest me, but it is not necessary to dis-
24 cuss them here. I was interested to note, for example, as to
25 the Chairman's functions of appointments and supervision of

1 Commission employees, it goes on to note, "The Chairman may
2 not make appointments of heads of major administrative units,"
3 and they have been defined here as presumably EDO, NRR, MNSS,
4 Research, and perhaps I&E --

5 CHAIRMAN ROWDEN: They just list the statutory posi-
6 tions.

7 COMMISSIONER KENNEDY: Yes. Whereas up until now it
8 has, I think, been our view, has it not, that it was not con-
9 strued as narrowly, put it that way.

10 COMMISSIONER GILINSKY: Those are appointments that
11 are made by the Commission?

12 COMMISSIONER KENNEDY: That is right.

13 MR. STRAUSS: The General Counsel should also be
14 consulted.

15 COMMISSIONER KENNEDY: Up until now we construed
16 this as a collegial body, we construed it much more broadly
17 than that, and extended even beyond the General Counsel to a
18 number of other significant positions of the Commission.

19 CHAIRMAN ROWDEN: Well, it has never become an issue
20 because of the way we have chosen to operate here.

21 COMMISSIONER KENNEDY: I just wondered if this is a
22 very narrow interpretation of the law, or one that is exclusive
23 of any other possible interpretation.

24 CHAIRMAN ROWDEN: I think it would be unfortunate
25 if this was considered to be a determinative legal opinion. I

1 noted the same thing.

2 I think it calls for a little more careful consider-
3 ation, so there will be no misunderstanding.

4 MR. STRAUSS: I think that is the point, isn't it,
5 what the statute says in allocating the functions is if it
6 wasn't universally welcomed, reasonably clear, and the Commis-
7 sion's practice has been to engage in the practice which was
8 much more likely, if practiced before the amendment, than the
9 amendment would have permitted, and that is fine, and may
10 continue to do so.

11 COMMISSIONER KENNEDY: Yes. The question is, is it
12 clear that a legal opinion would say that is what was intended
13 by the amendment. It had not been my understanding.

14 MR. STRAUSS: As the Commissioners will recall, in
15 the usual techniques of statutory interpretation looking at the
16 legislative history and so forth, it is rather hard to tell what
17 was intended by the amendment.

18 COMMISSIONER KENNEDY: In this case I should think
19 well nigh impossible.

20 MR. STRAUSS: That is right. If one looks to the
21 experience of other agencies, as I remember, this creates us
22 as a middle of the road agency. One looks to the experience of
23 other agencies, this is consistent with that experience. This
24 is also consistent with the language of the statute, and in
25 this kind of situation, I think all that a General Counsel

1 could say really is beyond that point no further, obviously
2 within it, the Commission is free to order its affairs as it
3 chooses.

4 COMMISSIONER KENNEDY: That is different, however,
5 from saying -- let me put it another way. That is putting in
6 the hands of the Commission the conclusion as to the extent to
7 which the power of the chairman extends.

8 MR. STRAUSS: The king and his parliament together.

9 COMMISSIONER KENNEDY: That is right. Which is
10 different from the implication of this statement, I think.

11 MR. STRAUSS: The unfortunate situation which this
12 statement looks toward is one in which the king does not have
13 a parliament with which to consult.

14 CHAIRMAN ROWDEN: I frankly would find it unaccept-
15 able that the Commission could determine the powers of the
16 chairman, which were conferred by statute.

17 On the other hand, I think there are two different
18 categories which are subject to Commission consideration; at
19 least arguably you could make that point.

20 Under the Energy Reorganization Act it says,
21 "Certain officials shall be appointed by the Commission."
22 There is no special mention of the chairman. And my recollection
23 of the amendment, it gives the chairman administrative and
24 executive authority, including that over personnel, except that
25 appointments of principal -- I don't know how it describes it --

1 officers or units, whatever the descriptive term is, shall be
2 approved by the Commission. The chairman makes the nomination
3 and the Commission approves. It might lend itself to the
4 suggestion that there are two categories there. I don't think
5 we have to resolve that here. But I wouldn't consider it to
6 be a definitive legal opinion.

7 Sometimes these things just lie there and later on
8 somebody picks them up and says that is the law.

9 MR. STRAUSS: The word "preliminarily" appears a
10 number of times.

11 MR. SHAPER: In connection with the matter of
12 delegation, I would point out there are two different kinds of
13 situations in terms of delegations. By regulation, in effect,
14 the Commission has delegated to the staff all functions, with
15 two exceptions, and that is major rulemaking and action in
16 adjudicatory matters. And that is one category. The other
17 category is by practice the Commission has asked the staff to
18 come to the Commission before taking certain actions which in
19 theory but for that direction the staff could take itself.
20 So I would think in any consideration the Commission would want
21 to give to the matter of delegation, there is much greater ease
22 in effecting the change in one area than in the other.

23 MR. STRAUSS: I think maybe the principal issue
24 there would be in areas of policy formulation as distinct from
25 formal rulemaking or formal adjudication.

1 MR. SHAPER: I think two examples might be export
2 licensing. The Commission made it absolutely clear that export
3 licensing would be treated differently and they want to consi-
4 der them by themselves.

5 CHAIRMAN ROWDEN: Does that mean there would be a
6 moratorium on the issuance of export licenses if --

7 MR. SHAPER: No, it means you would have more
8 flexibility in delegating that if you wanted to.

9 MR. STRAUSS: I assume what could be done, in the
10 context of this document, in a variety of situations in which
11 authority has been or might be delegated to the staff would be
12 to have an understanding that the staff will consult with those
13 Commissioners who are here and on a request that a matter be
14 held for consideration by a Commissioner when it appears, the
15 matter would be held.

16 MR. SHAPER: Sure.

17 CHAIRMAN ROWDEN: Those Commissioners who are here
18 don't constitute a lawful body?

19 MR. STRAUSS: No, it is a working accommodation.

20 MR. SHAPER: Another example might be --

21 CHAIRMAN ROWDEN: It is a matter of being able to
22 take action.

23 MR. STRAUSS: The other area where, a similar sort
24 of area, there may be some things such as the issuance of
25 policy statements which have traditionally been done at the

1 Commission level, and there is suggestion in the legislative
2 history that that is what has long been intended, but there is
3 not statute that formally requires that. We would obviously
4 exercise a good deal of discretion in staff issuance of such
5 statements absent the Commission, even if it could be done, if
6 the authority were delegated, because it is important that they
7 have the imprimatur of the presidentially-appointed leader.

8 CHAIRMAN ROWDEN: You have the worst of both possible
9 worlds, you have the impression created that major action can
10 be taken by non-presidential appointees, where as a matter of
11 fact, what would happen would be a paralysis of all action,
12 because no staff guys will take a major initiative in those
13 circumstances. At least it would be surprising to me if that
14 would happen.

15 Again I repeat what I think is more than an aspira-
16 tion, there is enough chance for mischief or embarrassment.
17 As I have said, I don't believe that situation will come to
18 pass. But proceed with the seeding work on that.

19 MR. STOIBER: Before leaving item no. 4, would it
20 be possible for me to have the Commission's feeling that the
21 elimination of the presence requirement is something we should
22 seek and we should draft legislation for that, consult with
23 Carl Kempe about the best way to have that induced? And to OMB.

24 CHAIRMAN ROWDEN: I think so.

25 COMMISSIONER KENNEDY: That sounds reasonable to me.

1 With the understanding that what we need to do is establish
2 the ground rules, a set of procedures under which we function.
3 A lot of those are outlined in these pros and cons in the paper
4 that we have got.

5 MR. STOIBER: Fifth item in the package is the
6 upgrading of the Director of the Office of Enforcement and
7 Inspection to Executive Level 4. You have two pieces of paper
8 here from the Office of Administration discussing ways to do
9 that. The first paper of April 22 merely discusses the con-
10 cept of making this another statutory office, with the concomi-
11 tant amendment of the Energy Reorganization Act. It was my
12 understanding in the discussion in April that the Commission
13 would like to do this with as low a profile as is possible to
14 avoid the necessity of raising the whole question of how the
15 Enforcement and Inspection effort relates to the other statu-
16 tory offices of the Commission.

17 Therefore, the second paper reflects four alternative
18 ways of achieving this result by simply upgrading one of the
19 Commission's Level 4 positions to a Level 5 position. That
20 alternative is set forth on page 2 of the May 5 memo from
21 Mr. Jones to Mr. Donahue as alternative B. Both the Office of
22 Administration and ODC think that is an appropriate course of
23 action.

24 CHAIRMAN ROWDEN: How would that work?

25 MR. STOIBER: Well, the only thing we would need to

1 do would be to seek legislation which would state that one of the
2 five authorized Level 5 positions which the Commission has under
3 the Energy Reorganization Act would be increased to a Level 4,
4 making that not a staff level position and retaining the Level
5 5 position as career positions.

6 CHAIRMAN ROWDEN: This would be an amendment to the
7 Energy Reorganization Act or an amendment to Title V or
8 what?

9 MR. STRAUSS: Cal Jones drew it up as an amendment
10 to the Energy Reorganization Act. I won't argue it. I would
11 think it would be an amendment chiefly to Title V. In order to
12 make the Executive Level 4 position career, you would probably
13 also have a minor amendment to the Energy Reorganization Act.

14 MR. STOIBER: You would have to change the number of
15 Executive Level 4 positions you have provided now in the Energy
16 Reorganization Act.

17 The Section 2(y) of the 1974 Act says, "There shall
18 be in the Commission not more than five additional officers
19 appointed by the Commission." That is where the adjustment
20 needs to be. That would seem a tidy way of doing it without
21 getting into the whole question of creating a whole new statu-
22 tory office.

23 CHAIRMAN ROWDEN: I guess the basic question is
24 guidance from the Commission as to whether that ought to be
25 done?

1 MR. STRAUSS: Yes.

2 MR. TERRELL: I wonder how easy it is to get out of
3 going through the argumentation about holding statutory office.

4 CHAIRMAN ROWDEN: It is a question that is going to
5 be raised.

6 MR. TERRELL: It is going to be raised and none of
7 the papers that have been written on this so far, the ones we
8 have here, are all in the nature of implementation, and we
9 don't really have a paper that answers organizational, mana-
10 gerial, substantive questions about that function. I think,
11 no matter whether your minds are made up right now to do it,
12 I think you are going to need that background at least in your
13 hip pocket, because those questions are going to be raised.

14 MR. STRAUSS: I think we have understood from the
15 start if a statute in this form was sent up, it would be sent
16 up with materials explaining the need for Level 4 in I&E in
17 terms of its size, responsibilities and the like, which could
18 readily be converted into statutory form if the Committee
19 decided that was the way they felt they had to go about it.

20 MR. TERRELL: Wouldn't it be better to have those
21 materials before you make a decision?

22 MR. STRAUSS: I don't know why it has to be that way.

23 CHAIRMAN ROWDEN: I assumed we would see a legis-
24 lative package before final action is taken, and part of the
25 backup for that package would be a description of the functions

1 of the Director of the Office of I&E.

2 MR. STRAUSS: That is right.

3 COMMISSIONER KENNEDY: If I understand your point,
4 what you are saying is that, or you are saying it may be the
5 case that no matter how you wish to avoid that search reexami-
6 nation of the entire organizational structure, which indeed
7 we have said earlier we wish to avoid, the probability is you
8 are not going to if you raise the question of this Level 4,
9 in whatever form you raise it, the question of organization is
10 going to arise.

11 MR. STRAUSS: That will depend on the Committee, that
12 is right. They may or may not want to get into it.

13 Both of the Committees that will be presumably
14 responsible for this legislation have happily increased the
15 responsibilities of the Office of Inspection and Enforcement
16 recently by a significant amount.

17 COMMISSIONER KENNEDY: That would have been the time
18 to do this?

19 MR. STRAUSS: Yes. But their having done it recent-
20 ly, they ought to be willing to endorse this pretty damn fast.
21 Maybe they will want something more than. We will see.

22 MR. TERRELL: I am must saying it is prudent to
23 assume and prepare for it.

24 MR. STOIBER: There are two additional matters not
25 reflected in the paper before you, one of which deals with the

jeri 1 handling of health and safety matters in a foreign context.
2 The study group has received the Commission's indication of
3 desire for such study. I think there is an outline which
4 should be at the Commission in the next day or so setting forth
5 the parameters of that study. I am not sure what the dates
6 are. It is coming up from IP, but we have had a couple of
7 meetings on it.

8 One of the questions which is being examined in the
9 context of that study is whether or not additional legislative
10 authority is necessary to do the kinds of things we are con-
11 cerned about doing.

12 MR. STRAUSS: If we can go off the record for just
13 a moment.

14 (Discussion off the record.)

15 MR. STRAUSS: Back on the record.

16 MR. STOIBER: The second matter not reflected in the
17 memorandum is the question of whether or not the Commission
18 should consider recommending legislation which would authorize
19 the use of deadly force by licensee personnel in protection of
20 special strategic nuclear material. I have in my hand, as one
21 ex-Senator used to say, a package of material discussing that
22 issue which the Commission has generated in the last year and
23 a half. It is not a question which is unfamiliar to the Commis-
24 sion.

25 However, Congressman Dingell has raised this issue

1 very forcefully in hearings in which the Commission was in the
2 hearing room. So therefore our office is in the process of
3 preparing an additional paper to add to this stack which will
4 discuss again and perhaps more narrowly in a more focused way
5 the question of deadly force and whether or not that is a
6 necessary kind of legislative authority to seek.

7 MR. SHAPER: The Commission may be interested in
8 knowing how it came up, it came up at the recent hearings.
9 Dingell pressed hard, as well as his counsel, about whether or
10 not we had given enough authority to license guards to, in
11 effect, use force. I pointed out that state laws were pretty
12 much controlling. Dingell was clearly not satisfied with that.
13 He indicated the great harm to public health and safety in the
14 event that any of this material was stolen or diverted. Then
15 his counsel kep after me and indicated, he paid some recogni-
16 tion to state legislation. He said that will take a long time.
17 I said yes. He said, "Have you considered asking for a federal
18 authorization, a federal statute?" I said candidly, "The matter
19 is not under active consideration."

20 He said, "Will it be?" And said, "In view of the
21 last question, the answer is in the affirmative." Laughter.

22 And I think we can reasonable anticipate a followup by either
23 Dingell or his staff counsel on what our position is on that.

24 CHAIRMAN ROWDEN: Well, we ought to address it.

25 COMMISSIONER GILINSKY: If they are willing to

1 authorize use of deadly force by licensees, don't you think they
2 would be willing to entertain an exemption to the Freedom of
3 Information Act?

4 (Laughter.)

5 MR. SHAPER: I referred to it as a "license to kill"
6 and Dingell said, "I did not say a license to kill."

7 MR. STOIBER: The Commission essentially decided
8 the issue in the negative in conjunction with the security
9 agency study, where this was examined in detail. But there is
10 not reason why we can't look at it again.

11 My early professional background was in prosecuting
12 these kinds of cases, these deadly force cases, and I can't
13 see that Congress would look with greater enthusiasm on that.

14 CHAIRMAN ROWDEN: Well, we ought to look at the
15 question. I don't recall we addressed it that directly in
16 connection with the security agency study.

17 COMMISSIONER KENNEDY: Couldn't there conceivably
18 be constitutional questions raised?

19 MR. STRAUSS: Sure.

20 MR. SHAPER: In view of the controversiality sur-
21 rounding this one, I can hardly think of anything that would be
22 more controversial than putting for legislation like that.

23 COMMISSIONER KENNEDY: What purpose is served by
24 this agency putting that kind of legislation forward?

25 MR. SHAPER: We have no problem with Congressman

1 Dingell introducing it himself. But you need a position, at
2 least to tell Dingell you have considered it.

3 CHAIRMAN ROWDEN: Our understanding is this is in
4 the context of the instructions which ERDA has given; it is not
5 just federal guards but contract guards. Although that is a
6 proprietary operation, they are still private citizens, who act
7 as guards at many of these facilities and they have been
8 instructed by ERDA to use deadly force in juxtaposition to
9 ourself.

10 COMMISSIONER GILINSKY: We instructed the guards
11 at licensing facilities to use deadly force?

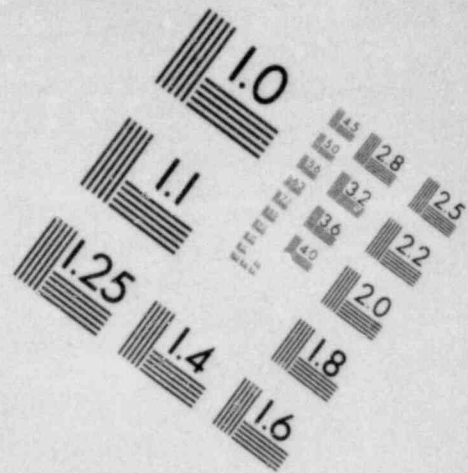
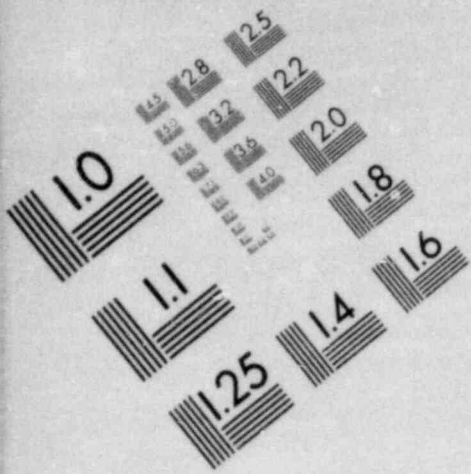
12 CHAIRMAN ROWDEN: Within the constraints of state
13 law. We put limitations on it, unless there is a threat to,
14 well, what is the basic criterion?

15 MR. STOIBER: It varies from state to state.

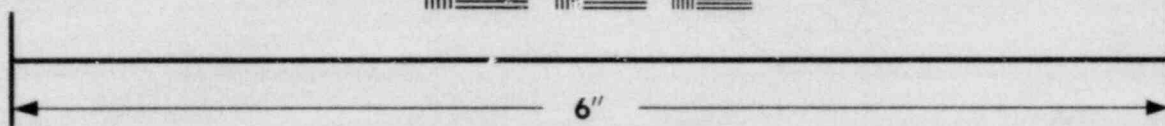
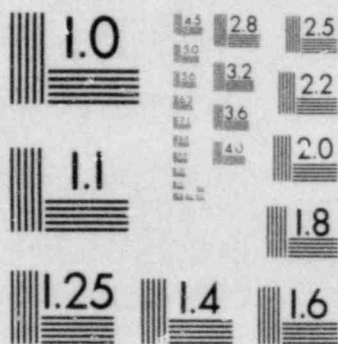
16 COMMISSIONER GILINSKY: We don't want to violate
17 the law. But where it doesn't, we want them to forcibly protect
18 the material, right?

19 CHAIRMAN ROWDEN: That force which is necessary to
20 protect the material within the constraints of state law. If
21 there is no threat to life, you think that is it, isn't it?

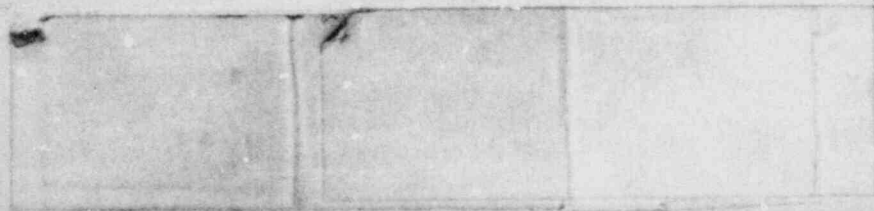
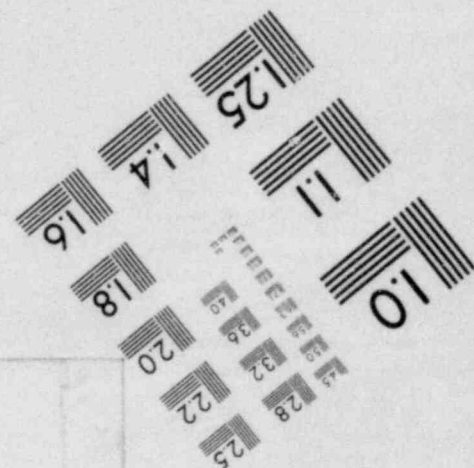
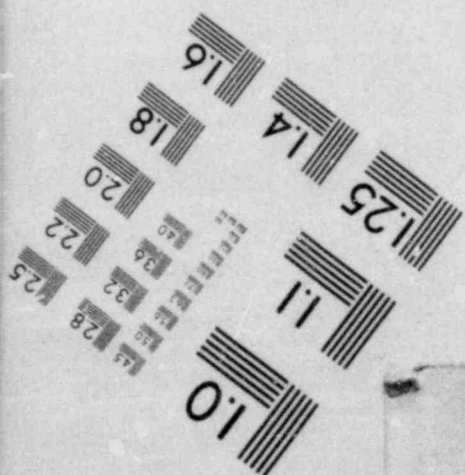
22 MR. STOIBER: It is in defense of one's self or of
23 others. The question is whether or not that common law defense
24 would be broadened out by the courts to include the material
25 of such deadly possibilities that it could be used to injure others.

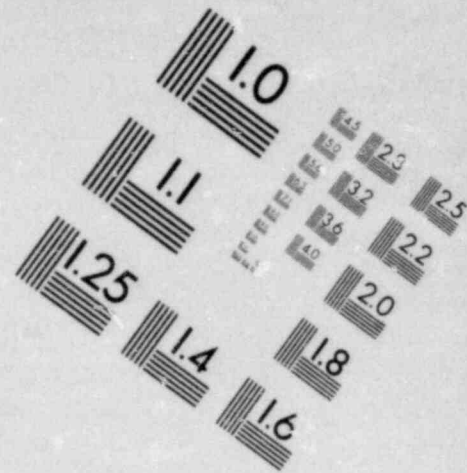
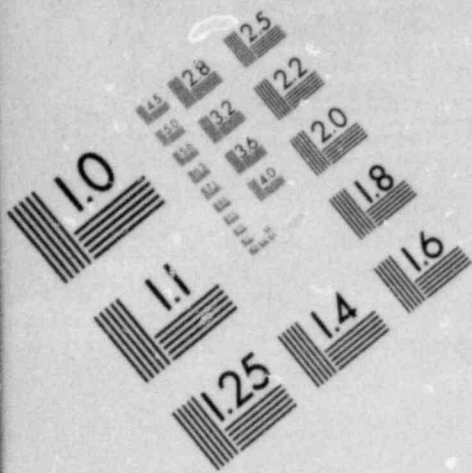


**IMAGE EVALUATION
TEST TARGET (MT-3)**

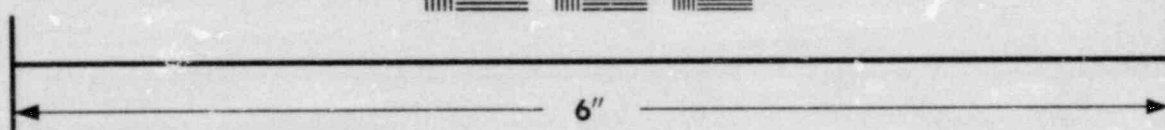
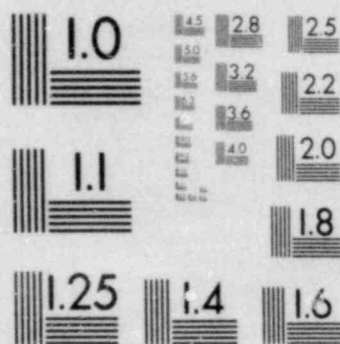


MICROCOPY RESOLUTION TEST CHART

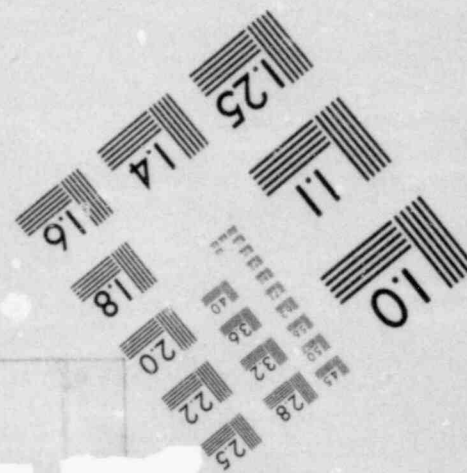
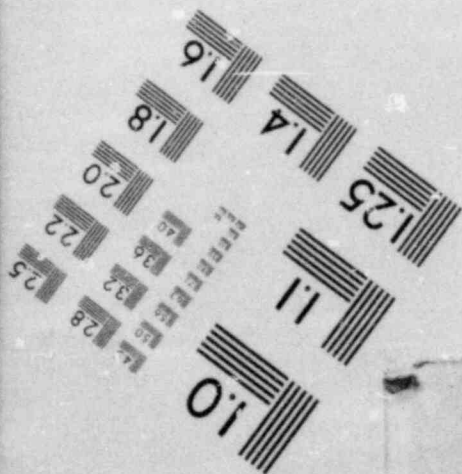




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



1 MR. SHAPER: You don't have to give up the property.
2 Can you attempt to defend the property, then if they show a
3 threat of force, you are entitled to defend yourself. But it
4 varies from state to state and it is not clear.

5 MR. STRAUSS: And there is a recent decision in the
6 Eighth Circuit throwing constitutional, describe it as light
7 or mud, on the problem.

8 CHAIRMAN ROWDEN: If they have the material in a
9 vehicle speeding away from a facility, it is difficult to
10 put that in the framework of utilizing deadly force to protect
11 your life or the life of someone else on the facility.

12 CHAIRMAN GILINSKY: Suppose no state law stands
13 in the way, what are our instructions to the licensee's guards?

14 CHAIRMAN ROWDEN: There is an instruction you can
15 read from in that regard. We approved it recently.

16 MR. STOIBER: It says, "Upon detection of abnormal
17 presence or activity," et cetera, "The licensee's security
18 organization shall," then it goes through what it does in terms
19 if a threat exists, "Assess the extent of the threat."

20 "Four, your guards are to interpose themselves between
21 the special nuclear material and any person attempting entry
22 for purposes of industrial sabotage or theft, and to intercept
23 any person exiting with special nuclear material.

24 "And five, instruct guards to prevent or delay the
25 theft or industrial sabotage by using a sufficient degree of

1 force to counter that degree of force directed at them, includ-
2 ing the use of deadly force when there is reasonable belief
3 that it is necessary in self-defense or in the defense of
4 others."

5 COMMISSIONER GILINSKY: Let's take this case of
6 someone fleeing with a sample of plutonium. What is the
7 guard expected to do?

8 MR. STOIBER: Well, you --

9 COMMISSIONER KENNEDY: Wrestle him to the ground.

10 COMMISSIONER GILINSKY: Suppose he runs faster than
11 the guard?

12 CHAIRMAN ROWDEN: I think "give chase." If I were
13 a guard, I would feel on insecure ground firing after him.

14 MR. SHAPER: If he shot and killed him under those
15 circumstances, I think he could run afoul of the criminal laws
16 of the state.

17 MR. STOIBER: I think it is highly unlikely.

18 MR. SHAPER: That is exactly the case Peter referred
19 to.

20 CHAIRMAN ROWDEN: There are two problems: Would it
21 be prosecuted, and would he believe that he would be prosecuted?
22 And the willingness on his part to take appropriate action is
23 going to be colored but that latter factor more than the for-
24 mer one.

25 MR. SHAPER: The case Peter mentioned was those

1 circumstances, shooting of a fleeing felon.

2 MR. STRAUSS: No, someone believed to have been a
3 fleeing felon.

4 MR. SHAPER: But he committed burglary in front of
5 the officer?

6 COMMISSION GILINSKY: So we don't expect a guard to
7 shoot someone running away with special nuclear material?

8 CHAIRMAN ROWDEN: I don't read those instructions as
9 a layman as covering that situation. Do you disagree with that?

10 MR. STOIBER: No.

11 MR. TERRELL: Shouldn't you ask yourself two ques-
12 tions. First, quite apart from the law, what would you like to
13 see done?

14 CHAIRMAN ROWDEN: That is right.

15 MR. TERRELL: Then if the law doesn't permit that,
16 how can you go about getting some authority to have these people
17 do it? Maybe you don't want a guy shot in the back who is
18 running away with 50 pounds of plutonium.

19 CHAIRMAN ROWDEN: Or a package.

20 MR. STRAUSS: It is a package they are running away
21 with.

22 COMMISSIONER KENNEDY: It might be their lunch.

23 MR. TERRELL: If you don't want them shot in the
24 back, the problem is solved. If you would like the guards to
25 have authority to do that, if they believe it, --

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1 MR. SHAPER: I think they would like to do it, but
2 they wouldn't like to do it themselves, but the guard would --
3 I think probably would like to permit the theft.

4 MR. STRAUSS: Part of the problem is knowing a threat
5 has occurred and making instructions that are simple enough --

6 COMMISSION GILINSKY: Do ERDA guards have instruc-
7 tions to fire?

8 CHAIRMAN ROWDEN: Yes; that is my understanding.

9 MR. SHAPER: They do. They have a special statute
10 we don't have.

11 CHAIRMAN ROWDEN: The statute simply authorizes ERDA
12 to arm federal and contract personnel. It doesn't authorize
13 them to shoot to kill.

14 MR. SHAPER: That is correct. But are they relying
15 on that statute for their authority? ERDA counsel told me
16 although that is the way the ERDA instructions read, they
17 don't believe there is good legal support for it though. That
18 is in confidence, though.

19 MR. STRAUSS: If I may add a couple of further
20 observations about this first. It isn't only Congressman
21 Dingell. GAO in a recent report has recommended the same thing.
22 So the Commission will have to take a position on it.

23 CHAIRMAN ROWDEN: We simply have to be prepared to
24 address that.

25 MR. STRAUSS: And the adoption of 73.55 and a number

1 of other things makes this a perfectly logical forum in which to
2 do so.

3 Wait until you see the training memo which is on its
4 way up. Those fellows are going to be such --

5 MR. SHAPER: They may not be able to shoot, but if
6 they shoot, they will be well-qualified to hit.

7 MR. STRAUSS: I think that is a fair description.

8 CHAIRMAN ROWDEN: When can we expect that?

9 Don't throw all of that material at us. I think we
10 need a paper.

11 MR. STOIBER: A week or two.

12 MR. SHAPER: That is a hard paper to write.

13 CHAIRMAN ROWDEN: Okay.

14 MR. STRAUSS: There was one other matter in this
15 connection that we said we would discuss with you informally
16 this afternoon and that is the testimony a week from Monday,
17 the Chairman's testimony a week from Monday on six bills and
18 the general subject of licensing reform. The six bills concern,
19 to start from the top, a proposal for moratorium pending GAO,
20 A study of nuclear plant listing, the Price nuclear licensing
21 reform bill of last year which has been reintroduced as H.R. 18.

22 Congressman Udall's two measures, alternative measures,
23 recognizing siting authority in the states coordinate with the
24 NRC. And two measures addressed to state approvals of location
25 of waste repositories by ERDA. And I thought I might raise a

1 couple of issues with you generally that the Chairman and I
2 have discussed at some length, and we hope to have a draft to
3 you by next Tuesday which would be a composite of papers that
4 have already been prepared.

5 CHAIRMAN ROWDEN: By the way, everybody is invited.
6 Vic, my letter said come on up, and bring anybody
7 you want with you. So the invitation is extended.

8 MR. STRAUSS: On the question of moratorium, the
9 Commission has said in a number of contexts, and I think the
10 Administration as well has taken the same position, that the
11 question of choice among energy choices is one to be reached
12 as a matter of balance among all. What I would anticipate the
13 Chairman might say is that obviously this is an issue which it
14 is appropriate for the Congress to decide.

15 The Commission has no information which would lead
16 it to believe as a regulatory matter that such a moratorium
17 was required. And that in its view how one and with what
18 technologies one answers the nation's energy demands is a com-
19 plex question which requires assessment of all, not simply one,
20 energy source from the perspective of what their various costs
21 and benefits are going to be.

22 The licensing bill we have supported in the past and
23 I would expect you would wish to support it again. There is
24 a question which has arisen since then -- you will recall one
25 section of that bill, Section 102, called for a study which

1 has in fact already been performed and is essentially complete.
2 We will be hearing from Bob Ryan about that next week. I don't
3 know of the outgrowth of that study and some other thinking that
4 has gone on is the situation in addition to early site review
5 and standardization of nuclear designs, that coordinating measures
6 be found to reduce the duplication of environmental reviews,
7 need for power reviews, and indeed, even within the Federal
8 Government, various federal agency reviews.

9 The Chairman means to state as a personal view that
10 this kind of measure would be appropriate as an additional measure
11 to those already provided for in H.R. 18, that is to say, on the
12 one hand a measure providing for some coordinating authority
13 within the the Federal Government over federal agency review,
14 on the other, some form of technique for allocating between the
15 Federal Government and the state government a single respons-
16 ibility for need for power and environmental site reviews.

17 And one question, I guess, it would be appropriate
18 to talk about today is whether that should be presented, whether
19 in doing the draft, I should present it as a Commission view
20 or whether the Chairman would prefer to present it as his own.

21 COMMISSIONER KENNEDY: I have no problem with the
22 second half. I am not sure what the first half implies.

23 The first half was the coordinating mechanism of
24 all such reviews. I don't know how that works, and who would
25 do it, I don't know what effect it would have on the

1 responsibilities of all of the agencies who are involved now.

2 CHAIRMAN ROWDEN: I think in fairness to the others
3 maybe the thought should be developed in the testimony. My own
4 view, and this pretty much, I think, reflects what we have seen
5 in the Section 102 study, the need for coordination at the
6 federal level is to have a mechanism which establishes --

7 COMMISSIONER KENNEDY: The point is how do you do
8 that?

9 CHAIRMAN ROWDEN: Say through the Department of
10 Energy or something, I think the 102 study recommended a coun-
11 cil of some sort that would do it.

12 MR. STRAUSS: We have seen a number of bills over:
13 the past few years --

14 MR. OSTRACH: It was a coordinating council under
15 a lead federal agency which would be the Department of Energy.

16 CHAIRMAN ROWDEN: Yes, which would set reasonable
17 time schedules after hearing the views of the agencies involved.
18 It is my own view that, quite apart from this being part of
19 your recommendations in the study, that it is a desirable
20 mechanism. There are difficulties, if that is not applied in
21 a sensible fashion. We have had difficulties with that sort
22 of proposal in the past. But I think it is desirable, if it is
23 sensibly structured, and I think we can come up with a sens-
24 ible recommendation in this regard.

25 And it is almost essential, if we support, at least

1 as I would propose to support and I think is supported in the
2 study, to have some mechanism to encourage or maybe even force-
3 feed the concept of one-stop siting at the state level, coordi-
4 nated siting there. It is difficult to tell the states to get
5 their house in order without our doing anything at the federal
6 level. And the NEPA/NRC thing at Seabrooke is an example of
7 the thing. But these are concepts now.

8 You ought to look at the language as it is developed.

9 COMMISSIONER KENNEDY: The broad concept of purpose
10 it seems to me is acceptable. It is when one starts thinking
11 about how you do this that it begins to get a little tougher
12 and a little less clear.

13 MR. STRAUSS: One of the things that came out of
14 H.R. 18, well, that came out of the Commission's bill when
15 H.R. 18 was created was a notion of open and advanced utility
16 planning. I think it will be an inevitable feature of the
17 sort of regimes that we are speaking about that that will go
18 back in and I expect you will find some language about that also
19 in the draft.

20 Bob Ryan has very helpfully put together a few pages
21 on the state siting study, which certainly should be addressed
22 in this testimony.

23 CHAIRMAN ROWDEN: I think that is an essential aspect
24 of the testimony.

25 MR. STRAUSS: Foward has given us a useful start on

1 the testimony.

2 On the two bills, the two Udall bills specifically,
3 dealing with the state role in siting, you may recall one of
4 those bills provides for state approvals before NRC approvals,
5 and I think we will be able to talk our way around that in the
6 mode I have already suggested, and we will be at least half
7 approving, if not more, of that concept.

8 The other bill provides for a 90-day period --

9 CHAIRMAN ROWDEN: Wait now. Approval in the sense
10 of what?

11 Nonradiological considerations?

12 MR. STRAUSS: That is right. The other bill provides
13 for a 90-day veto after NRC has reached its conclusion. There
14 one is looking strictly at a political device rather than what
15 one might describe as a rational application of regulatory
16 responsibility. I would think the Commission would wish to
17 oppose that. There is the further element in both of these
18 statutes that they appear to look towards conferring on the
19 states some responsibility for health and safety. The states
20 could adopt more rigorous standards than the Nuclear Regulatory
21 Commission so long as the Commission through some mechanism,
22 there is a not very good one spelled out in the statute, deter-
23 mine this was not inconsistent with the federal scheme.

24 There are precedents for such statutes, the Hazardous
25 Materials Transportation Act, the Clean Air Act, the Water

1 Pollution Control Act. And we are looking to see whether those
2 precedents really have any bearing here. My disposition is to
3 think they will get in the way of standardization and should be
4 opposed on that basis.

5 I have heard Ben Huberman talk often enough about
6 the detuning of design that goes on when you impose differing
7 criteria on reactors to think that may be an effect. But Bob
8 and Ed Case are looking into that and again we will have some-
9 thing ready by Tuesday on that.

10 MR. SHAPER: Plus the fact that in answer to the
11 letter Bob Moran sent out, the governors are not anxious to get
12 into radiological health and safety.

13 MR. RYAN: Yes. We should mention that also.

14 MR. STRAUSS: The final set of bills concern loca-
15 tion of the ERDA waste repository. I am not quite sure why we
16 were asked to comment on those two bills. I can see some
17 interest if we were not wishing to be 75 percent of the way
18 along toward licensing a repository and then have a state tell
19 us that no, this place is unsuitable and we don't accept it.
20 It would certainly be appropriate to have some words to say
21 about the need for hard work and early decision and indeed you
22 have just had a memorandum from Howard indicating to you that
23 this is almost a necessary element in the staff view that
24 licensing of reactors may continue.

25 It may be that one comes to the point here of saying

1 state law autonomy is fine, but if there are only a few places
2 in the country that could be safe sites for waste storage, the
3 nation, as a matter of national policies, can't afford to let
4 each state where those places are say no. I don't know that
that is a position that the Commission ought to be stating
6 rather than saying the Department of Energy or ERDA.

7 I am going to try and find out more than I presently
8 know from other folks but how they feel about that issue.

9 MR. SHAPER: It is so controversial, it might be
10 well to defer to ERDA on that.

11 MR. RYAN: I think they do plan to invite ERDA
12 to testify. They are billing the entire session as a licensing
13 proceeding. I have learned, by the way, Mr. Chairman, that
14 they are preparing Chairman Udall's introductory remarks now
15 and he will state the purpose of the hearing as three-fold.
16 One, to clarify the role of the states; two, to identify ways
17 to reduce licensing lead times; and three, to identify methods
18 to enhance public participation in the process.

19 MR. STRAUSS: Well, I guess we hadn't really planned
20 to talk about funding of intervenors again, but if you would
21 like to --

22 CHAIRMAN ROWDEN: No, it is our position that we
23 have taken consistent with Chairman Udall, if our position is
24 not well-known at this time, documented as well as articulated,
25 I don't think there is anything more to say on this subject.

1 He has accepted that in the past, he knows what our views are
2 and he has heard from others on the subject.

3 MR. RYAN: I don't think he is settling either on
4 funding only for intervenors or in talking about public partici-
5 pation.

6 CHAIRMAN ROWDEN: The things we are talking about
7 now, in terms of generic reviews, really have strong components
8 of more effective public participation.

9 MR. STRAUSS: Okay.

10 Any other suggestions?

11 COMMISSIONER GILINSKY: Yes. I think you ought to
12 check with some of the Committee to see how they feel about
13 exemption.

14 MR. STRAUSS: Exemption from the Freedom of Informa-
15 tion Act for security plans. We will start with that.

16 Well, we are prepared to move on to the next sub-
17 ject, which will require a general clearing of the room.

18 (Whereupon, the hearing was closed at 4:00 p.m.)

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end

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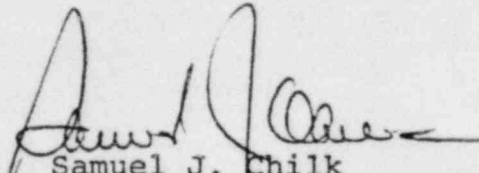
UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

August 14, 1980

COMMISSION DETERMINATION REGARDING PUBLIC DISCLOSURE
UNDER THE GOVERNMENT IN THE SUNSHINE ACT OF:

Transcript of Discussion of Proposed
Commission Legislative Program, June 3, 1977

Pursuant to the Commission's regulations implementing the Government in the Sunshine Act (10 CFR 9.108(d)), it has been determined after a further review of this transcript that the entire text can be released to the public.


Samuel J. Chilk
Secretary of the Commission