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In the

Supreme Court of the United States

THE COMMITTEE FOR NUCLEAR RESPONSIBILITY, INC., et al.,

Petitioners,

v.

JAMES R. SCHLESINGER, et al.,

Respondents.

A-483

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Washington, D. C.,

Saturday, November 6, 1971.

The above-entitled matter came on for argument at 9:30 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

DAVID SIVE, ESQ., Washington, D. C., for the Petitioners.

ERWIN N. GRISWOLD, Solicitor General of the United States, for the Respondents.

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for the Petitioners 3

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for the Respondents 36

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for the Petitioners 59

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument now in A-483, Committee for Nuclear Responsibility against Schlesinger.

Mr. Sive, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID SIVE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SIVE: Mr. Chief Justice, and may it please the Court:

I am David Sive, on behalf of the applicants for the injunction.

The time assigned to me was, I believe, 30 minutes, but I would like to at this time ask that approximately eight minutes of that be held for rebuttal. And thus I will confine myself to 22 minutes.

This action arises primarily under the National Environmental Policy Act. Actually the action, the complaint sets forth four claims:

One under other statutes; one under the Fifth and Ninth Amendments to the Federal Constitution; and one under the Nuclear Test Ban Treaty.

However, because of the urgency and the simple squeeze of time that was with us throughout the action, to some of the details of which I will refer, we were only able really to dig into, to the extent we could, the principal

first claim arising under the National Environmental Policy Act, which I will hereafter refer to as NEPA.

Q Mr. Sive, if I might ask, have you filed a petition for cert?

MR. SIVE: Not as yet, Your Honor, no.

Q But you plan to?

MR. SIVE: We can file one tomorrow night, and we stated in the application we could file one on Monday, if need be we'll file it tomorrow morning; and work through the night.

Q Are you raising all the questions that you're about to address to us?

MR. SIVE: The questions which I think we're forced to limit ourselves to are those claims under NEPA. At least we will argue those essentially, and not make any --

Q You're not going to raise the Fifth and Ninth Amendment claims, then, are you?

MR. SIVE: I think there is just not time to properly brief that at this point, Your Honor.

The applicability of NEPA is unquestioned. And this is important, because I think at the heart of the problem, perhaps the unusual and the unprecedented problem before us is the question of the law governing the acts of the defendants, the Atomic Energy Commission, and whether that law does govern, on this day and on this very hour,

approximately ten hours before the act, to enjoin which was the purpose of the lawsuit.

And there is no doubt about the applicability of NEPA, from the very first, and it became law on January 1, 1970. As soon as it became law, the Commission acknowledged that, and, as is stated in the application, began preparing draft impact statements, issued a draft in June of '70, and the final impact statement on June 21st of 1971.

Q Mr. Sive.

MR. SIVE: Yes?

Q We're talking particularly about Section 102?

MR. SIVE: I am, yes. In 102(c) and the impact statement provision.

Q Right. And you say, as I understand quite correctly, that its applicability is a matter of common ground between you and your brothers on the other side in this case?

MR. SIVE: Absolutely, Your Honor. That's correct.

Q But is it conceded that the filing of a sufficient impact statement, under 102(c), is a condition precedent to the government proceeding with the planned operation?

MR. SIVE: I think, Your Honor --

Q Its applicability is conceded, but is that conceded, is that second point conceded?

MR. SIVE: I think it is, Your Honor.

Q As a condition precedent. That if, in other words, in this case, the government should concede that in one way or another the impact statement was deficient under the law, that it would further concede that your application for an injunction should be granted?

Do you understand that that is conceded?

MR. SIVE: Yes. Yes, I do, Your Honor, and I can only answer by saying I think it is conceded, because at no point to date, as far as I can recall, has that question ever been raised. And the whole argument and the whole course of proceeding before is to the sufficiency of the impact statement, but if it be not conceded, then I simply refer Your Honors respectfully to the cases on page 89 of our brief submitted to the Court of Appeals.

Q I understand the Court of Appeals stated some doubts as to the adequacy of the impact statement, but didn't reach the decision, it just went on to hold that it would be interfering with a Presidential function.

MR. SIVE: I think that is not quite correct, Your Honor.

As I understand the Court of Appeals opinion, and the vital language is on page 3, and the whole opinion is the last opinion attached to the petition, the court, the District Court and the Court of Appeals never questioned the impact of the language of 102, and no question was ever raised by

either court that if the impact statement were insufficient, the detonation was illegal.

Now, the Court of Appeals did address itself to the question of the Presidential power. And with respect to that, I respectfully refer Your Honors to the October 28th opinion. That opinion was issued the day after the argument on the second appeal. That argument was at 2:15 on October 27th. And at 12:15 the respondents, the Commission, held a press conference and issued a press release, and stated: We have now received the requisite Presidential authority.

And then argued before the Court of Appeals that the President having given that authority, the Court had no jurisdiction.

The Appeals Court held, consistently with the arguments we then made, that the validity of the detonation rested on two conditions: one, the obedience by the Commission to NEPA; two, the Presidential approval required an especial provision of the Appropriations Act, appropriating the basic budget for the Commission for this fiscal year.

That issue may be raised again by the Solicitor General. There is some indication in their Court of Appeals brief that they will again argue that the President having approved this, that sweeps NEPA aside.

We believe that is wrong, and the Court of Appeals --

Q And that Presidential approval followed an action

by the Congress on the authorization and appropriation committees, did it not?

MR. SIVE: That's correct, Your Honor.

Q And the condition was what? In the authorization and the appropriations that the President was to --

MR. SIVE: Personally approve.

That condition --

Q And that statute followed --

MR. SIVE:, NEPA.

And that statute, Your Honor, that appropriation bill and that particular requirement of personal Presidential approval, arose as a kind of compromise in a debate. There was a very strenuous debate about whether this detonation should go at all.

Q Well, whatever may be behind it, the fact is the appropriation bill and the authorization bill as to Cannikin, in terms of Congressional action, both followed the adoption of NEPA?

MR. SIVE: That's correct, Your Honor, yes.

Q Now, may I ask one thing, Mr. Sive: What actually is before us -- your application for some kind of injunctive relief, I take it, is only pending our action, the Court's action on your petition for certiorari, isn't it?

MR. SIVE: That is correct, Your Honor.

Q In other words, you can't, I gather -- I don't

suggest that you can't -- ask us for any kind of permanent injunction?

MR. SIVE: No, Your Honor.

Q At this juncture. All that you can get, I gather, is that we enjoin the detonation pending our action on your petition for cert?

MR. SIVE: Precisely correct.

Q Which could be next week. You're telling us that it will be filed --

MR. SIVE: We can, Your Honor. If need be, we'll file the petition for cert by noon tomorrow. My associates and I are prepared to work through the night, we've done that several times in the last two weeks.

Q Well, how much of a postponement, then, are you asking for?

MR. SIVE: If Your Honors can hear the petition for cert, I would suggest that whatever time to hear this, beginning Monday morning, is convenient to Your Honors. We'll be back with the petition. We'll be back with petition, if need be, by noon tomorrow.

Q Because, obviously, if we don't grant the petition for cert, then obviously you have not standing for an injunctive relief? And you can't have --

MR. SIVE: That's precisely correct, Your Honor.

Q -- it for longer than the time it takes us to

act on your petition.

MR. SIVE: That's correct, Your Honor.

I might point out that part of the problem, and the problem which I think results from the disregard of some of the provisions of law by the respondents is at the very heart of our case. And this is spelled out in the petition. Based upon what I call the conflicting reports, the reports of the government agencies specifically recommending against Cannikin, because of the environmental hazards, after the struggle which is recited in the application, came to us simultaneously with the denial of the preliminary injunction.

Q Well, may I ask, do you take any position that if we don't grant you a stay at least long enough for us to consider and decide whether we're going to grant your petition for cert, that the whole case would become moot; is that it?

MR. SIVE: Yes, Your Honor, that is correct.

There is a possibility of amending the complaint to allege a claim, perhaps, under the Freedom of Information Act, to exposure of some of the documents as to which the District Court and Appeals Court upheld the executive privilege.

It would be a different kind of action, and I would have to --

Q Well, I thought you told me earlier that you are limiting the questionspresented in your petition, --

MR. SIVE: That's correct.

Q -- just to NEPA?

MR. SIVE: That's exactly correct, Your Honor.

Q We're not concerned with the information.

MR. SIVE: I think not. And I think the answer is the case does become completely moot once the detonation goes. The whole action is to enjoin that detonation for illegality.

Q Well, isn't it the Congress that sets up the scheme of liability of the government for nuclear accidents or nuclear detonations?

MR. SIVE: Yes, the so-called Price-Anderson bill does provide --

Q Does that cover this kind of case?

MR. SIVE: I don't think so, Your Honor. I think that goes to the merits, perhaps, of the standing of the plaintiffs.

Q I just mention it, because, if it does, then if the prospect of government liability is in the offing, I don't see how we can say that this litigation would become moot.

MR. SIVE: The answer is, Your Honor, it does not. All that that does is limit the damages recoverable by an individual damaged as to his person.

This action is not for pecuniary injury or damage to property. It's the public interest, of which our plaintiffs, we believe, are the responsible representatives, not based on a

pecuniary damage.

Q I understand, but --

MR. SIVE: Forgive me.

Q Mr. Sive --

MR. SIVE: Yes?

Q I take it that when the appropriation bill was debated in the Senate, that the impact statement at issue here was before the Senate in that debate, and some Senators questioned its adequacy and there was a proposal to forbid the use of funds for this purpose?

MR. SIVE: That's correct, Your Honor.

Q And ultimately Senator Pastore proposed a compromise. True?

MR. SIVE: He proposed a compromise --

Q Which became Section 103 of the Appropriation bill?

MR. SIVE: Yes. However, I think, Your Honor, that the compromise he proposed was not addressed to the impact statement.

Q Well, I know, but it was addressed to whether or -- or to settle a debate about whether or not funds should be appropriated for this purpose?

MR. SIVE: Yes, for whether or not there should be a specific prohibition of this detonation.

Q And instead they put a condition upon the

expenditure of funds for this purpose, and left it with the President?

MR. SIVE: Left it with the President --

Q As to whether or not funds would be --

MR. SIVE: Yes.

Q -- would be appropriated -- would be spent for that purpose?

MR. SIVE: Right. I think that in the context of that whole debate, as is stated in the Circuit Court opinion, what was done was an extra condition, in addition to the condition that --

Q Well, let me finish. Here's what Senator Pastore said: This pinpoints the authority and responsibility that all departments concerned, whether it be the State Department, the Office of Science and Technology, let them bring their causes to the Oval Room in the White House, and then let the President of the United States, who is the first responsible citizen of the country, make the decision.

Do you think Congress anticipated that he would gather all the information and decide the adequacy of the various factors that went into such a decision?

MR. SIVE: I think not, Your Honor. And I think that part of the answer to that is in the original Circuit Court opinion of October 5, and part of the answer to that is in the history of this whole matter, with which I have some

personal acquaintance from the very start. That from the very first there was an effort to forbid this, and the compromise on that was imposing the extra condition of the President's approval.

Q But this debate in the Congress, and the final proposal of -- the final adoption of the Appropriations bill was after this lawsuit was instituted?

MR. SIVE: I don't think so. I don't at the moment know the precise day --

Q It was July 20th, 1971, I think, wasn't it?

Q Last July 20th was the debate on the floor.

MR. SIVE: The debate -- the suit began on July 9th.

Q Yes, and the bill was finally adopted when?

MR. SIVE: I --

Q In October, finally approved?

MR. SIVE: I don't know the precise date of the adoption of the bill. It was after July 9th.

Q Thank you.

Q While you are pausing here for a moment, counsel --

MR. SIVE: Yes.

Q -- would it be reasonable to assume that the Court of Appeals in its final disposition of this matter concluded that you had not met the burden of showing the probability of success in the ultimate litigation of the case?

MR. SIVE: I think not, Your Honor. I think the

only --

Q What does its holding in <u>Virginia Petroleum v. Joppers</u> mean when the panel, including some of the same judges, said that one of the requirements for the interlocutory injunctive relief was to show the probability of success?

MR. SIVE: That is correct, Your Honor. We recognize the --

Q When they denied interlocutory relief, must they not have concluded that you had not made a showing of probability of success, requisite to meet the <u>Virginia Petroleum</u> standard?

MR. SIVE: If Your Honor is speaking of the Court of Appeals decision of November 3rd; I think no.

Q Collectively, all of their holdings.

MR. SIVE: I think the same answer applies, Your Honor.

Q How could they have reached the result they reached?

MR. SIVE: They reached the result, the Court of Appeals, because they determined that there was insufficient time, even one or two days, to study the very documents which we have been trying for three months to secure, which were finally delivered to the court for an in camera inspection last Saturday, and finally came to us on November 2, and were delivered to the Court of Appeals simultaneously with the

notices of appeal.

And the Court of Appeals, I submit, erroneously stated that the necessity is so pressing, and this is so desperate a situation that we just do not have the time to take even the 48 hours to look at the documents, which I think now Your Honors have.

I think you have all of the documents. The Train memoranda, the Ruckelshaus recommendation against the shot; many of which I have not seen. And those documents, I think, show the strength of our case, I think strong enough, if we have the time, to move for summary judgment in the case.

And I think that the Court of Appeals decision is not a holding. I think it specifically says that it is not a holding that our claim does not have merit. It says, I think, the opposite. It says that our claims do have substantial merit --

Q Well, the standard is not whether it has merit, under the holding of that court about ten years ago, but whether you have met the burden showing that you probably will be successful. That's one of the basic standards, which is of course ancient inequity, isn't it?

MR. SIVE: That is correct, Your Honor. But I think we have met that burden. Had the Circuit Court of Appeals taken the 48 hours to look at the documents delivered to them, and we could have met that burden much more easily by being

given 24 hours between the time we finally got the documents and the District Court ruled on the preliminary injunction motion.

And what is important, and I think goes to the heart of this matter, is that we began the action as soon as impossible after the impact statement. We began the discovery to secure those documents, with the recommendations which the October 5 opinion said: if they exist, we must prevail. We began that the very first day permitted by Rule 26. The summary judgment motion was granted. We came back immediately after the October 5th opinion.

For three weeks there was an unprecedented series of efforts by us to secure those documents, an unprecedented series of objections by the government; finally the Executive Privilege objection, the constitutional objection, the determination of that on October 28. And finally the documents came to us the morning of November 1st.

Q Mr. Sive, when did the Commission schedule November 6th as the date for detonation?

MR. SIVE: I think, Your Honor, it was approximately five days ago. My recollection --

Q Well, had it ever scheduled any earlier date, or any other date?

MR. SIVE: Thee was talk, and I didn't have direct knowledge --

Q No, I mean was there actually a scheduling of a date other than -- or is this the only date that's ever been scheduled?

MR. SIVE: I think the only specific date.

At that press release and that press conference at noon on October 27th, they stated they'd begun the stemming. And they said, I think, "a week from today we'll be ready to detonate". Meaning, as I understand it, ready if then conditions permit.

I think that there is time to delay the detonation for us to present the petition for cert and for Your Honors to rule upon it.

I see that I just have one minute left of the time which I will take initially, and I will use that to simply state what I think is really the --

MR. CHIEF JUSTICE BURGER: Counsel, if I may interrupt you --

MR. SIVE: Yes.

MR. CHIEF JUSTICE BURGER: -- we'll extend your time at the moment five more minutes, and play it by ear, as it were, as we go along; and the same extension for counsel.

MR. SIVE: Well, thank you. Then I will take more time.

But to come to the heart of the matter here, which I think Your Honors correctly raise: What proof did we put in

to show the merits of the case, and how do we judge this, applying the ordinary rules under Rule 65, and then what is extraordinary about the case?

I believe that if Your Honors look at the documents, you will see the recommendations specifically against Cannikin by governmental agencies, recommendations to which there was no reference in the impact statement. You will see references to a number of opposing scientific views, held by scientists within governmental agencies.

Q Is there anything unusual about that, the processes of government, whether they are going to build a new type of battleship or submarine or airplane? Are there position papers of various experts within and from outside the gover-ment that are in conflict?

MR. SIVE: That is not unusual, Your Honor. Under the statute which we are proceeding, the applicability of which is knowledge, and under the Court of Appeals holding of October 5, which I say is the substantive law from which we have started. The Court of Appeals stated that the impact statement is defective, and therefore the detonation illegal, if there are responsible opposing scientific views opposing some of the substantial views set forth in the impact statement, to which no meaningful reference is made in the impact statement.

And there's a second ground: If there are reports

specifically recommending against Cannikin because of its environmental hazards.

From that point on, October 5th, is when we started this process of discovery, to secure the secret documents in which there are the responsible opposing views about the very basic hazards of Cannikin. The basic hazards of Tsunami of earthquakes. Those are set forth in the Train memorandum, Mr. Russell Train, the Chairman of the Council on Environmental Quality. The recommendation, I believe, against Cannikin is set forth in the Ruckelshaus document, which Your Honors have, which I have not seen.

The opposing scientific views go right through the several papers to which reference is made in the affidavit which we submitted by my associate, James Burke, after the one-hour's look that we had at the papers when they were delivered to us simultaneously with the ruling on the preliminary injunction.

Now, that is the substantive law in the October 5 opinion. And the question, then, is: Should that law be brushed aside? Should there be something different? Should there be some permission granted to the Commission to waive that law aside?

On the ground that there is some pressing necessity which requires that.

Q I just want to be sure I understand your

position, Mr. Sive. You referred to the merits of the case. Now, the merits of the case, basically, aside from your Fifth Amendment argument, the merits of the case go to the sufficiency, the legal sufficiency of the impact statement, under Section 102(c); is that right?

MR. SIVE: That's correct, Your Honor.

Q They go not at all, you're not asking this Court, nor did you ask the District Court nor the Court of Appeals, to itself weigh the impact of this proposed detonation upon the environment, did you?

MR. SIVE: No, Your Honor.

Q That's no business of the Court, is it?

MR. SIVE: No. And the Appeals Court said that it would not be the ultimate judge of the correctness of the views on one side or the other.

Q And that is the law, at least in the Court of Appeals for the District of Columbia?

MR. SIVE: Yes. That would be subject, perhaps, to a ruling by the administrative agency which might be impeached for being wholly capricious. We don't have that issue here.

Q Right. So the merits of the case go to the legal sufficiency of the impact statement under Section 102(c) of the Act?

MR. SIVE: That is correct. And as authority for

enjoining a works, which is described in an impact statement, or where there is no impact statement rendered, or the impact statement is insufficient.

To enjoin that, the cases, some of them are set forth on pages 8 and 9, we know them, the Arkansas Dam case, the Alaskan pipeline case, and the others.

Now --

Q Now we have before us, now, so far as this case has gone, an opinion earlier this month by the United States Court of Appeals, not deciding, not deciding whether or not the impact statement was sufficient, saying that they didn't have time to decide that, expressing doubts as to its sufficiency, and not expressing any view as to the probability of ultimate success; but saying that under those circumstances it would then weigh the equities and, balancing the equities on both sides, it declined your application.

That's what we have.

So we have the basic merits of the case, wholly unresolved by the Court of Appeals. Is that correct? They were resolved in the District Court against you.

MR. SIVE: Unresolved, Your Honor, I would --

Q It was the finding of the District Court that the impact statement was wholly sufficient under the law. And that was disavowed by the Court of Appeals.

MR. SIVE: Yes. The Court of Appeals stated our

failure to enjoin the test is not predicated on the conviction that the AEC has complied.

Q Right.

MR. SIVE: And then it referred to the serious question. But it did not give itself the time to look at the documents to --

Q Well, it didn't decide the merits of the case.

MR. SIVE: That's correct, Your Honor. And it didn't decide the merits because of what I think is the basic error of the Court of Appeals. It assumed that there is some necessity which requires that the NEPA law be waved aside in these circumstances. And not giving itself the two or three days necessary repeals that NEPA provision, because it was the Commission who chose to file the impact statement only four months before the scheduled area of the time of the test. It was the Commission which moved to dismiss the complaint; the District Court which erroneously did so; the Commission which then frustrated the whole lawsuit from October 5th through November 2nd; and finally we, when we finally begin to secure the meaningful discovery of the very documents which, under the Court of Appeals October 5 opinion, we think are our case.

Under that substantive law, then the Court of Appeals says, we submit erroneously: we throw up our hands, this is too urgent, this comes at too late a stage.

And so the final question is: Is there such necessity, such emergency that this detonation must go ahead, that the major substantive law applicable to it, acknowledged applicable to it, must be brushed aside?

And we submit that there is not that necessity. The one item which the Commission refers to is in that press release, when they said, in so many words: The necessity of the shot overrides the environmental consideration.

But we have no situation of martial law, of war, of emergency, of invasion; no situation whatsoever which should repeal, for practical purposes, the substantive law.

And the failure of the District and the Circuit Courts to give themselves the time to look at the documents which, we submit, spell out our case, we think was a disregard of the substantive law, and in the circumstances to which the Circuit Court itself referred, mildly,perhaps, criticizing what I do not do the Commission and its attorneys were concentrating on frustrating the discovery to get to the point where the detonation would be there when we finally get the documents.

In those circumstances, the Circuit Court said we cannot act. And in those circumstances is when we determined, my clients and myself, that we would come to this Court to place before you the ultimate issue of whether the Commission, which has the power to make the machines which can virtually

destroy the earth, has the same obligation to obey the substantive law NEPA applicable to it --

Q Well, let's concede that it has an obligation to obey that law, doesn't it?

MR. SIVE: That's correct.

Q You began your argument by saying that. So let's not indulge in this rhetoric, if it's beyond the issues in this case. That's not in issue. The Commission concedes that it has an obligation to obey --

MR. SIVE: I think that is correct.

Q I thought you were getting into your main argument.

MR. SIVE: What the Commission does not concede, I think, and what the Court of Appeals perhaps did not hold, and what I ask this Court to hold, is that where the circumstances of the bringing of the only action possible to test the substantive law were such that the plaintiffs did everything humanly possible to bring that, and then, at the last moment, they secure the evidence in the documents; simultaneously therewith the District Court denies the preliminary injunction motion.

Then we say if there is no concession that there must be that time to look at those documents, then they do not concede the practical applicability of the substantive law; and, for all practical purposes, the substantive law is

repealed.

Q Has there been any question raised in this case as to the standing of your clients?

MR. SIVE: No, Your Honor, there has not. I --

Q The point was never raised?

MR. SIVE: None at all. I know that there is before this Court the Mineral King case, and that involves some of the same organizations involved here; but the government has never raised the question of the standing.

Q You have emphasized several times, counsel, that perhaps the Court of Appeals and the District Court did not look at the non-record documents, because they didn't have the time. Now, you indicated we have them. Are you aware that the totality of those documents could be read by anyone within, at the outside, three hours? At the very outside?

MR. SIVE: I don't know the precise extent of them, Your Honor, because some of them I have not seen. I know that the Court of Appeals stated that it doesn't have time to look at the documents which were thrust albeit just one day before its determination.

I only know the number of pages in the documents which were shown to me. Your Honors have greater knowledge of the precise extent of the documents.

But those documents, we submit, have the specific recommendations of governmental agencies against Cannikin.

Those documents show the Coast -- the U. S. Geological Survey, stating that the tritium may escape to the sea within one to two years instead of three years or more; stating that the concentration may be 100,000 times the allowable limit instead of the 1200 times in the impact statement.

The existence of the Geological Survey study, which is discussed at length in the Train memo, doesn't appear at all in the impact statement.

Q Now, then, the Commission, of course, had to take all of these things and weigh them in this decision. I understood you to concede that that was the case?

MR. SIVE: Yes. The Commission took these documents, and it had to weigh them, and under the Court of Appeals holding the Commission had the duty to place in the impact statement some reasonable reference to, some meaningful reference to the opposing scientific views and references to are set forth in total, the reports of government agencies against the detonation.

And those reports --

Q You mean they can't simply say: we've had the great deal of material, and we've considered all of it, and it doesn't affect our determination.

MR. SIVE: Precisely.

Q What they had to do was to take each -- what

was the word you used: responsible?

MR. SIVE: Responsible opposing views make a meaningful --

Q They had to say there was the opposing view of this agency, a responsible one, and they said such-and-such; nevertheless we don't accept that for the following reasons; that sort of thing?

MR. SIVE: That is the holding of the Circuit Court. And, Your Honors, I will point out, too, that we're not here dealing with something which is just a matter of another airport or another dam or another bridge; we're dealing with responsible opposing views as to the perils of a 5-megaton bomb. We're not simply dealing with a technical aspect of the law.

Q It's that deficiency, if I get it correctly, Mr. Sive, that you say makes out a violation of 102(c)?

MR. SIVE: That deficiency and the second deficiency --

Q Or non-compliance, in other words?

MR. SIVE: That's correct.

The second is the deletion of the recommendations specifically against Cannikin by the principal environmental protection agencies, EQC and EPA.

Q You mean the Commission deleted something?

MR. SIVE: The impact statement --

Q Yes.

MR. SIVE: -- has no reference to --

Q Well, that's an omission not a deletion.

MR. SIVE: Perhaps it is an omission, yes.

The principal environmental protection agencies recommended against this. And what happened was that the recommendations against the detonation went to an Under Secretary's committee --

Q Yes, but just let me get back to this. If I've understood your position correctly, it is that the Commission, under 102(c), has a duty to address itself specifically to certain responsible opposition, as you put it. What form does the address take? They say,"We've had this opposition, and it nevertheless does not lead to a different conclusion for the following reasons." Or how is that to be done?

MR. SIVE: Essentially it would be that. "We have studied the opposing views, we acknowledge that there are those opposing views" --

Q But they have to name them, is that what you're getting at?

MR. SIVE: Yes, they must make a meaningful reference to them.

And the reason for that is that the impact statement is what goes to all of the other government agencies and goes to the public, and under the Arkansas Dam case, is the public document the disclosure of the environmental hazard, and the

other agencies and the public in this case included the State of Alaska, and the Governor of Alaska, and all of those agencies concerned with the peril.

And what the Commission failed to do here was to disclose the most vital aspects of the study of Cannikin, and render the statement substantially misleading. And it did that on the basis of claims of privilege later made in this suit, that the "against" part of the study of the agencies could go to an Under Secretary's committee and be --

Q Is that the Irwin committee?

MR. SIVE: That's correct, Your Honor.

Q As I take it, if you're right about this, then the facts, that when they considered the impact statement, if they did, in the Senate at the time of the appropriation bill, they did not have what was the form of statement that the statute requires. Is that right?

MR. SIVE: I didn't catch the last part of Your Honor's question.

Q Do I understand that the impact statement was before the Senate when it considered the appropriation bill this last month or so?

MR. SIVE: The impact statement had been issued on June 21st.

Q Well, was it debated in connection with the appropriation bill?

MR. SIVE: There are references to the impact statement.

Q Right. And I gather your position is that that gets us nowhere, because the impact statement that was before the Senate, was before us, and was before the Courts below, was not in compliance with Section 102(c).

MR. SIVE: Yes. And the impact statement, if it was used or referred to by the Senate, misled them as much as it misled the public.

Moreover, --

Q They didn't approve the blast -- I mean they didn't approve the detonation.

MR. SIVE: That's right.

Q They said, "Let's settle this big argument about whether or not it should or shouldn't over in the White House"?

MR. SIVE: I think not, Your Honor. I think what they said was, "Let's impose an extra condition on this".

Q Yes. Well, they said the President was to have the decision as to whether or not the blast was to take place.

MR. SIVE: They said that, I believe, as an extra condition. They did not repeal NEPA's applicability to this, as they could well have done, as NEPA could provide that all detonations or all Atomic Energy Commission major works will be exempt from NEPA. They did not do that.

And it's interesting, too, that during that debate, and this shows the way the documents matter was managed, nobody ever knew the classified information as to what this shot was for, the Spartan warhead, until the Commission ran into some political difficulties, and then, during the midst of that debate, it released the information that this was for the Spartan warhead.

Q That was in a letter to Senator Pastore.

MR. SIVE: That's right.

Q Right.

MR. SIVE: Correct.

Q Now, Section 102(c)(3) provides that the impact statement contain a -- include a possible alternative to the proposed action.

MR. SIVE: Yes; right, right.

Q Is it your contention that Part 4 of the impact statement, page 46, listing the alternatives, is legally insufficient under the statute?

MR. SIVE: Yes, it is, Your Honor.

Q Why, and how?

MR. SIVE: The basic thrust of the impact statement is that we must proceed with this shot, and the necessity of proceeding with it outweighs any environmental hazards.

But we submit that it is not fulfilling the obligation to simply way what they did: that this is a military

necessity.

Q Well, you've read -- I'm sure you've read page 46?

MR. SIVE: Yes, I have. I'll get out my copy.

Q Of the impact statement.

MR. SIVE: Of the impact statement.

Q It's all in Part 4, and it appears on one page. And that, I suppose, is in response to Section 102(c)(3)?

MR. SIVE: Yes.

If Your Honor is referring to the one, this alternative"not testing the device would severely hamper the development of nuclear weapons technology."

That, we submit, is insufficient.

Q Well, what --

MR. SIVE: However, that is not the issue which we were able to litigate.

Q No. But then 2 is testing the device at another location.

MR. SIVE: That's right.

Q 3 is testing a smaller-yield device. And 4 is delaying the Cannikin test for more study of environmental matters.

MR. SIVE: That's right.

Q Those are the four alternatives listed. And you say that's insufficient under 102(c)(3)?

MR. SIVE: The -- yes, we say that is insufficient, but that is a separate ground of illegality from what I've been discussing thus far.

Q Well, the illegality is the insufficiency of the impact statement under 102(c). That's your claim?

MR. SIVE: That is correct.

And one of the aspects --

Q What I'm trying to get at is: what specifically is the claim to illegality?

MR. SIVE: The setting forth of --

Q Like you, I stayed up fairly late last night, and I read the impact statement. But I don't have it word for word in mind, and that's the reason I'm interested in your answer.

MR. SIVE: I think the answer, Your Honor, is clear. If you have a copy of 102(c) --

Q Yes.

MR. SIVE: -- it provides that the detailed statement by the responsible official -- and the detailed statement is the impact statement -- shall set forth five items, the third of which, one of which is the alternatives to the proposed action.

Q Alternatives to the proposed action. Right.

MR. SIVE: That page 46 sets forth the alternatives, and may or may not be sufficient as that third item. The items

which I've been discussing thus far are under the other items, because this impact statement does not set forth with particularity required by the law of this case, and the other cases on pages 8 and 9 of our brief in the Appeals Court, of the environmental consequences.

And those environmental consequences are the substantial hazards, the hazards of tidal waves going to Hawaii, and this is from the Train memo not from our affidavits, those are the hazards which the Court of Appeals was referring to when it said "opposing scientific views".

And Your Honor's question is addressed to Item 3, but Item 3 only of what is in the impact statement.

Q Subsection 3.

MR. SIVE: Forgive me, subsection 3.

Q Item 4 or 5, I think, page 46.

MR. SIVE: Yes. I'm referring to Item 3 of 102(c) of the text of the Act. And that page 46 is the purported satisfaction of that single item.

Q Right.

MR. SIVE: I think, Your Honor -- forgive me.

MR. CHIEF JUSTICE BURGER: You are now cutting into your rebuttal time.

MR. SIVE: Yes. Well, then I will halt at this time, and save myself, if I may, five or seven minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

MR. SIVE: Thank Your Honors.

MR. CHIEF JUSTICE BURGER: We've extended you now a total of 15 minutes, and we'll do likewise with the Solicitor General. But you may count on seven minutes, more or less.

MR. SIVE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GRISWOLD: May it please the Court:

Of course we must comply with the law. We have.

There is a question of standing in this case, as is evident enough when one reads the names of the plaintiffs, which includes, among other things, a Canadian unincorporated association. We have not raised that question below simply because of the context, the -- we're trying to facilitate the consideration of this in the Court. We're trying to avoid delay.

And I mention it only because of its relevance to what seems to me to be an underlying question here, a question of separation of powers.

Whether this is something which should be decided by the courts, or whether this is something which is properly under our system, left to the determination of the politically responsible officers of the government.

The question of law in this case is a narrow one.

There is no basis for an injunction unless something illegal is threatened. There is nothing illegal here.

The sole question arises under the Environmental Protection Act, which requires, in section 102, that an environmental impact statement be made and published. An environmental impact statement was made and published by the AEC.

I hold it in my hands.

It was published on June 21, 1971. But an earlier draft of it was prepared in 1970, nearly a year before it went out; was widely circulated and distributed. Comments were received. It was not sprung on anybody in 1971.

And it is the impact statement required by the statute. It is obviously carefully, thoughtfully done, in good faith. No court below has decided to the contrary.

There is nothing in the Environmental Protection Act or in any other Act which requires this statement to be right, to be exhaustive, to cover everything. There is nothing in this statute, using the words that Mr. Sive used, which requires the Commission to consider all responsible opposition and to make intelligent and relevant response thereto. The statute is quite simple: "All agencies of the federal government shall (c) include in every recommendation or report on proposals for legislation and other major federal actions"-- which applies to the AEC and they have always

recognized that it does --"significantly affecting the quality of the human environment, a detailed statement by the responsible official"-- and here the responsible official is the general manager of the AEC, who has signed this; and the statement, all told, is 75 or 80, 69 pages long, plus supplementary material.

"... a detailed statement on"-- and then five things are listed, and if the statement is examined, those five things are covered.

Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved, copies of such statements and comments and the views of the appropriate federal, state and local agencies which are authorized to develop and enforce environmental standards shall be made available to the President, the Council on Environmental Quality and to the public, as provided in section 552, Title V" which is commonly known as the Freedom of Information Act, "and all of the statements received are included in the impact statement and shall accompany the proposal through the existing agency review process."

Now, that is the statute, and it has been fully complied with.

Q Are those referred to in the impact statement?

MR. GRISWOLD: Yes, they are included as an Appendix to the impact statement, a considerable number of letters from officers of the government, and responses by the agency. There is nothing in the Act which requires the statement to be right; there is nothing in the Act which gives any court any authority to review the statement in any way. It is not a decision --

Q Well, you don't mean the Court can't review whether or not it complies with 102(c), do you?

MR. GRISWOLD: I don't mean that, Mr. Justice. I think it obviously does comply with section 102(c), if it were --

Q Well, what is your position --

MR. GRISWOLD: -- if it were -- excuse me.

Q The issue is whether this one does or doesn't comply with 102(c).

MR. GRISWOLD: My position is that it is perfectly obvious that it does comply with 102(c).

Q I understand that. I understand that's your position. But that's the issue, isn't it?

MR. GRISWOLD: That, I assume, is the issue.

Q And certainly that's an issue for the courts to decide, isn't it?

MR. GRISWOLD: That is an issue for a court to decide.

Q Right.

MR. GRISWOLD: And if the statement were one page long and said, "Well, we really don't think this is very important and we've put down these five things, and we say that they are all complied with", it would be inadequate.

But this is not such a statement by any possibility.

Q I didn't find Train's statement, is that in --

MR. GRISWOLD: You didn't find --?

Q Russell Train's statement.

MR. GRISWOLD: Russell Train's statement is not -- was not -- I will come to that in a moment. Russell Train's statement was made to the Under Secretary's committee of the National Security Council. It was not made to the Atomic Energy Commission in response to this, and was not required by the statute to be included or to be dealt with.

Q Nor can I find Ruckelhaus's statement.

MR. GRISWOLD: In the same way, I will come to that.

Q Okay.

MR. GRISWOLD: And I think that -- well, I would like just to finish this part, because that's the next part of my argument.

Q Yes.

MR. GRISWOLD: This is not a decision based on a record which can then be examined to see whether it's based on adequate evidence. It's simply an environmental impact statement, required by law, and duly and carefully made.

Now, the court below suggests that the action of the AEC may be illegal. But it does not suggest any statute under which it may be illegal. It does not suggest any statute which the AEC may have violated.

I do not believe that there is any such statute.

Q Well, Mr. Solicitor General, let's assume that it were clear that the impact statement were legally insufficient. Let's assume that it was a one-page statement of abstract conclusions, which I think you conceded in argument would be insufficient under 102(c), a moment ago.

MR. GRISWOLD: Yes, Mr. Justice, I think they must make a good-faith effort to comply with section 102, and to me, it is perfectly clear they have.

Q Yes, I understand that.

Let me finish my question. Let's assume that it were conceded that the impact statement were insufficient under 102(c). Then, would you concede, as a matter of law, that this proposed detonation should be enjoined? Do you, in other words --

MR. GRISWOLD: No, Mr. Justice, because --

Q Do you, in other words, concede that the filing of a legally sufficient impact statement is a condition precedent to the government's going forward with its proposed action?

MR. GRISWOLD: I think it would be, Mr. Justice, if

it were not for the actions of Congress, in effect, delegating this decision to the President, and the President's decision made pursuant to that delegation. Which I think takes this out from under an ordinary environmental impact statement situation.

Q But if --

Q Then you'd go so far as to say you didn't need an impact statement?

MR. GRISWOLD: Even if there had been no impact statement issued at all, I believe that if Congress chooses to say, "Well, whether or not there shall be a detonation at Amchitka is to be decided by the President", and the President makes that decision, both in his capacity as Chief Executive and as Commander-in-chief, I believe that should determine the matter and should be regarded as a matter properly con- --

Q Well, now, let me see if I understand that. You are then suggesting that the action with respect to both the authorization and the appropriation bills, which said, in effect, "let the President personally decide whether Cannikin shall be detonated", that that action had the effect of superseding NEPA.

And why do you -- if that's so -- is that your position?

MR. GRISWOLD: Well, that is one of my positions. My other position is that NEPA was fully complied with.

Q I see. But you're saying even if it were not complied with, then section 102(c), for the purposes of Cannikin, was washed out by the Congress in its action on the appropriation bill?

MR. GRISWOLD: Yes, Mr. Justice, I think we have both grounds to rely on. I think the first is perhaps the clearer and stronger ground, but the second is one which seems to me to have great merit.

Q I gather the Court of Appeals disagreed with that decision, did it not? Expressly.

MR. GRISWOLD: No, they said that -- what Mr. Sive says, that the President's approval was an additional condition.

Q That's what I say. They disagreed with your position.

MR. GRISWOLD: That doesn't seem to me to be a realistic appraisal of what --

Q It may not be, but all I am asking is: The Court of Appeals disagreed with the position the government is urging here this morning?

MR. GRISWOLD: Yes, Mr. Justice.

Q Yes.

MR. GRISWOLD: I assume I'm free to disagree with the --

Q Of course you are.

MR. GRISWOLD: -- with the Court of Appeals --

Q Of course you are, as I'm free to disagree with you.

MR. GRISWOLD: -- on this matter.

Here the Atomic Energy Commission has made its environmental impact statement, and that is all it is required to do under the law. There is no basis for review.

Q It is required to make one that complies with the provisions of 102(c).

MR. GRISWOLD: Yes, Mr. Justice.

Q It can't just file a paper labeled impact statement.

MR. GRISWOLD: I agree, Mr. Justice.

Q Right.

MR. GRISWOLD: And I think they have.

Q Right.

MR. GRISWOLD: As I think can be quickly determined by anyone who examines it.

There is no basis for review in the statute or for second-guessing the Commission, which has performed its function and has complied with the statute, and has met all of the requirements of the statute fully.

Now, the next point, and I think it is important. The statements which were sought, and most of which have been given, were not made to the Atomic Energy Commission. They

are not part of the process leading to the environmental impact statement.

Every one of the statements sought, without exception, was made to the Under Secretary's committee, of the National Security Council. And I have here a copy of the subpoena, which was served on Mr. Seaborg, requiring him, not personally but through a representative, to appear; and the subject stated: With respect to testify with respect to actions and procedures of the Council on Environmental Quality, as an adviser to the -- excuse me, this is one which was addressed to Mr. Train -- actions and procedures of the Council on Environmental Quality as an adviser to the Under Secretary's committee of the National Security Council, with respect to the underground nuclear weapons test proposed by the Atomic Energy Commission, known as Cannikin.

Well now, what is the --

Q Just a moment, Mr. Solicitor General. The language that you read to us earlier from 102(c), "the responsible public official shall consult with and obtain the comments of any federal" -- any federal agency.

MR. GRISWOLD: Yes.

Q "Which has jurisdiction by law or special expertise" and so forth. Does that not embrace consultation with those who prepared these very statements?

MR. GRISWOLD: I think not, Mr. Justice.

Q Oh, it does not? I see.

In that connection, my related question concerns the Council, Mr. Train's Council. His Council prepared the guidelines, did it not, for the 102(c) compliance?

MR. GRISWOLD: I'm not prepared to answer that, Mr. Justice. I'm sorry. I came into this case at 3 o'clock yesterday afternoon --

Q Well, so did I.

MR. GRISWOLD: -- and I'm not familiar with this.

(Laughter.)

Now, I have read the subpoena --

Q I'm sorry, Mr. Solicitor, I just wondered -- why do you say that these are not agencies that the AEC should have consulted?

MR. GRISWOLD: I'm not saying that they are not agencies that the AEC should have consulted. At least as to the Environmental Protection Agency. The Environmental -- what is Mr. Train's? It's got a Q in it.

A VOICE: Council on Environmental Quality.

MR. GRISWOLD: The Council on Environmental Quality is a part of the Executive Office of the President, and I think it raises some very interesting and difficult questions about the relationship of the Executive in matters of this kind.

But there is --

Q Well, isn't the Environmental Protection Agency

also an agency of the Executive Department?

MR. GRISWOLD: No, the Environmental Protection Agency is more like the Interstate Commerce Commission or the -- it has certain authorities to --

Q You mean the Council was created by the President, sua sponte without --

MR. GRISWOLD: No, it was created by an Act of Congress, as I understand it. But as a part of the Executive Office of the President, which the Environmental Protection Agency --

Q And so you say it's not a federal agency within the meaning of that term -- of that statute?

MR. GRISWOLD: I think it is probably not within the meaning of that statute, just as I think Dr. Kissinger is not a federal agency within the meaning of that statute.

Q But, Mr. Solicitor General, is it suggested that the AEC did not consult with the Environmental Protection Agency?

MR. GRISWOLD: I don't know. There's nothing to indicate whether they did or did not. It is plain that none of the material that is sought here is material which was submitted to the AEC.

Q Well, then --

MR. GRISWOLD: Indeed, some of the material sought here was prepared after the environmental impact statement was

issued.

Now, what is the Under Secretary's committee? That's a little mysterious. But there has been a statute for 25 years setting up the National Security Council, which consists now of a number of high-level Cabinet officers.

And there is a National Security decision memorandum 2. Now, that is not an executive order, because coming in the National Security zone it is not published as an executive order. But it is, for all practical purposes, an executive order.

It was signed by President Richard Nixon on January 20, 1969, which was Inauguration Day, and it provides for the reorganization of the National Security Council system.

And one of the things it provides for setting up is the National Security Council Under Secretary's committee, which shall consider a number of items, including other operational matters referred to it jointly by the Under Secretary of State and the Assistant to the President for National Security Affairs.

And then there is a National Security decision memorandum 18, dated June 27, 1969, which is secret, and properly secret. But I have been authorized to quote two passages from it.

"The President" -- this is signed by Dr. Kissinger,

the adviser to the President.

"The President has directed that the National Security Council Under Secretary's committee will review the annual underground nuclear test program and quarterly request for authorization of specific scheduled tests."

And then:

"The results of the committee's review of the underground nuclear test program, and its recommendations, should be transmitted to the President in time to allow him to give them full consideration before the scheduled events are to take place."

Q Mr. Solicitor General, absent the section 103 of the appropriation bill, would the President have had the power to stop this detonation anyway?

MR. GRISWOLD: Oh, yes, Mr. Justice. I'm sure he would have had -- I cannot now cite the statute or the authority, but I am sure that the President, either under statute or under executive power, would have had the power at least to delay it, to refer the matter to Congress for recommendation; as I understand the law, the President is never under any legal obligation to expend money which the Congress has appropriated. He may be under various and sundry political and moral obligations.

Q Well, wasn't this an appropriation to the AEC?

MR. GRISWOLD: This was an appropriation to the AEC,

yes, Mr. Justice.

Q Well, can the President interdict the AEC decisions?

MR. GRISWOLD: I have no doubt that he can, as a practical matter, and if I were more familiar with the details of the Atomic Energy Act, I am sure I could cite you a provision which would give him rather explicit power with respect to all atomic detonations.

Q I suppose the place, anyway, was under federal jurisdiction. He probably had some powers to --

MR. GRISWOLD: The area is certainly federal land.

Q Yes. Thank you.

MR. GRISWOLD: Now, as I pointed out, the Under Secretary's committee was specifically directed by the President to review the annual nuclear test program. Dr. Kissinger's memorandum transmitted an order of the President, though signed by him. It's obviously part of the process of aiding him, just as the Clerk or a Deputy Clerk signs for this Court in transmitting an order of the Court.

Every item sought here was prepared as a part of this process. It should be clearly privileged throughout. There is no statute to the contrary. Not the Environmental Protection Act, for it has nothing to do with the procedures of the AEC under that Act.

It is -- in its decision of October 28, the Court of

Appeals required much of this material to be made public, or to be made available to counsel on the other side.

We thought that decision was plainly wrong, and plainly unsupported by any statute. But we did not seek certiorari, because we did not want to bring this question to this Court under such time pressure.

Instead,we accepted the decision of the Court of Appeals, as far as it and the District Court are concerned, and we went back to the District Court and complied fully with the decision of the Court of Appeals. At least we did everything that Judge Hart required under that decision, and more.

But it is still our position, which we rely on here, that the decision of the Court of Appeals as to these materials, all of which were prepared for the Under Secretary's committee of the National Security Council, was wrong. Both as a matter of the President's privilege to get information on a secure confidential basis and because it had nothing to do with the environmental impact statement of the AEC.

I think the publication of Mr. Train's memorandum itself illustrates the inherent difficulties in the problem of simply making everything of this kind available.

Now we come to the statutory provisions --

Q When was Mr. Train's communication first made available to either the parties in this case or the public?

Was that a private communication originally, Mr. Train's?

MR. GRISWOLD: Mr. Train's communication was a communication to the Under Secretary's committee in response to a request from the Under Secretary's committee, arising under the duty established by this order signed by Dr. Kissinger, National Defense memorandum No. 18.

Q In other words, he was fulfilling his function as an adviser to the Executive Branch when he wrote that memorandum?

MR. GRISWOLD: Yes, Mr. Chief Justice, and that is a part of the President's responsibility under statutes that I have not at my fingertips, to have ultimate control with respect to planning and final decision of atomic detonations.

Now we have the statute, and there are two statutes. In considering the Atomic Energy Commission authorization bill, both the House and the Senate considered amendments that would have eliminated authorization for the Cannikin test. I have the Congressional Record citations here.

The amendments were not passed. In connection with -- no, not of the authorization; I don't believe the impact statement was available. It may have been.

The authorization bill was approved by the President on August 11th, 1971, six weeks after the impact statement was issued.

The Appropriations Act, the Public Works Appropria-

tions bill of 1972, both the House and the Senate debated resolutions to delete from the bill funds for the Cannikin project. In the House the amendment was defeated. In the Senate the original amendment to delete the funds was withdrawn --

Q Excuse me, Mr. Solicitor. Was there a line item for Cannikin?

MR. GRISWOLD: No, Mr. Justice, it is -- I have -- these are the Senate and House hearings, which I brought, and in the time I have had available, it appears to me that it is included in a line "weapons, $848,100,000".

Q So, I gather, the amendment actually was simply that no part of the appropriation should be expended for Cannikin? Is that it?

MR. GRISWOLD: Yes, I assume that was it.

On the other -- it is perfectly clear that in the discussion in the Appropriations Committee there is specific reference to Cannikin, and in the debate on the Floors of Congress there was specific reference to Cannikin.

And the amendment to delete was withdrawn, and what Congress finally passed, after it got through the Senate and the conference process, is section 103 of the Act of October 5, 1971, 85 Stat 366. "None of the funds appropriated by this Act shall be obligated or expended to detonate any underground nuclear test scheduled to be conducted on Amchitka

Island, Alaska, unless the President gives his direct approval for such test."

And the President has given that approval.

Now, let me say one thing which I say with regret. But the time situation is extraordinarily difficult. In the first place, in this part of the world, that far north, there are only three hours of daylight every day. This must be done in daylight in order that it can be observed.

In the second place, the weather is generally bad this time of year, and rapidly getting worse. There was, yesterday, a hurricane. Today is the calm behind the hurricane, and I am advised that it is an excellent day.

I am also advised that after today, all the indications are of three days of very bad weather.

The device is now 6,000 feet in the ground and irretrievable. The hole down which it was put has been plugged. A process which takes several days, and which began several days ago.

Until 12:30 today it is possible to stop it, but at 12:30 the unwinding of the life-support devices, which keep it mechanically functional, must begin; in particular, pumps must be turned off.

Once that process has begun, it is not feasible to do anything except either detonate it at 5:00 this afternoon, or abandon the project.

Q This is 12:30 our time?

MR.GRISWOLD: These are -- the times I'm giving are our -- are Eastern Standard Time. There is a six-hour time differential, I understand.

If it is delayed after 12:30 today, it must be delayed for at least three days because of the weather conditions. The chances of mechanical malfunction increase exponentially with the passage of time. Partly because there is a 100 percent humidity down there, and corrosion and things come in.

I cannot say that it would be impossible to carry it out after three days. I have not even been able to get an evaluation of the chances.

Q Well, may I ask, Mr. Solicitor General: I gather that the real issue before us is whether we're going to grant an injunction pending an opportunity to pass on the plaintiff's petition for certiorari.

MR. GRISWOLD: Yes, Mr. Justice.

Q And if this detonation goes off this afternoon, there's nothing left of the case, is there?

MR. GRISWOLD: That is clear.

(Laughter.)

Q So the whole case is moot, without our ever having had a chance to see the petition for certiorari, which counsel tells us they can file by --

MR. GRISWOLD: Except the chance that you have here, under which I have tried to show that there is no legal basis upon which they can proceed.

Q And you've done it very well. But suppose we don't agree with it?

(Laughter.)

MR. GRISWOLD: The judgment is for you, of course, Mr. Justice.

Q Yes. Well -- but I think you appreciate our dilemma.

MR. GRISWOLD: I certainly --

Q If this goes off this afternoon at 5 o'clock, we'll never have a chance to pass on the merits of this case.

MR. GRISWOLD: That could be, too, and if you do stay it, of course every effort will be made to see that your orders are complied with. But it may well amount to a permanent injunction against the --

Q Well, that, I take it, depends on how quickly we get the consideration of the petition for certiorari.

MR. GRISWOLD: No, Mr. Justice, I'm told that the chance that it will be a total failure, and now irretrievable, that there will be nothing to do but start over; that a year will be lost.

Q Now, I thought you said three days. You can't say that if this were postponed for another three days or --

MR. GRISWOLD: The chances increase exponentially, is the word that I've put, and every day is a very serious matter.

Q What was that word?

MR. GRISWOLD: Exponentially. If it is --

(Laughter.)

-- if it is two times less likely tomorrow.

MR. CHIEF JUSTICE BURGER: We'll have no more of that.

Just a minute, counsel.

The audience will observe proper demeanor at all times during arguments of the cases in this Court. I hope that need not be said again.

MR. GRISWOLD: If it is two times tomorrow against it, it will be four times on Monday, and it will be eight times on Tuesday. And that is a very -- it amounts to deciding whether you let the case go moot or whether you issue what is in effect a permanent injunction against this, which involves not only -- I'm not relying on the expense, the country can stand the expense. But whether we can stand the delay in getting information about nuclear devices is a far more serious matter.

And I come to this, I have a final but important word.

The purpose of this detonation is to preserve the

peace.

For the past twenty years we have kept the peace between the Great Powers, and this has been done in considerable part by maintaining a balance of deterrents.

That may be an unfortunate way to have to keep the peace, but it is the way we have done it. This has not been easy, and it has taken great skill and effort by the politicians and the scientists of the world.

We all hope, I am sure, that a better way will eventually evolve by which the peace can be maintained. But the fact is that it has been the balance of deterrents which has been the controlling factor in the recent past and at the present time.

On the other side of the world, in the Northern Hemisphere, an underground nuclear explosion of 6 megatons, larger the one involved here, occurred on October 17, 1970. There was no great world outcry, and the matter was not before any courts.

It seems odd that it should be thought that those responsible for our national security cannot obtain information of the same order. For obtaining information useful in preserving our national security is the only objective here.

It seems odd that our officers cannot obtain this information when their plans have been carefully made, their expenditures have been authorized by Congress, their actions

have been approved by the President, and there is no law or legal provision of any sort which has not been fully complied with.

I submit that there is no basis for granting an injunction, and it should be denied.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Sive, you have about seven minutes left.

REBUTTAL ARGUMENT OF DAVID SIVE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SIVE: I think I will not use the whole of the seven.

Just to clarify a couple of items which arose.

First, we do not seek a permanent injunction in the sense that if our prayer for relief is granted, this is enjoined. The injunction which would issue with a final judgment for us would only be until the law is obeyed.

Also, we do not reach here --

Q Well, I think on until your petition for certiorari was disposed of, isn't that what you mean?

MR. SIVE: Yes, that's correct, Your Honor.

Q Yes.

MR. SIVE: But I'm addressing myself to the ultimate relief going beyond that. Assuming more, that the petition would be granted, this Court would overrule, and then final

judgment for us.

That enjoins it only while the violation of law so found is outstanding. When and if that violation of law is removed, then the shot may proceed.

And that means that the ultimate question is what Mr. Solicitor General has said, is it so important that this shot proceed now? I know about the detonation, at least I've read of it, by another nation.

I also know that the District Court raised this question and asked me: How are we going to compete?

And my only answer to that was that 25 years ago, when many of us were in a war, when I was there in the Infantry, the same question was raised, and I told His Honor: Somehow we won.

And we won because, I think, we have a system of law, and I think that is a far more important question than what may be the need for nuclear deterrents, which I think is not in issue in this case.

And we haven't ever raised that issue, and we haven't ever asked for anything which goes to any military secrecy. Every document we've asked for, every question on every deposition, has said: Take out anything military; take out anything dealing with foreign policy.

And so we went to the agency which had the environmental information, and here is where there is one

specific answer in the law to a question which one of Your Honors raised: The EPA is specifically included in the EQC guidelines promulgated on April 30, 1970, as one of the agencies with the special expertise which the committing agency, the project agency, the AEC must consult.

Q Do we know -- we have no reason to know, one way or the other, whether the agency did consult the EPA, do we?

MR. SIVE: I don't know whether they did.

Q Well --

MR. SIVE: If they --

Q -- do we know that they did or that they didn't, that's my question.

MR. SIVE: That's right, we do not know whether --

Q No.

MR. SIVE: -- they did or did not.

Q It doesn't appear in the impact report one way or the other, does it?

MR. SIVE: Right.

We know that --

Q But assuming -- there is a presumption in the law of regularity, and assuming that the guidelines that you refer to requires the agency to consult the EPA, and shouldn't there further be a presumption that they did so?

MR. SIVE: I think, Your Honor, the answer is that if they did consult the EPA under the guidelines and the Act,

that consultation and the answer of the EPA must be set forth in the impact statement.

Q Well, that's a different question.

MR. SIVE: Yes.

Q It's a related question.

MR. SIVE: It goes beyond Your Honor's question.

Q Right. Right.

MR. SIVE: And that is the defect of law. They did not set forth --

Q Well, that's your claim on the merits.

MR. SIVE: Yes.

Q It's related to your claim on the merits.

MR. SIVE: Yes. And the EPA is a specific agency under the April 30 guidelines.

Now, the CEQ itself is not. We submit that the CEQ is, to take the language of the statute, an agency which does have the special expertise, and it should be one of the agencies.

But, beyond that.

Q How about the Department of Interior?

MR. SIVE: Pardon?

Q Would you think the Department of Interior would also be an agency with expertise?

MR. SIVE: Oh, yes, that is specifically named, I think, in the guidelines. I can check that, Your Honor.

Yes, it is.

Q Don't let me hold you up, for that.

MR.SIVE: I beg your pardon?

Q Don't let me hold up your argument.

MR. SIVE: Yes, the Department of the Interior is, and I can submit to Your Honors copies of the April 30 guidelines.

Specific sections -- specific departments are named, and the project agency is directed to go to them, and the response which comes is directed by the Act and the guidelines to be in the impact statement.

Now, what happened here is just as the Solicitor General said. Certain reviews by certain agencies, including the EPA, specifically directed by the Act to be put into NEPA, and the CEQ, which, we submit, should have been, and agencies of the Department of the Interior, not the ones mentioned in the impact statement, the U. S. Geological Survey. Those agencies were funneled into the Under Secretary's committee, and that was what created the executive privilege problem.

There, however, we and the Circuit Court and District Court excised all of the military information, we never asked for that, and we said, "Present only the environmental information", and the question is: Under the law, was the Commission correct in taking the anti-detonation information and funneling it to the Under Secretary's committee, and then

coming into court and saying, "That's secret; you may not look at that", to which our response was, "Excise the secret matter; let's see the environmental information."

Now, I think this -- I would submit that merely naming a committee and setting up a committee, whether it be set up by Dr. Kissinger or anybody else, doesn't exempt what goes to that committee from being in the impact statement, if the law would otherwise require it.

Nor does it exempt it, per se, from the competency of the courts to have the information, and therefore from the scope of discovery under Rule 26.

So I think we come to this issue: Should the law be obeyed here? And if it is a fact that there is some kind of a deadline before us, in that we have one hour and 35 minutes, then I think that one hour and 35 minutes should be used by all of us to consider whether the Commission obeys the law, and whether, if we do secure the nuclear deterrents and the equality, whether it's worthwhile securing if we disobey the laws, and if the Commission is somehow under a slightly different obligation to obey law than the humblest citizen getting his license to sell bananas on a pushcart.

Q Well, this really -- this is the third time you've said it, the issue before us is not "should the law be obeyed?", is it? Isn't that a distorted way of putting the issue, to state it -- to understate it --

MR. SIVE: Forgive me, Your Honor, if I've been overly emotional.

Q Well, --

MR. SIVE: I think Your Honor is correct. But when the government takes the position that this Court does not have the time to look at this, and says that unless the questions which are raised before this Court, and the questions which we raised in every direct manner before the two courts below, when those questions cannot be decided because the time is short, and the time was shortened by the Commission and the errors of the District Court, and their executive privilege overruled by the Circuit Court of Appeals, then, I submit, the question is whether, in effect, they are asking for repeal of the law.

I think that ends the notes which I have, and I don't know whether I've used as much as the seven minutes of rebuttal time, Your Honor.

MR. CHIEF JUSTICE BURGER: Fine.

MR. GRISWOLD: May I make one --

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

MR. GRISWOLD: The Environmental Protection Agency did not exist when the original draft of the impact statement was sent out. It was created in 1970. The impact statement was sent to, and was replied to by officers of HEW and Interior, which were later incorporated into the Environmental

Protection Agency.

Now, it is perfectly true that there is no official, signed by Ruckelshaus, statement here, but the HEW and the Interior agencies were the ones which were responsible for this when the original draft was circulated.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Did you have something to add, Mr. Sive?

MR. SIVE: I think one suggestion, Your Honor, that eases the problem before you: I would be willing perhaps to submit, on the papers which Your Honors have, and the arguments made, as the petition for certiorari, if that eases the problem and makes the mechanics simpler.

If that is done, I would ask leave simply to make several photostats of perhaps two additional briefs, which I might get done in the next half hour and bring them to the Court.

But whether that eases Your Honors' problems, I do not know.

MR. CHIEF JUSTICE BURGER: We will take that into account.

Thank you, Mr. Sive.

Thank you, Mr. Solicitor General.

The case is submitted.

(Whereupon, at approximately 11:00 a.m. the case was submitted.)