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DEPARTMENT OF THE ATTORNEY GENERAL
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December 14, 1979

The Honorable Barbara M. Trafton
Dillingham Hill
Auburn, Maine 04210

Dear Senator Trafton:

You have asked several questions regarding the constitutionality of a proposed indirect initiative which, if enacted either by the Legislature or the general electorate, would prohibit the generation of electric power by means of nuclear fission in the state. This proposed legislation would, therefore, not only bar the construction of new nuclear power plants in Maine, but would also require the closure of the state's only existing plant, the Maine Yankee facility in Wiscasset. In essence, your request raises three distinct constitutional questions: whether the legislation would violate Article VI, clause 2 (the "Supremacy" Clause) of the United States Constitution, in that it would be preempted by the Federal Atomic Energy Act of 1954, as amended; whether it would violate Article I, Section 8, clause 3 (the "Commerce" Clause); and whether it would violate Article I, Section 10, clause 1 (the "Contract" Clause). In addition, you inquire generally as to whether any other provision of the federal constitution might be violated, and invite our opinion thereon. Pursuant to this request, we will also address the question of whether the legislation as proposed would, as applied to the Maine Yankee facility, constitute taking of property without compensation, in violation of the Fifth and Fourteenth Amendments of the Constitution.1/

1/ It is possible that one additional constitutional argument could be made by persons challenging the legislation: that the Act constitutes an invalid utilization of the public power by the State in violation of the guarantee of substantive due process of law found in the Fourteenth Amendment to the Constitution. Because we believe that the protection of the public from radioactive hazard is an obviously valid objective of legislation, and that a determination by the people that such a danger requires the prohibition of nuclear fission facilities would be unlikely to be disturbed by the courts, we will not discuss this argument in detail. Rather, we will assume that the legislation, if passed, constitutes a valid exercise of the police power.

Our answers are that while we think it unlikely that a court would invalidate this legislation under any one of the latter three constitutional provisions, we think the existence of the Atomic Energy Act, as it has been interpreted by the courts, poses a substantial threat to the legislation's viability, although even here we cannot say with certainty that the legislation would not survive.

I. Preemption Under the Supremacy Clause by the Atomic Energy Act.

The Supremacy Clause of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding." Article VI, Clause 2.

Under this clause, state regulatory authority is not contingent upon any delegation of power by the Congress. It exists concurrently with that of Congress until Congress, acting pursuant to a power enumerated in the Constitution, affirmatively preempts it.2/

Beginning in 1946, the Congress has adopted several laws concerning the use of radioactive materials and the production of electrical power from them. The question presented, therefore, is whether, by the enactment of these laws, the Congress has preempted State authority to adopt the legislation in question. Generally speaking, constitutional questions of this kind turn on whether Congress has expressly stated in the federal law its intention to prevent the states from legislating in the same field, or whether a court, upon examination of the federal law, divines a necessity or implication of a Congressional intent to preempt the

2/ The effect of federal regulation, therefore, when concurrent state authority exists, is to provide uniform minimum standards, in this case for health and safety or national security purposes. If a state's regulation is more lax than the federal, then the more stringent federal standards will be the operative ones; if the state measure is more stringent, then it becomes the operative standard and there is presumably greater protection than is federally required. This approach to regulation is not at all uncommon, even in the field of nuclear energy. See e.g., the recent amendments to the Federal Clean Air Act, 91 Stat. 712, 42 U.S.C. §§ 7422, 7416 which expressly authorize state regulation of radioactive air emissions, regardless of their source, more stringent than applicable federal regulations.

states.[3] See Jones v. Rath Parking Co., 430 U.S. 519, 525-26 (1977), and cases cited therein.

A. History of Federal Atomic Energy Legislation.

The first federal legislation dealing with atomic energy was the McMahon Act in 1946.[4] Atomic energy technology was then in its infancy. Knowing little more about it than its awesome destructive potential, Congress in that Act carefully preserved a complete monopoly in the federal government over all activities involving atomic energy, while encouraging research and development of its use. This development proved faster than expected, and by 1954 Congress saw a variety of peaceful domestic and international uses to which atomic energy could be beneficially applied. Moreover, it had confidence that there had grown a considerable expertise in handling nuclear materials outside of the government.

In response to these developments, the Atomic Energy Act of 1954[5] (the "Act") was enacted to authorize qualified private use of nuclear materials, under the strict supervision of the Atomic Energy Commission (the "AEC") by means of various contractual and licensing arrangements. This Act allowed private ownership of nuclear production and utilization facilities, but only by persons who obtained appropriate construction and operation licenses from the AEC. 42 U.S.C. §§ 2061, 2131-34. Similarly, the AEC was authorized to license private control of any of the three general categories of radioactive materials: "special nuclear material," "source material," and "byproduct material." 42 U.S.C. §§ 2073, 2092, 2111.

Congress' concern with the hazards associated with this loosening of federal control over nuclear materials and facilities is apparent throughout the 1954 Act itself and its legislative history. Both health and safety hazards from exposure to radioactive materials and "common defense and security" hazards arising from their weapons potential are repeatedly cited as the basis for extensive federal regulation. See 42 U.S.C.

3/ For the purpose of this opinion, and without examining the question, it has been assumed that the several federal acts were a proper exercise of Congressional authority, and that inherent in that authority is the power to preempt state law via the Supremacy Clause. See generally D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE, ch. 4 (1973), for the suggestion that the Congress might not always possess this power.

4/ 60 Stat. 755

5/ 68 Stat. 919, codified at 42 U.S.C. § 2011 et seq.

§§ 2011, 2012 and 2013, and S. REP. NO. 1699, 83d Cong., 2d Sess. (1954), reprinted in [1954] U.S. CODE CONG. & ADMIN. NEWS 3456. However, neither the Act nor its legislative history shows any congressional consideration of the role the states might have in the regulation of these activities.

Soon thereafter, Congress and the AEC began considering "increased participation by the states" in such regulation, and bills were introduced in 1956 and 1957 which would "'delineat[e] the separate responsibilities' of the AEC and the States with respect to the health and safety aspects of activities licensed under the act...." S. REP. NO. 870, accompanying S. 2568, 86th Cong., 1st Sess., reprinted in [1959] U.S. CODE & ADMIN. NEWS 2872, 2875. Finally, in 1959, the Congress amended the Act[6/] and specifically addressed the subject of "Federal-State cooperation," making provision for the "turn over" to the states of certain responsibilities that had until then been exercised by the AEC. Three parts of these amendments are particularly relevant to this opinion, and have been the focus of extensive preemption debate. These provide:

> (b) Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State -
>
> (1) byproduct materials;
> (2) source materials;
> (3) special nuclear materials in quantities not sufficient to form a critical mass.
>
> During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.
>
> (c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of -

6/ 73 Stat. 688, codified at 42 U.S.C. § 2021.

> (1) the construction and operation of any production or utilization facility;
>
> (2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;
>
> (3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;
>
> (4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.
>
> Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.
>
> . . .
>
> (k) Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

Thus, the Congress authorized the AEC to confer to any state regulatory control over most nuclear materials, but declined to authorize it to delegate its regulatory control over nuclear facilities. These amendments have remained unchanged since their adoption, and constitute the sections of federal law which most directly address a state role in the regulation of nuclear material and facilities.

Subsequent to the 1959 amendments, Congress has had occasion to legislate further with regard to the regulation of the generation of nuclear power. In 1964, in response to the urgings of the AEC, the Congress passed the "Private Ownership of Special

Nuclear Materials Act,"7/ which eliminated the requirement of mandatory federal government ownership of special nuclear materials in order to promote the growth of the nuclear power industry. See S. REP. NO. 1325, 88th Cong., 2d Sess. (1964), reprinted in [1964] U.S. CODE CONG. & ADMIN. NEWS 3105. By 1974, however, the Congress became concerned that the developmental and promotional activities of the AEC posed a threat to the proper conduct of its regulation of the nuclear power industry to insure the public's safety from radiation hazards. Accordingly, it passed the Energy Reorganization Act of 1974 8/ which split off the AEC's development and promotional functions, and created a new agency, the Nuclear Regulatory Commission (the "NRC"), for the purpose of regulation only. See generally S. REP. NO. 93-980, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. CODE CONG. & ADMIN. NEWS 5470. The developmental and promotional functions were later transferred to the newly created Department of Energy in 1977.9/ Thus, the general attitude of Congress toward nuclear power may be said to have changed significantly since 1959. While still anxious to promote the development of nuclear technology, it has become increasingly concerned about the safety of utilizing that technology for the production of electricity. This concern has not manifested itself as yet, however, in any express alteration of the relation between federal and state regulation of nuclear power facilities established by the 1959 amendments.

B. Judicial Interpretation of Preemptive Effect of Atomic Energy Legislation.

The interpretation of the 1959 amendments (42 U.S.C. § 2021) to the Atomic Energy Act has been the subject of litigation since their enactment, most of which has occurred in the lower state and federal courts.10/ The major exception to this has been the decision of the United States Court of Appeals for the Eighth

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7/ 78 Stat. 602

8/ 88 Stat. 1233

9/ 91 Stat. 565, Section 301.

10/ United States v. City of New York, 463 F.Supp. 604 (S.D.N.Y. 1978); Commonwealth Edison Co. v. Pollution Control Bd., 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972); Marshall v. Consumers Power Co., 65 Mich.App. 237, 237 N.W.2d 266 (1975); State v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976); Public Interest Research Group of N.J., Inc. v. State, 152 N.J. Super. 191, 377 A.2d 915 (App. Div. 1977); Van Dissel v. Jersey Central Power & Light Co., 152 N.J. Super. 391, 377 A.2d 1244 (Law D.v. 1977); cf. Power Authority of New York v. State of New York, 77 Civ. 596, Jan. 15, 1979 (S.D.N.Y.); N. Cal. Ass'n to Preserve BodegaHead & Harbor, Inc. v. P.U.C., 61 C.2d 126, 390 P. 2d 200 (1964); Application of Portland General Electric Co., 277 Or. 447, 561 P.2d 154 (1977)

Circuit in Northern States Power v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), a case which was affirmed on its merits without opinion by the United States Supreme Court, 405 U.S. 1035 (1972)11/ and upon which all courts subsequently considering the general issue have unquestioningly relied.

Northern States arose from the attempt of the State of Minnesota to regulate the amount of radioactive liquid and gaseous discharges from a nuclear-fueled electric generating plant proposed in that state. Minnesota's limitations were included in a waste discharge permit issued by the state pollution control agency, and were substantially more stringent than the limitations of the same discharges included in a provisional license issued by the AEC. There was no agreement in effect between Minnesota and the AEC under the 1959 amendments to the Atomic Energy Act.

With regard to the intention of Congress, the Eighth Circuit first concluded that "no provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants," id. at 1147. Relying upon the three parts of Section 2021 quoted above, however, the Court did find that an intent to preempt state authority with respect to radiation hazards was implied, and held the Minnesota limitations unconstitutional.

In addition to Northern States, one other case deserves special mention. Earlier this year, a federal district court in California declared a California statute impliedly preempted by the Atomic Energy Act. The statute prohibited state certification of any new nuclear power plant until a state agency determined that a satisfactory technology for the disposal of nuclear wastes had been developed.12/ Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission, 472 F.Supp. 191 (S.D. Cal. 1979). In reaching this conclusion, the Court not only relied on the Northern States analysis of the 1959 amendments, but also rejected an additional argument that the California Act was intended to protect the State's citizens from the economic uncertainties created by the absence of a

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11/ Since the time of its affirmance of Northern States, the Supreme Court has addressed the question of federal preemption of state regulatory authority over nuclear power facilities only twice in passing. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 15-16 and n. 12 (1976) (summarizing the Northern States holding with approval); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (indicating that the future of nuclear power is subject to control both by Congress and the states).

12/ A similar statute exists in Maine, 10 M.R.S.A. § 251, et seq.

known nuclear waste disposal technology. It is important to note, however, that the case is currently on appeal before the United States Court of Appeals for the Ninth Circuit, an appeal which has attracted nationwide attention. Thus, we may expect within the coming year to have the views of another high federal court as to whether the 1959 amendments may be found to preempt a statute much closer in content to the one under consideration in Maine than the one reviewed in Northern States.

C. Application of Federal Legislation and Judicial Construction Thereof to Proposed Maine Legislation.

It thus appears that all the legislative and judicial authority points toward preemption of any state effort to prohibit the generation of power by nuclear fission. However, notwithstanding this substantial body of law, we are not able to say that the proposed Maine legislation would be clearly preempted by the Atomic Energy Act. The reason for this is that we can perceive at least two arguments why the Northern States analysis might not be applied to the Maine law, none of which have been conclusively foreclosed by the existing judicial decisions. We discuss these in the order of their likelihood of success:

1. The Purpose of the Maine Legislation is Different From That of the Atomic Energy Act.

It is a recognized rule of preemption law that a state statute may be allowed to survive in the face of a federal statute if it can be shown to be enacted for a purpose different from that of the federal act and that it otherwise frustrates no legitimate federal purpose. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 444-448 (1960). In addition, as indicated above, subsection (k) of Section 2021 (the 1959 amendments to the Atomic Energy Act) provides that:

> "...nothing in this section shall be construed to effect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards" (emphasis added)

In its preamble, the proposed Maine legislation recites that its purpose is to protect the citizens of the state from the "economic, physical and mental[13]" hazards of nuclear energy. The purposes

13/ "Mental harm" appears to refer to feelings of concern or fear over the two more tangible harms and will therefore be treated as essentially indistinguishable from them.

of the Atomic Energy Act are set forth at 42 U.S.C. § 2013; they include an expression of concern for the "health and safety of the public," 42 U.S.C. § 2013(d), but do not indicate any expression of Congressional intent regarding economic costs which the citizens of the country or of particular states might be expected to bear. Thus, it might be argued in defense of the proposed legislation that even though it might be preempted by the Atomic Energy Act with regard to its purpose of protecting the public from radiological hazard, it may not be preempted to the extent it is seeking to protect the public from what are judged to be unacceptably high economic costs of nuclear power generation.

This argument was, as indicated above, made to the District Court in Pacific Legal Foundation, supra at 197-200, and rejected. However, two points need to be made regarding that decision. First, as also indicated above, the case is currently under appeal so that it cannot be regarded as final in any sense. Second, the court's treatment of the issue is somewhat peremptory, appearing to reject entirely the notion that the respective purposes of the federal and state statutes are relevant at all, with no mention of the Huron Portland Cement case, which clearly holds to the contrary. This is not to say that had the court considered that case, its result would have had to have been different. It is to say, however, that the issue has yet to receive final and definitive treatment. In view of this, we cannot say that any possibility of this argument's success has been foreclosed.

2. Congressional Policy With Regard to Nuclear Power has Changed since 1959.

One of the major themes running through both the Northern States and Pacific Legal Foundation decisions is that since the Atomic Energy Act of 1954, with its 1959 Amendments, was concerned not only with the radiological hazards of nuclear reactors but also the promotion of the fledgling nuclear power industry, the Congress could not have intended to allow the states to regulate (or prohibit) radioactive discharges since to do so would be to permit them to frustrate the promotional purposes of the Act. As the Northern States court put it

> "...[T]hrough direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards. Only through the

> application and enforcement of uniform standards promulgated by a national agency will these dual objectives be assured. Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceivably be so overprotective in the area of health and safety as to unnecessarily stulify the industrial development and use of atomic energy for the production of electric power." Northern States Power Co. v. Minnesota, supra at 1153-54.

See also Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission, supra at 200. Thus, both courts were unwilling to read the 1959 amendments (Section 2021 of the Act) as being concerned solely with safety from radiological hazard.

As we have seen in Part IA of this opinion, however, the Congress has significantly altered its attitude toward nuclear power since the time of the 1959 amendments (and the Northern States opinion). Most particularly, in 1974, Congress removed from the newly created Nuclear Regulatory Commission the function of the promotion of nuclear power and confined that agency's activities to insuring the safety of nuclear power generation. Section 2021, therefore, is now under the administration of an agency with no legislative mandate to encourage the development of the nuclear power industry. This would seem to remove an important argument from the Northern States court's reasoning. Whether its removal would result in a different conclusion is, of course, difficult to say, since even if Section 2021 is stripped of any promotional content, it might still be read to effect the same distribution of powers between the federal and state governments with regard to the regulation of nuclear power that the court found. Nonetheless, until a court has definitely dealt with the legal effect of the Energy Reorganization Act of 1974 on Section 2021, we would be unwilling to conclude that such an effect is nonexistent.

* * *

In summary, we believe that under the existing case law, the proposed Maine legislation would probably be found to violate Article VI, clause 2 (the "Supremacy" clause) of the United States Constitution. Since there are several arguments, which have not been conclusively resolved, with respect to whether

the Atomic Energy Act of 1954 would preempt the Maine statute, we must qualify our conclusion at least to the extent of noting that future judicial decisions might lead to a different result.[14/] At present, however, the precedent weighs against the constitutionality of the proposed legislation.

II. The Commerce Clause.

The Commerce Clause of the Constitution provides:

> "The Congress shall have power...to regulate commerce with foreign nations, and among the several states,...." Article I, Section 8, Clause 3.

It has long been held that this clause operates even in the absence of congressional action as a limitation on the power of the states to enact general welfare legislation which has an effect on interstate or foreign commerce. See e.g., Hughes v. Oklahoma, U.S. _____, 47 U.S.L.W. 4447 (April 24, 1979); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350 (1977), citing, inter alia, Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1852). Thus, it is possible that even if the state legislation here in question were found not to be preempted by the Atomic Energy Act (the issue discussed in Part I of this opinion), a court might determine that the legislation, which would clearly affect the movement of electricity in interstate and foreign commerce, would violate the Commerce Clause itself.

The first step in resolving whether a piece of state legislation violates the Commerce Clause directly is to determine "whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce on its face or in practical effect." Hughes v. Oklahoma, supra at _____, 47 U.S.L.W. at 4451. If the legislation is found either to have a substantial effect on interstate commerce, or a discriminatory effect, the burden shifts to the state to show that the legislation serves a legitimate local purpose and is the only means available to achieve that purpose. Id. If the legislation has only an "incidental" effect

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14/ The next significant decision in this area will probably be the ruling of the Ninth Circuit in the Pacific Legal Foundation case. We anticipate that decision some time in the second half of 1980.

on interstate commerce and is not discriminatory, however, it will be found not to violate the Clause.

We think in the present case that a challenge to the proposed legislation would not survive this first hurdle. First, the Act certainly does overtly discriminate against electricity moving out of state on its face, nor can it be said to do so in practical effect. Its purpose is simply to stop the generation of electricity by means of nuclear fission, regardless of where that electricity might ultimately be sent. Second, we think it improbable that a court would find that the Act had anything other than an incidental effect on interstate commerce. While the Supreme Court has not given much guidance as to when, absent overt or covert discrimination against out-of-state commerce, it will find an effect on commerce to be incidental or substantial, we note that the issue tends to arise most frequently in the context of challenges to state legislation which is aimed directly at the instrumentalities of commerce themselves: See, e.g., Raymond Motor Transportation, Inc. v. Rice, supra (state truck regulation invalidated); Huron Portland Cement Co. v. Detroit, supra (local air pollution regulation sustained as to its effect on ships); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state truck regulation invalidated) Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (state train regulation invalidated); South Carolina Highway Dept. v. Barnwell, 303 U.S. 177 (1938) (state automobile regulation sustained). Since the legislation at issue here is not directly concerned with such instrumentalities (for example, electrical power lines), we think it would not be threatened by these cases. Thus, whatever other clauses of the Constitution may cause problems for the proposed legislation, we think it unlikely that the Commerce Clause would be one of them.

III. The Contract Clause.

The Contract Clause of the Constitution provides:

> "No state shall...pass any...Law impairing the Obligation of Contracts,...." Article I, Section 10, clause 1.

This clause was originally included in the Constitution primarily for the purpose of protecting the general remedial rights of creditors against state legislative attack, See TRIBE, AMERICAN

CONSTITUTIONAL LAW 466 (1978); CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 413 (1973), and has been applied by the United States Supreme Court several times in this context in this century, W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935); Treigle v. Acme Homestead Ass'n. 297 U.S. 189 (1936). Its earliest application, however, occurred in the area of public contracts, the Supreme Court holding, in two famous cases, that the clause prevented a state from modifying by statute a contract to which it was a party itself, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), and the clause has retained its vitality in this particular area. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). But with regard to contracts between private parties, the clause has received limited application. The leading modern case in this regard is Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), in which the Supreme Court held that when a state passes legislation in pursuance of its power to protect the general welfare of its citizens, such legislation will not be held invalid merely because it affects certain contracts into which some of those citizens may have entered among themselves. The only recent instance of the use of the clause by the Supreme Court to invalidate legislation because of its effect on private contracts is Allied Structure Steel Co. v. Spannaus, 438 U.S. 234 (1978). There the Court indicated that in analyzing questions of this kind, it would limit its inquiry as to whether the statute in question did in fact serve some general social need, and whether the specific approach employed was tailored to that need. Id. at 242, 250. Applying these principles to the statute in question, the Court found that the Act neither was general in scope, nor was framed to interfere with private contracts to the minimum extent and thus found it invalid.

In the present case, it might be suggested that the proposed legislation might violate the Contract Clause in that it would require the closure of the Maine Yankee facility and thus cause the operators of that facility to breach whatever contracts they may have with suppliers of material, labor and capital or receivers of electric power. It will be seen at once that this situation does not fall within one of the two main areas of Contract Clause concern: it does not involve an attempt to regulate directly the general rights of creditors, nor does it involve a public contract. The only possibility of its invalidation, therefore, would seem to be if it failed to meet the tests set forth in the Allied Structural

Steel case. In this regard, it seems clear, first of all, that the statute, if passed, would represent a legislative judgment that the generation of electricity by means of nuclear fission was injurious to the public health, safety, and welfare, and would therefore be addressed to the kind of broad social concern found wanting by the Court in Allied Structural Steel. The only question, therefore, would appear to be whether the Court would find the Act's rather blunt approach to the problem unnecessarily insensitive to existing contract rights. We would not think that the Court would be much troubled with regard to whatever contracts Maine Yankee might have with suppliers of materials and labor or recipients of electricity. These contracts are undoubtedly of relatively short duration and could probably be terminated without the incurring of substantial damages by the company. More serious might be the effect on the company's ability to repay to bondholders. Without knowing the extent of the company's obligations, it would be difficult to answer this question with finality. Nonetheless, because the proposed legislation does not attack these contracts directly, and because we have assumed the Court would not presume to disturb a legislative finding that the production of electricity by nuclear fission was harmful to the public, we are inclined to think that the Court would not prevent the closure of the facility out of consideration for its bondholders, whose obligations against the company would remain valid in any event. Thus, we do not think that a court would invalidate the proposed act on the ground of the Contract Clause. If anything, the prevention of the continuing operation of Maine Yankee, if undertaken without compensation, would present problems under the Fifth and Fourteenth Amendments, a subject dealt with in Part IV of this opinion.

IV. Taking Without Compensation Clause.

The Fifth Amendment to the Constitution provides:

> "...nor shall private property be taken for public use, without just compensation."

This clause has been made applicable to the states by the Fourteenth Amendment. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 236 (1897). In applying this clause, the Supreme Court has had the greatest of difficulty in determining what constitutes a "taking", to the point where, in its most recent decision involving the clause, it has openly admitted its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central Transportation Co.

v. New York City, 438 U.S. 104, 124 (1978). See also Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967). To determine whether the proposed legislation would constitute a "taking", therefore, requires an analysis of the facts which would result from its passage, and a search for analogous cases from among those decided by the Supreme Court or other courts.

The principal consequence of the passage of the proposed act as to existing private property would be the prohibition of the operation of the only existing nuclear fission facility in the state. Such a prohibition would render worthless, or nearly worthless,15/ the building and equipment which has been constructed in Wiscasset by the Maine Yankee consortium. Thus, the constitutional question presented is whether this legislative act, validly enacted pursuant to the governmental power to protect the public's health, safety and welfare, which does not actually seize for the government's use tangible property, but which prohibits the use of such property such as to render it valueless, is a taking.

The Supreme Court appears to have experienced several shifts of philosophy in resolving questions of this kind. During the end of the last century and the early years of this one, when government regulation of business was in its infancy, the Court was generally disposed toward sustaining legislation which regulated or even prohibited existing businesses such as to render their assets valueless. Mugler v. Kansas, 123 U.S. 623 (1887) (liquor); Reinman v. Little Rock, 237 U.S. 171 (1915) (livery stable); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard); Walls v. Midland Carbon Co., 254 U.S. 300 (1920) (carbon black manufacturing). This trend began to wane shortly thereafter as the Court began to employ the taking clause to invalidate regulatory legislation, the most notable case of this period being Justice Holmes's famous opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulation of coal mining). In recent years, however, the Court has been more reluctant to wield the clause against such legislation. Thus, in Goldblatt v. Hempstead, 369 U.S. 590 (1962), it upheld a local prohibition on excavating below the water table even when the prohibition had the effect of putting an existing sand and gravel operation out of business.

In view of these shifting attitudes, therefore, it is difficult to predict with certainty how the Court would react to the question

15/ There might be some possibility of converting a nuclear fission facility into some other type of electric power generation. For purposes of this opinion, however, we will assume such conversion is not possible and that the legislation would reduce the value of the existing facility to the resale value of its components.

of whether the closure of a nuclear power plant would constitute a taking without compensation. In view of the Court's recent reluctance to use the taking clause in this way, see e.g., Penn Central Transportation Co. v. New York City, supra and Goldblatt v. Hempstead, supra, it might well be that such legislation might survive Fifth Amendment scrutiny notwithstanding the substantial injury sustained by the owners of the facility. In view of this, therefore, we would be reluctant to conclude that the legislative closure of such a facility would constitute a taking without compensation, recognizing at the same time that the question is an uncertain one whose resolution would depend very much on the specific factual effects of the legislation as well as prevailing judicial attitudes at the time of decision.

I hope this answers your questions. Please feel free to reinquire if you should desire further clarification.

Sincerely,

Richard S. Cohen

RICHARD S. COHEN
Attorney General

RSC/d