RESPONSE

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With his characteristic comprehensiveness, Dr. Relyea has essentially reponded to his own paper, leaving me with rather little to say. What I will do, then, is pick up the themes that he set before you and give you a concrete example of where we are heading with regard to this issue based upon a proposal that, in all likelihood, will be before the United States Senate next week.

The problems in the area of nuclear power information control seem to be complicated by circumstances surrounding the origin of nuclear power information and the intentions of policy-makers planning the development of nuclear power. As Dr. Relyea said, we learned of nuclear power from the development of the most destructive weapon ever. And yet, since 1954, we have facilitated the development of commercial domestic uses for nuclear power to keep pace with the further development of nuclear weapons.

In the context of several revisions in government policy dealing with national security information generally, policy-makers have also dealt with revisions in their view of atomic power. This has led to certain problems in deciding how much information should be released to the public. The government began this process with a virtual monopoly on all nuclear power information. From that monopoly they moved toward significant disclosure of information which, according to Dr. Relyea's paper, was greeted with some surprise by public power advocates who considered it a twelve billion dollar give-away of a government investment in nuclear power research. From that point of expanding the public's knowledge of nuclear power, we are now headed towards further secrecy. In essence, we are going backwards. As Dr. Relyea mentioned, this regression focuses on the subject of safeguards information. Safeguards information is information concerning the potential for theft, diversion, or sabotage of nuclear materials or nuclear facilities.

In 1979 the Nuclear Regulatory Commission decided that it needed specific legislation authorizing it to protect information relating to the security measures taken by commercial nuclear licensees. This concern arose largely from a report published by the Nuclear Regulatory Commission called *Barrier Penetration Data Base.* This report was characterized in the press as being basically a guide to breaking into a nuclear plant.

How the press reached this conclusion is an interesting story. When I first saw the news accounts of the report, I contacted the reporter who wrote the story for the *Washington Post* to find out where the story had come from; had the documents been disclosed under the Freedom of Information Act, or had he come across the story while pursuing his beat on nuclear power and other energy policies? It turns out that the *Barrier Penetration*

Data Base report got such play because of a press release issued by a public relations firm in New York, Burton Marsteller. The press release was issued on behalf of their client, which currently has security responsibilities for twenty-six commercial nuclear licensees. Their press release ran something like this:

> This report is publicly available to anyone and everyone who could make whatever conceivable evil use one might imagine of it. Therefore we would like to have you talk to our security expert, a former consultant to the Nuclear Regulatory Commission's Safeguards Division, who can inform you about the best ways to secure the grounds, facilities and the materials at your plant.

That was how the *Barrier Penetration Data Base* report created the Nuclear Regulatory Commission's concern that it lacked proper authority to protect this kind of information.

Well, they ran into a problem. The issue came up whether they could classify security information relating to commercial nuclear plants under existing authority, or whether they needed additional authority to protect that kind of information. There was an exchange of correspondence between Zbigniew Brzezinski, who at that time was National Security Advisor, and Senator John Glenn about whether or not this kind of information could be classified as national security information. One problem facing such classification was meeting the minimal standard required: could unauthorized disclosure of such information reasonably be expected to result in at least identifiable damage to national security? Joseph Hendrie, who was then the Chairman of the Nuclear Regulatory Commission, examined this question, he had his doubts about answering it affirmatively. After all, while this information deals with security measures, it deals with security measures in the private sector, measures taken by commercial enterprises. Hendrie felt that "the legislative approach, which establishes an explicit statutory basis for invoking exemption (b)(3) of the Freedom of Information Act to protect such information, is better than an extension of national security coverage to these commercial activities."

As a result of this position there was a proposal in the Nuclear Regulatory Commission Authorization Bill of 1979 to give the Commission specific authority to prohibit unauthorized disclosure of safeguards information that specifically identifies a licensee's or applicant's detailed security measures for the physical protection of nuclear materials and facilities. To protect information under this provision, one has to show that its unauthorized disclosure could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or facilities. The language I just used to state the test was not the original language of the proposal. The original language

was much worse; it was much broader, and the standard had a much lower threshold of proof.

The interesting thing about the passage of this provision is that it was included in the Nuclear Regulatory Commission's authorization bill, a bill that is only supposed to deal with funding. It is the authorization for the fiscal year appropriations for the Commission. Traditionally, these bills are regarded as not being proper vehicles for substantive amendments to the law. They are supposed to only deal with fiscal responsibilities, the expenditure of money. But this is a tradition that is honored much more in the breach than in the observance.

When the Department of Energy was asked to comment on this proposed authority for the Nuclear Regulatory Commission, they were rather upset, for two reasons. One, they were not included. The amendment to the Atomic Energy Act was specifically going to apply to the Nuclear Regulatory Commission's authority to protect safeguards information. The other reason they were upset was that they believed that since the Nuclear Regulatory Commission is an independent regulatory agency, rather than an executive branch agency directly under the authority of the President, it should not set policy for withholding information from public disclosure. That was the prerogative of the executive branch of government.

Nevertheless, when the Atomic Energy Commission had been re-established in two forms, as the Nuclear Regulatory Commission and the Energy Research and Development Administration (ERDA), the responsibility to protect sensitive information was ambiguously divided between those agencies. The Department of Energy, the present incarnation of ERDA, ultimately said that it could accept the amendment if DOE was included in it. Thus, DOE wanted the provision to apply to the NRC with respect to its licensees or applicants and to DOE with respect to its licensees or applicants. This argument was rejected by Congress ultimately, but the interesting thing about it was that at the same time DOE was trying to distinguish between its own responsibilities and the responsibilities of the Nuclear Regulatory Commission, it was essentially saying that they should both have the same authority in this area.

This year, DOE has come back and asked for the same authority, again ignoring the important differences between its responsibilities and the responsibilities of the Nuclear Regulatory Commission. The Commission, as I said, deals with regulation of commercial enterprise. DOE, on the other hand, has responsibility for producing the special nuclear material that provides the warheads for our nuclear weapons systems. As a result, DOE receives a separate budget authorization for its national security programs. In this year's Senate bill the authorization is proposed to be something over five billion dollars. In that authorization bill, the Senate Armed Services Committee included a provision, which would amend the Atomic Energy Act for DOE in the same way that the provision just discussed had amended it for the NRC two years ago. Or at least that was their contention.

In fact, the two provisions are very different. The report of the Senate Armed Services Committee characterizes the authority sought by DOE as essentially the same as that of the provision providing that similar information is protected under the NRC's authority. However, DOE classifies a tremendous amount of information related to its atomic energy-defense programs. These are the programs that involve production of nuclear weapons materials.

This is the language from the provision of that bill, to give you an idea why I think we can say safely that we are headed towards a period of increased secrecy in this area. What DOE wants is authority to prohibit the dissemination of unclassified information generated by the government or under government auspices pertaining to the following categories of information: the safeguarding of nuclear material, equipment and facilities; the production of special nuclear materials; and the design, manufacture, or utilization of nuclear weapons or components. Now, you might say that this sounds very much like the kind of information that qualifies as restricted data under the Atomic Energy Act or that is classified as national security information under the executive order. And you would be right on both counts.

DOE wants the authority, though, for at least two reasons. They do not want to have to meet the standard of the executive order to demonstrate that disclosure would cause at least identifiable damage to national security. Also, they do not believe that the ambiguous authority of the restricted data provision, which was tested in a somewhat aborted fashion in the *Progressive* case, actually will be held to be as sweepingly broad as its literal language.

So they have asked for more. They have asked for the authority to prohibit dissemination of all of the unclassified information of those categories to the extent that unauthorized dissemination could reasonably be expected to result in significant adverse effect on the health and safety of the public or the common defense and security by facilitating theft, diversion, or sabotage of nuclear materials. One might say that this standard parallels exactly the authority the NRC obtained two years ago. This is true. But DOE has added a new wrinkle. They want to protect this information if unauthorized disclosure would have that same significant adverse effect on the health and safety of the public or the common defense by "facilitating the fabrication of a threat."

Now, when I talked to the Senate Armed Services Committee's staff people who wrote this provision ostensibly in order to meet the concerns of the Department of Energy, I asked them if they could identify any information, the disclosure of which would not facilitate the fabrication of a threat. For example, if you give me the address of the Pantex plant in Texas, where atomic weapons are produced, then you have facilitated my ability to fabricate a threat against the plant. Or if a newspaper report says, as it did two years ago about the Erwin plant in Tennessee, that twenty pounds of special

nuclear material were unaccounted for, then someone could claim to account for that twenty pounds of nuclear materials and fabricate a threat. So basically this provision would throw a cloak of secrecy over any information that DOE possesses related to its atomic energy defense programs which it could not classify under the President's own standards of the executive order or that it believes would not be covered under the restricted data provisions of the Atomic Energy Act. When you put all three of these authorities together, there is very little left that can be disclosed.

Again, this was done in the context of an authorization bill, a bill which traditionally is not supposed to amend substantive law, but is only supposed to deal with the expenditure of money. There are reasons why it was done in that fashion. For one thing, very few people read authorization bills, as a general practice. For another, sensitive provisions may escape Congressional scrutiny; there were no hearings held on this provision, other than a single page of testimony which consisted of approximately three paragraphs of explanation by a DOE official in a classified hearing before the Senate Armed Services Committee, the transcript of which was declassified only last week.

Fortunately, during that time we have managed to communicate to a number of Senators that the provision exists and to explain what we believe it would accomplish. The bill is currently being reworked to try to soften the impact of this language. But I do not believe the Department of Energy will stop trying. If they do not get it in this one, they will try to get it later on. The direction in which they are moving is toward more secrecy, and I think that this will probably continue unimpeded. The trend is toward allowing less rather than more public disclosure that would feed the debate on commercial and military nuclear power.