

# INFORMATION, SECRECY, AND ATOMIC ENERGY

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## I

### INTRODUCTION

In many regards, it had been the greatest war in world history, and now it was coming to an end. Hostilities in Europe ceased officially in early May. Bitter conflict continued in the Pacific, however, as the Allied forces closed in on the islands of Japan. Then, unexpectedly, the United States delivered a death blow of unprecedented magnitude; it dropped two atomic bombs, one on the Japanese city of Hiroshima, the other on Nagasaki. Some would say that this final act of devastation was necessary; that it would save the lives of those who otherwise would be required to conquer an unremitting enemy through more conventional warfare. Others would suggest that a desire to demonstrate American destructive supremacy had prompted resort to the new weapon.

It was August 6, 1945. A statement from President Truman, en route from the Potsdam Conference, disclosed to the American people that an atomic bomb had been perfected and used for the first time. At that time few could appreciate either the enterprise or the resources which had gone into this weapon or the destructive force that it had unleashed. Perhaps even fewer could comprehend the ramifications of the President's concluding comments.

It has never been the habit of the scientists of this country or the policy of this Government to withhold from the world scientific knowledge. Normally, therefore, everything about the work with atomic energy would be made public.

But under present circumstances it is not intended to divulge the technical processes of production or all the military applications, pending further examination of possible methods of protecting us and the rest of the world from the danger of sudden destruction.

I shall recommend that the Congress of the United States consider promptly the establishment of an appropriate commission to control the production and use of atomic power within the United States. I shall give further consideration and make further recommendations to the Congress as to how atomic power can

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become a powerful and forceful influence toward the maintenance of world peace.<sup>1</sup>

Today, these paragraphs from the President's announcement suggest various points worthy of study. This article is concerned primarily with his first area of consideration—the availability of information concerning atomic power. It focuses on the evolution of atomic energy information regulation in the United States and the implications of this regulation for the American democratic polity as well as for the rights and liberties of the American people.

## II

### ATOMIC SECRECY

#### A. Origins

Atomic secrecy began during World War II as the United States government fostered the development of nuclear weapons.<sup>2</sup> Apprised in October, 1939, of atomic power capabilities and the likelihood of military applications,<sup>3</sup> Franklin Roosevelt directed his science adviser, Dr. Vannevar Bush, to begin planning the development and production of an atomic bomb.<sup>4</sup> Bush subsequently recommended that the Army assume responsibility for design and construction of the weapon. The President agreed and ordered the creation of a special unit within the Army Corps of Engineers which would later be known as the Manhattan Project.<sup>5</sup> Two characteristics distinguished the Manhattan Project's operations from those of other Engineer Divisions: (1) they were not confined to a single geographic locale, and (2) they were clothed in official secrecy. General Leslie R. Groves was the principal supervisor of the Manhattan Project almost from its inception in August, 1942, until 1946 when its operations were assumed by the Atomic Energy Commission.<sup>6</sup>

1. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1945, 197-200 (1961).

2. Official secrecy has a long history in American national government. For a discussion of this history, see *Security Classification Reform: Hearings on H.R. 12004 Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 93rd Cong., 2d Sess. 505-97 (1974) (paper by Dr. Harold Relyea, *The Evolution of Government Information Security Classification Policy: A Brief Overview (1775-1973)*). Dr. Relyea's paper also appears at *Government Secrecy: Hearings on S. 1520, S. 1726, S. 2451, S. 2738, S. 3393, S. 3399, Before the Subcomm. on Intergovernmental Operations of the Senate Comm. on Government Operations*, 93rd Cong., 2d Sess. 842-84 (1974).

3. See 1 R. HEWLETT & O. ANDERSON, JR., *A HISTORY OF THE UNITED STATES ATOMIC ENERGY COMMISSION: THE NEW WORLD, 1939/1946* 17 (1962).

4. *Id.* at 45-46.

5. *Id.* at 71-75.

6. For an overview of the development and operation of the Manhattan Project see HEWLETT & ANDERSON, *supra* note 3 at 71-407, 620-55; L. GROVES, *NOW IT CAN BE TOLD:*

Security arrangements for the Manhattan Project were initially handled by the Army counterintelligence command and the Federal Bureau of Investigation. Soon, however, the Project's own complete security staff, which consisted of 485 individuals by the end of the war, assumed this responsibility. Liaison and cooperation with the F.B.I. apparently continued, though, throughout the entire course of the Manhattan Project.<sup>7</sup>

These authorities used various procedures to maintain the security of the Project. Foremost among the procedures, in the view of General Groves, was the compartmentalization of knowledge: ". . . each man should know everything he needed to know to do his job and nothing else."<sup>8</sup> In addition, code names and words were used to mask sensitive or secret matters; both official and personal correspondence was monitored; "loose-talk" cases were investigated and a vigorous security education program was maintained. In addition, public relations efforts were made to obtain the cooperation of the press and of communities adjacent to Project plant sites and a censorship/review program was established to limit media reports on the existence of the Manhattan Project, on its activities and personnel, and on atomic theory, equipment, and materials in general. The censorship/review program was conducted in cooperation with the Office of Censorship. By the spring of 1944 it covered 370 newspapers and 70 magazines.<sup>9</sup>

As a further security measure, personnel having access to official secrets of the Project were subjected to a background investigation to establish their loyalty, integrity, and discretion. Approved individuals were informed of the penalties for improper disclosure of classified information and were "required to read and sign either the Espionage Act or a special secrecy agreement."<sup>10</sup> Business firms also underwent security investigations. These generally resulted in approval if a perusal of Army intelligence files, a Dun and Bradstreet credit report, and various agency checks of key personnel produced no adverse findings. By August, 1945, some 400,000 Manhattan Project employees reportedly had been investigated and approximately 600 companies involved in the Project had been cleared.<sup>11</sup>

In spite of all the precautions, the Manhattan Project security staff investigated "over 1,500 cases in which classified project information was

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THE STORY OF THE MANHATTAN PROJECT (1962); THE SECRET HISTORY OF THE ATOMIC BOMB (A. Brown, C. MacDonald, eds. 1977) [hereinafter cited as SECRET HISTORY].

7. Groves, *supra* note 6, at 138-39.

8. *Id.* at 140.

9. SECRET HISTORY, *supra* note 6, at 204. For material on the Office of Censorship, see generally Childs, *Public Information and Opinion*, 37 AM. POL. SCI. REV. 56-68 (1943); *The Office of War Information*, 7 PUB. OPINION Q. 1 (1943); E. DAVIS & B. PRICE, *WAR INFORMATION AND CENSORSHIP* (1943); Price, *Governmental Censorship in Wartime*, 36 AM. POL. SCI. REV. 837-50 (1942).

10. SECRET HISTORY, *supra* note 6, at 201.

11. *Id.*

transmitted to unauthorized persons, approximately 100 suspected espionage cases, and approximately 200 suspected sabotage cases."<sup>12</sup>

### B. Atomic Secrecy Law

When Franklin Roosevelt died in April, 1945, his successor was informed of the efforts of the Manhattan Project and of the existence of the atomic bomb.<sup>13</sup> The following month, Secretary of War Stimson, with President Truman's approval, created a special advisory committee to counsel the Chief Executive on the use of this weapon and to recommend legislation regulating the new energy discovery.<sup>14</sup> The legislative proposal that emerged from the War Department encountered criticism from inside and outside the government.<sup>15</sup> The opponents of the War Department proposal soon found a forum for airing their views when the Senate created a special committee to study atomic power and to consider all related bills and resolutions.<sup>16</sup> After six weeks of intensive debate, this Special Committee on Atomic Energy reported its own bill to the Senate in mid-April of 1946.<sup>17</sup> On August 1 of the same year President Truman signed a revised version of the Committee's bill into law.<sup>18</sup>

In general, the Atomic Energy Act of 1946<sup>19</sup> gave the federal government an absolute monopoly over all aspects of atomic energy research, development, and production.<sup>20</sup> To protect information related to atomic energy, the statute established three major safeguards. First, the Act obli-

12. *Id.*

13. Miller, *A Law is Passed—The Atomic Energy Act of 1946*, 15 U. CHI. L. REV. 799, 802 (1948). Although Truman served as chairman of the Senate Special Committee to Investigate the National Defense Program, and at one point granted the personal request of Secretary of War Stimson to cancel investigations of certain facilities which were part of the Manhattan Project, he learned nothing about the mission of these highly protected installations until after he assumed the presidency. See 1 HARRY S. TRUMAN, MEMOIRS: YEARS OF DECISIONS 10-11 (1955). For material on the activities of the Senate Special Committee see D. RIDDLE, THE TRUMAN COMMITTEE: A STUDY IN CONGRESSIONAL RESPONSIBILITY (1964).

14. Miller, *supra* note 13, at 802. Even the mission of the panel fell under a cloak of secrecy.

15. Many scientists felt betrayed by those who had assured them the bill would promote progress in the development of nuclear power, dismayed by its vague and sweeping provisions, and frightened by its security penalties. HEWLETT & ANDERSON, *supra* note 3, at 431-32. Inside government, the scientists had several allies, most notably James Newman, the assistant to the director of the Office of War Mobilization and Reconversion, and Harold Smith, Director of the Bureau of the Budget. *Id.* at 436-39; Miller, *supra* note 13, at 806.

16. See HEWLETT & ANDERSON, *supra* note 3, at 429, 435-36.

17. For a discussion of the immediate legislative developments leading to the Atomic Energy Act of 1946, see *id.*, at 438-530.

18. The Atomic Energy Act of 1946, Pub. L. No. 585, 60 Stat. 755 (codified as amended at 42 U.S.C. §§ 2011-2296 (1976 & Supp. III 1979)).

19. *Id.* For a detailed discussion of the statute see J. NEWMAN & B. MILLER, THE CONTROL OF ATOMIC ENERGY (1948).

20. § 1(b)(4), 60 Stat. 755, 756 (current version at 42 U.S.C. § 2013(c) (1975)); see *id.* § 3(a), 60 Stat. 755, 758 (current version at 42 U.S.C. §§ 2051-2053 (1976)); § 4(c), 60 Stat. 755, 759 (current version at 42 U.S.C. § 2061 (1976)); § 5(a)(2), 60 Stat. 755, 760 (repealed 1964).

gated the Atomic Energy Commission "to control the dissemination of Restricted Data" in such a manner as to assure "the common defense and security."<sup>21</sup> The Act defined "Restricted Data" as "all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power."<sup>22</sup> It allowed disclosure of "any data which the Commission from time to time determines may be published without adversely affecting the common defense and security."<sup>23</sup> The statute further prohibited the acquisition, disclosure or destruction of such secret information under certain circumstances and authorized severe punishment including life imprisonment and death for violations.<sup>24</sup>

In operation, these provisions made all atomic weapon and atomic energy information "born classified."<sup>25</sup> No special governmental effort was necessary to bring the information under the statute's umbrella of secrecy.<sup>26</sup> Only affirmative governmental action could divest information of its Restricted Data status.<sup>27</sup> By contrast, the opposite presumption has applied to other security-related information which becomes classified only by exercise of executive authority.<sup>28</sup>

The second safeguard established by the 1946 Act required Commission employees, including those who had worked for the Manhattan Project, to undergo an F.B.I. investigation regarding their "character, association, and loyalty."<sup>29</sup> Individuals having access to Restricted Data as a consequence of a Commission research arrangement, contract, or license were also required to undergo an investigation.<sup>30</sup>

The final information protection provision of the 1946 Act dealt with patents. The Act prohibited the issuance of patents for "any invention or discovery which is useful solely in the production of fissionable material or in the utilization of fissionable material or atomic energy for a military weapon."<sup>31</sup> By using the patent mechanism to discourage the private development of atomic energy, the Act prevented the diffusion of atomic energy information. To further advance this goal the Act also required

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21. *Id.* § 10(a), 60 Stat. 755, 766 (current version at 42 U.S.C. § 2163 (1976)).

22. *Id.* § 10(b)(1), 60 Stat. 755, 766 (current version at 42 U.S.C. 2014(y) (1976)).

23. *Id.*

24. *Id.* § 10(b)(2)-(4), 60 Stat. 755, 766-67.

25. THE GOVERNMENT'S CLASSIFICATION OF PRIVATE IDEAS, H.R. REP. NO. 1540, 96th Cong., 2d Sess. 173-87 (1980) (paper of Richard G. Hewlett, The "Born Classified" Concept in the U.S. Atomic Energy Commission) [hereinafter cited as GOVERNMENT'S CLASSIFICATION].

26. *See id.*

27. *See supra* text accompanying note 23.

28. *See* Exec. Order No. 12,065, 3 C.F.R. 190 (1979).

29. Atomic Energy Act of 1946, Pub. L. No. 585, § 10(b)(5)(B)(ii), 60 Stat. 755, 767 (current version at 42 U.S.C. § 2165(b) (1976)).

30. *Id.* § 10(b)(5)(B)(i), 60 Stat. 755, 767 (current version at 42 U.S.C. § 2165(a) (1976)).

31. *Id.* § 11(a)(1), 60 Stat. 755, 768.

inventors not making patent applications to file a report with the Atomic Energy Commission describing discoveries involving fissionable material.<sup>32</sup>

The information security and secrecy provisions of the Atomic Energy Act remained largely unaltered until the statute was revised substantially in 1954.<sup>33</sup> Two forces produced this reform: first, demands by private industry for access to nuclear technology, particularly in the area of reactor development;<sup>34</sup> and second, changes in foreign policy under the Eisenhower administration.<sup>35</sup> Eisenhower's proposal for modifying the 1946 Act served as a model for the new statute.<sup>36</sup>

The Atomic Energy Act of 1954 ended the government's monopoly over the production and development of atomic energy by authorizing the controlled involvement of private industry in all non-military technologies involving this resource.<sup>37</sup> In addition, the 1954 Act relaxed patent restrictions<sup>38</sup> and made qualified allowance for official exchanges of atomic energy information with other nations.<sup>39</sup>

In the area of information control, the new statute redefined Restricted Data to include "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material [plutonium, certain enriched uranium, and other materials so designated by the Commission]; or (3) the use of special nuclear material in the production of energy."<sup>40</sup> It excluded from this definition information declassified or otherwise removed from the Restricted Data category by the Commission pursuant to authority specified elsewhere in the Act.<sup>41</sup>

A new section on classification and declassification policy ordered the Atomic Energy Commission to remove from the Restricted Data category

32. *Id.* § 11(a)(3), 60 Stat. 755, 768.

33. The 1946 Act was amended by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011, 2296 (1976 & Supp. III 1979)).

34. See Reubhausen & von Mehren, *The Atomic Energy Act and the Private Production of Atomic Power*, 66 HARV. L. REV. 1450, 1450-70 (1953).

35. In 1953, President Eisenhower proposed to the United Nations General Assembly the creation of an international atomic energy "pool" for peaceful purposes. Later, his administration sought to deploy nuclear weapons in Europe where, although remaining under American control, they would have to be shared with NATO allies. Eisenhower also wanted to share information and research materials with other uranium-producing countries, such as Belgium. All of these actions, however, were precluded by the 1946 Act. CONGRESSIONAL QUARTERLY INC., 1 CONGRESS AND THE NATION 281 (1965).

36. See PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1954, 38 (1960).

37. Ch. 1073, §§ 101-109, 68 Stat. 919, 936-39 (codified as amended at 42 U.S.C. §§ 2131-2139 (1976)).

38. *Id.* §§ 151-153, 68 Stat. 919, 944-45 (codified as amended at 42 U.S.C. §§ 2181-2183 (1976)).

39. *Id.* §§ 123-124, 68 Stat. 919, 940 (codified as amended at 42 U.S.C. §§ 2153-2154 (1976 & Supp. III 1979)).

40. *Id.* § 11(f), 68 Stat. 919, 924 (codified as amended at 42 U.S.C. § 2014(y) (1976)).

41. *Id.*

information relating "primarily to the military utilization of atomic weapons" which the Commission and the Department of Defense jointly determined could be adequately safeguarded by a "defense information" classification.<sup>42</sup> If these two bodies jointly determined that atomic weaponry information could be published "without constituting an unreasonable risk to the common defense and security,"<sup>43</sup> the Commission could declassify it completely.<sup>44</sup> The statute also required the Commission to remove from the Restricted Data category information concerning the atomic energy programs of other nations if the Commission and the Director of Central Intelligence jointly determined that the information could be adequately safeguarded as defense information.<sup>45</sup> These provisions, along with another section granting Department of Defense employees and contractors access to Restricted Data,<sup>46</sup> made sensitive atomic energy information available to a wider group of people.

The 1954 Act continued the personnel security practices of the 1946 Act. It required any persons having access to Restricted Data, whether by government employment or by contract, license, or other arrangement with the Atomic Energy Commission, to undergo a Civil Service Commission investigation regarding their character, associations, and loyalty.<sup>47</sup> If such an investigation unearthed data indicating the person in question was "of questionable loyalty" the Act mandated that the Civil Service Commission refer the matter to the FBI for a "full-field investigation."<sup>48</sup> With a view to the involvement of private industry in atomic energy development, the Act empowered the Atomic Energy Commission to establish written standards and specifications regarding the scope and extent of Civil Service Commission security investigations.<sup>49</sup> These regulations were to be "based on the location and class or kind of work to be done," and were to "take into account the degree of importance to the common defense and security of the Restricted Data to which access will be permitted."<sup>50</sup>

In sum, the Atomic Energy Act of 1954 did not significantly change the information control provisions of the 1946 Act. It did, however, broaden

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42. *Id.* § 142(d), 68 Stat. 919, 941 (codified as amended at 42 U.S.C. § 2162(d) (1976)).

43. *Id.* § 142(c), 68 Stat. 919, 941 (codified as amended at 42 U.S.C. § 2162(c) (1976)). If the Commission and the Department of Defense could not agree on the status of a piece of information, the President was to make the determination. *Id.*

44. *Id.* §§ 142(a), (c), 68 Stat. 919, 941 (codified as amended at 42 U.S.C. §§ 2162(a), (c) (1976)).

45. *Id.* § 142(e), 68 Stat. 919, 941 (codified as amended at 42 U.S.C. § 2162(e) (1976)).

46. *Id.* § 143, 68 Stat. 919, 941 (codified as amended at 42 U.S.C. § 2163 (1976)). Section 143 permitted the Commission to authorize access to these people only if the performance of their duties required knowledge of Restricted Data and if they passed security clearances. *Id.*

47. *Id.* § 145(b), 68 Stat. 919, 942 (codified as amended at 42 U.S.C. § 2165(b) (1976)).

48. *Id.* § 145(c), 68 Stat. 919, 943 (codified as amended at 42 U.S.C. § 2165(d) (1976)).

49. *Id.* § 145(f), 68 Stat. 919, 943 (codified as amended at 42 U.S.C. § 2165(g) (1976)).

50. *Id.*

the class of persons who might have access to Restricted Data. Consequently, "security investigation and clearance, which previously had been confined to government employees and to persons engaged in activities under Government contract, . . . [was] extended to a substantial and rapidly growing sector of the private economy which . . . [had] no direct relationship to the national defense effort."<sup>51</sup> As industries embarked upon atomic energy enterprises and entered the protected world of Restricted Data, the pall of security requirements spread over their factories, their operations, and, perhaps most importantly, their employees.<sup>52</sup> The information control provisions of the 1954 Act have changed little since the Act's enactment.<sup>53</sup> Certain federal regulations, however, have permitted even wider access to Restricted Data and thus have broadened the security umbrella to cover new groups.<sup>54</sup> These regulations establish an access permit program under which any person demonstrating a potential trade, business, or professional use for restricted information may apply for a permit allowing temporary access to restricted information.<sup>55</sup> Before receiving a permit, however, the individual must undergo a security investigation.<sup>56</sup>

While these regulations have made protected information more widely available, recent federal legislation has brought additional information into

51. Green, *Atomic Energy Information Control*, 38 CHI. B. REC. 55, 59 (1956).

52. With regard to the impact of security requirements on workers in the private atomic energy industry, one commentator asked:

May such an individual be deprived of what in many respects is equivalent to a license to work in the atomic energy field because Government officials project such factors in his past as his parents', wife's, or friends' political views or associations, or his drinking or sexual habits, or other standard security clearance criteria, into a conclusion that he may be unreliable or untrustworthy in protecting national secrets? May the Government follow in such cases the time-honored practice of resolving doubtful questions in favor of the interests of national security and against the individuals?

*Id.*

53. Congress has passed other legislation, however, which indirectly affects atomic energy information control. *See, e.g.*, Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (Supp. III 1979); Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (Supp. III 1979); Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. IV 1980).

54. 10 C.F.R. §§ 725.1-725.31 (1981).

55. *Id.* The access permit program was devised by the Atomic Energy Commission soon after the enactment of the 1954 Act. *See Green, The Atomic Energy Information Access Permit Program*, 25 GEO. WASH. L. REV. 548, 553 (1957). The program soon received criticism for contributing to substantial inequities in access to secret atomic energy technology:

[A]dditional advantages will continue to accrue in the future to those firms which participate under contract in the various programs conducted by the AEC. They will receive access to Restricted Data as an incident of their work for the AEC, for which, of course, they are compensated, and some of this information may be of the type which will not be available to other firms under access permits.

*Id.*

56. Atomic Energy Act of 1954, 42 U.S.C. § 2165(b) (1976).



the protected category.<sup>57</sup> This legislation requires the Nuclear Regulatory Commission, successor to the Atomic Energy Commission, to prohibit the disclosure of a new type of atomic energy information: "safeguards information" pertaining to licensees' security plans, procedures, and equipment for the physical protection of nuclear fuels and facilities.<sup>58</sup>

### III

#### RIGHTS AND LIBERTIES

Shortly after passage of the Atomic Energy Act of 1946, James Newman, an architect of the Act, wrote with anguish about the growing national safety concerns which had prompted the information restrictions in the new statute.<sup>59</sup> These restrictions, he said, represented "a radical abridgement of freedom of communication among scientists," and "may be held to require the abridgement of other freedom as well."<sup>60</sup> Newman urged that "all measures which purport to serve security purposes at the expense of individual liberty" be scrutinized and that only those "essential and well-designed to serve their intended purpose" be accepted as policy.<sup>61</sup> Although he recognized the need for public acceptance of "the basic proposition that we should have all the controls over atomic energy which contribute to our security," he also believed in "asking pointed questions about the nature and the probable effect of each of the specific controls proposed."<sup>62</sup> For the most part, however, the American public has not followed this advice. At least three interdependent factors have caused this reticence: the mystique of the taboo, the highly technical nature of the field, and lack of opportunity.

The American people learned of atomic power and its awesome force through a sudden and dramatic military application: a bomb which devastated an obdurate enemy and ended a costly and hard-fought war. The veil of secrecy surrounding this new phenomenon became easily accepted; the bomb was a miraculous discovery which had saved the lives of thousands of American soldiers. Until the summer of 1949, it was the "winning weapon."<sup>63</sup> The need to keep this destructive capability concealed in American hands alone appeared self-evident.

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57. Act of June 30, 1980, Pub. L. No. 96-295, § 207, 94 Stat. 780, 788 (1980) (amending Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976 & Supp. III 1979)) (to be codified at 42 U.S.C. § 2167).

58. *Id.* At least one legislator expressed concern about the impact of the provision on the Freedom of Information Act. 125 CONG. REC. 411, 497-98 (daily ed. Dec. 4, 1979) (remarks of Representative Moffett).

59. Newman, *The Control of Information Relating to Atomic Energy*, 56 *YALE L.J.* 769 (1947).

60. *Id.* at 801.

61. *Id.* at 802.

62. *Id.*

63. See generally G. HERKEN, *THE WINNING WEAPON* (1980).

Then came the realization that a new enemy had the same terrible weapon, perhaps discovered through espionage. What the United States had protected so zealously from prying eyes in order to retain world supremacy, it now guarded fervently as part of what Edward Shils called "the battle between the children of light and the children of darkness."<sup>64</sup> The American security objective became, and remains, to maintain an atomic edge over enemies and to safeguard this margin of superiority from betrayal or detection.

Thus, writing in mid-1948, Herbert Marks, who had recently served as general counsel of the Atomic Energy Commission, observed that "the range of issues which has excited any active public debate has been exceedingly limited despite the many intrinsically controversial questions with which the Atomic Energy Act is concerned."<sup>65</sup> Specifically, he noted that AEC press releases were used by the newspapers, "but rarely with more penetrating comment or follow-up than that which accompanies the society news,"<sup>66</sup> and speculated that the press and publishing industry "seem to have accepted in the field of atomic energy an arrangement somewhat similar to the one which existed more generally during the war under the Office of Censorship."<sup>67</sup> He also sensed a popular belief that asking questions about atomic energy matters was unpatriotic; "we have come to feel that because it is wrong to disclose secret information it is somehow wrong and possibly illegal for the uninitiated to seek information about the subject."<sup>68</sup>

Another limitation on "pointed questions" of the type urged by Newman was the technical nature of the subject. Who, other than a physicist or a chemist, could begin to understand atomic reactions? As for the Atomic Energy Act of 1954, who, other than an expert, could know which information required protection for security reasons and which did not? The issues surrounding the development of atomic energy and atomic energy information controls proved too complicated and technical to inspire much public debate.<sup>69</sup>

Along with the technical barrier to "pointed questions" there existed another obstacle: lack of opportunity. The Atomic Energy Act of 1946, as Newman well understood, created a thorough security system which reflected in many regards the highly successful secrecy arrangements of the Manhattan Project. The 1954 Act and its amendments modified this system only slightly. Criticism of such safeguard procedures proved difficult when

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64. E. SHILS, *THE TORMENT OF SECRECY*, 71 (1956).

65. Marks, *The Atomic Energy Act: Public Administration Without Public Debate*, 15 U. CHI. L. REV. 839 (1948).

66. *Id.*

67. *Id.* at 846.

68. *Id.* at 849.

69. Concern with other safety considerations, such as the effect of radioactive fallout, and environmental pollution emerged later, well after nuclear power plants began to operate.

those procedures themselves prevented access to information about the existing policy and its administration. Moreover, until recent times, such questioning did not enjoy popular approval. Official forums have not been terribly receptive: neither Congress nor the Atomic Energy Commission and its successors have evidenced much interest in relaxing security-secrecy requirements in response to claims of individual rights and liberties.

This lack of opportunity to question information safeguards, in conjunction with the other two factors previously discussed, has discouraged the emergence of Newman's skeptical citizens. Among the organized interests of American society, only the natural scientists appear to have persistently criticized atomic energy information restrictions. Legal analysts and political scientists, by contrast, have devoted little professional attention to the matter since the 1950s. Recently, however, environmentalists have been making important contributions to this research area. It also appears that the Three Mile Island incident, the Karen Silkwood case,<sup>70</sup> and the *Progressive* case<sup>71</sup> have prompted new interest in the implications of atomic power for civil rights and liberties. Renewed interest in the information control provisions of the Atomic Energy Act of 1954 and accompanying regulations shows that these restrictions may impinge upon several civil liberties: (1) intellectual freedom, (2) first and fifth amendment guarantees concerning speech, the press, and property, (3) the people's right to know about the activities and operations of government, and (4) intertwined rights of personal privacy and association.

With respect to intellectual freedom, Newman bemoaned the impact of the first Atomic Energy Act on communication among scientists as early as the spring of 1947.<sup>72</sup> During the summer of the following year, his colleague, Byron Miller, lamented that the statute's "compromise secrecy section has not only resulted in great timidity in declassification to the detriment of research, but it [also] has enabled the [Atomic Energy] Commission to follow undemocratic practices in so-called 'loyalty procedures,' thus driving away many young and able scientists."<sup>73</sup>

It soon became clear that the security-secrecy provisions of atomic energy law had other negative effects upon the scientific profession. Criticizing the effects of compartmentalization arrangements in atomic energy research, one commentator noted: "It is impossible to subdivide a scientific project into airtight compartments and produce anything but mediocrity and stagnation."<sup>74</sup> Developing this point, Walter Gellhorn observed that

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70. See, e.g., R. RASHKE, *THE KILLING OF KAREN SILKWOOD* (1981).

71. See *infra* text accompanying notes 100-11.

72. Newman, *supra* note 59, at 801-02.

73. Miller, *supra* note 13, at 821.

74. R. LAPP, *THE NEW FORCE* 219 (1953). The author became familiar with compartmentalization procedures through his work with the Manhattan Project. *Id.*

compartmentalization "narrows the range of expertness [so] that effective utilization of scientifically trained manpower is badly hampered,"<sup>75</sup> "prevents full utilization of work that has already been successfully accomplished,"<sup>76</sup> "necessitates frequent duplication of unfruitful research,"<sup>77</sup> "prevents one scientist's learning from another in the traditional way,"<sup>78</sup> and "take[s] no account of the needs of those who carry on their work outside the area of secrecy."<sup>79</sup>

Today, compartmentalization is less widespread in atomic energy research. But limitation of intellectual freedom in the scientific community continues through official protection of Restricted Data. This protection results in duplication of effort; costly not only in terms of time and money but also "in terms of what might have been accomplished if brains had been free to work on the problems of the as yet unknown, instead of on problems which had previously been solved by others."<sup>80</sup> Stifling communication among scientists slows the scientific process<sup>81</sup> and results in a loss of "objective appraisal of work in progress."<sup>82</sup> Secrecy may also hinder the education of new atomic energy experts<sup>83</sup> by putting limitations on what may be taught and where learning may take place. In the end, it may discourage promising candidates from entering research training programs.<sup>84</sup>

In addition to restricting intellectual freedom, atomic energy information controls may tread upon first and fifth amendment guarantees concerning property, speech, and the press. With respect to these issues, three problems emerge: (1) whether the government has authority to seize privately developed reports or papers because they allegedly contain Restricted Data, (2) whether the government has authority to control the communication of privately developed Restricted Data, and (3) whether the government has authority to prevent the publication of privately developed Restricted Data.

The first problem is illustrated by an incident which arose in 1978 when Dmitri Rotow, a 22-year-old Harvard University economics major, authored a lengthy report on the design and manufacture of a variety of atomic bombs. He was reportedly one of three college students who had written papers on the subject. Rotow relied primarily on materials found at the Library of Congress. After reviewing his report, Department of Energy officials informed Rotow that it contained Restricted Data. They prohibited

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75. W. GELLHORN, *SECURITY, LOYALTY, & SCIENCE* 40 (1950).

76. *Id.* at 41.

77. *Id.*

78. *Id.* at 42.

79. *Id.* at 43.

80. *Id.* at 44.

81. *Id.* at 45.

82. *Id.* at 49.

83. *Id.* at 59-60.

84. *Id.* at 60.

him from communicating his report to anyone not authorized to receive it, and informed him of his duty under security regulations to protect it.<sup>85</sup> At first, Rotow objected, arguing that the Department was using its security power to edit his piece. Eventually, however, he turned the report over to the Department for storage.<sup>86</sup>

There is some doubt that the atomic energy acts authorized the government to seize this private research. The legislative history of the Atomic Energy Act of 1946 contains only indirect and inconclusive evidence to support the proposition that Congress intended the Restricted Data control provisions to apply to privately developed information.<sup>87</sup> As Herbert Marks, former Atomic Energy Commission general counsel, put it: "neither the statute nor the legislative history seem sufficiently explicit on the point to avoid a question of statutory construction if the issue is ever tested."<sup>88</sup>

The Atomic Energy Act of 1954 continued the information control provisions of the earlier statute with only slight modification.<sup>89</sup> Again, however, the legislative history is inconclusive. The committee hearings contain very little discussion of the possible application of Restricted Data controls to privately developed information.<sup>90</sup> The issue received no attention on the floor of Congress.<sup>91</sup> The paucity of debate has led one commentator, referring to both the 1946 and the 1954 Acts, to conclude that "if Congress intended to control privately developed atomic energy information, it did so in a highly ambiguous, equivocal, and uncertain way."<sup>92</sup>

Just as it appears dubious that the government has authority to co-opt privately developed Restricted Data, it also appears doubtful that the government may prohibit the communication of such data. In the past, the government has achieved this result legally through an ingenious technique; it has induced corporations which independently generate information falling within the Restricted Data category to participate in the government's access permit program. This participation subjects the companies to the

85. The Washington Star, June 9, 1978, at A1, col. 3.

86. *Id.*

87. See S.1717, 79th Cong., 2d Sess. §§ 1-17 (1946); *Hearings Before the Special Senate Comm. on Atomic Energy on S.1717*, 79th Cong., 2d Sess. (1946); S. REP. NO. 1211, 79th Cong., 2d Sess. (1946); H.R. REP. NO. 2478, 79th Cong., 2d Sess. (1946); 92 *Cong. Rec.* 6082-98, 9249-75 (1946); see also Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Danger of Government Information Controls*, 48 *GEO. WASH. L. REV.* 163, 180-90 (1980). Draftsman James Newman felt that the information control provisions were intended to apply to privately developed information. See Newman, *supra* note 59 at 781-82; J. NEWMAN & B. MILLER, *supra* note 19 at 15.

88. Marks, *supra* note 65, at 845 n.16.

89. See *supra* text accompanying notes 37-52.

90. See, e.g., *Hearings on S.3323 and H.R.8862. To Amend the Atomic Energy Act of 1946 Before the Joint Committee on Atomic Energy—Part I*, 83rd Cong., 2d Sess. 51-53, 63 (1954).

91. See, e.g., 100 *CONG. REC.* 10564-66, 11580, 11655-60, 11671-72, 11719-20.

92. Cheh, *supra* note 87, at 187.

regulations governing the possession, transmission, and safeguarding of Restricted Data.<sup>93</sup>

Under these circumstances the government has ample authority for controlling the communication of Restricted Data developed by the company.<sup>94</sup> While it does not appear that the Atomic Energy Act requires corporations to join the program,<sup>95</sup> nothing prevents the government from inducing them to do so. Without doubt the government can condition entrance into the program on compliance with regulations prohibiting the communication of restricted information. But when the government attempts to control the communication of Restricted Data outside the confines of this program, it stands on less sure ground.

The legislative history of the 1946 and 1954 Acts, as well as their amendments, contains no clear indication of statutory authority to control the communication of privately developed information.<sup>96</sup> One legal expert has concluded that

. . . the AEC had (and DOE and the NRC now have) no statutory authority to control the use, handling, or dissemination of Restricted Data generated by persons unassociated with the government. If this information is governed by the Atomic Energy Act at all, it is governed only by the law's espionage controls.<sup>97</sup>

The House Subcommittee on Government Information and Individual Rights has reached a similar conclusion. After it held hearings in 1980 exploring the government's classification of private ideas its parent committee—the Committee on Government Operations—reported:

In the hearings, DOE witnesses noted there is no statutory prohibition on the mere possession of Restricted Data. They also said the matter of requiring prepublication review for private researchers who have not had access to Restricted Data is a particularly complex problem. In short, private citizens cannot be penalized for possessing it, nor can they be required—if they think they may possess it—to present the data for clearance.<sup>98</sup>

While this suggests that the government lacks authority to prohibit communication of privately developed Restricted Data, the government

93. See *supra* text accompanying notes 54-56; Cheh, *supra* note 87, at 178-79.

94. See *supra* text accompanying notes 54-56.

95. See 42 U.S.C. §§ 2011-2296 (1976 & Supp. III 1979).

96. The criminal sanctions of the Atomic Energy Act of 1954 would not apply to individuals or private groups unless they communicated information with intent to injure or with reason to believe it would injure the United States or secure an advantage to a foreign nation. *Id.* § 2274 (1976).

97. Cheh, *supra* note 87, at 190.

98. GOVERNMENT'S CLASSIFICATION, *supra* note 25, at 165.

stands on firmer ground on the issue of preventing publication of such data.<sup>99</sup> This issue arose recently in the *Progressive* case.<sup>100</sup> The litigation involved an article, prepared through the independent research of a freelance writer, which described the workings of the hydrogen bomb.<sup>101</sup> The general counsel of the Department of Energy objected to publication of portions of the piece which allegedly contained Restricted Data, maintaining that disclosure would injure the United States and benefit other nations.<sup>102</sup> He advised *The Progressive* that the removal of some offending sections and the rewriting of others would eliminate Restricted Data objections and allow publication to proceed. The magazine responded that it intended to publish the article as written unless the government got a temporary restraining order.<sup>103</sup> The Department went to federal court and succeeded in obtaining a preliminary injunction.<sup>104</sup>

*The Progressive* promptly appealed the decision to the Seventh Circuit, where argument took place in September, 1979.<sup>105</sup> Before the court reached a decision, however, a Wisconsin newspaper, *The Madison Press Connection*, published a letter which contained much of the same sensitive information objected to in the *Progressive* article.<sup>106</sup> Shortly thereafter, the United States moved to dismiss the case.<sup>107</sup> Despite the mootness of the case, it nevertheless raises important questions about the legislative intent behind the provisions of the Atomic Energy Act prohibiting the unauthorized communication of Restricted Data.

In its suit, the government contended that publication of the article in *The Progressive* would violate the provision in the 1954 Act authorizing

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99. For guidance on this issue, the author wishes to acknowledge his indebtedness to Cheh, *supra* note 87.

100. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). For background on the dispute see GOVERNMENT'S CLASSIFICATION, *supra* note 25, at 144-46; MORLAND, *THE SECRET THAT EXPLODED* (1981); A. DEVOLPI, G.E. MARSH, T.A. POSTOL & G.S. STANFORD, *BORN SECRET: THE H-BOMB, THE "PROGRESSIVE" CASE AND NATIONAL SECURITY* (1981).

The government sought to prevent the publication of privately developed information it believed fell into the "Restricted Data" category in one other well known instance. In 1950, *Scientific American* planned to publish an article on the hydrogen bomb. Though the editors of the magazine did not submit the manuscript to the AEC for security review, the AEC managed to obtain a prepublication copy. *Scientific American*, May 1950, at 26. The Commission requested that portions of the article be deleted and reportedly "was prepared to use its injunctive authority to support its request." Green, *supra* note 51, at 95 n.17. *Scientific American* complied, and modified the article along the lines suggested by the AEC. *Scientific American*, May 1950, at 26. The Commission also insisted upon destruction of all the original copies of the article, the production type, the printed plates, and the 3,000 copies of the magazine containing the unapproved article. *Id.*

101. Cheh, *supra* note 87, at 177.

102. *Progressive*, 467 F. Supp. at 998.

103. *Id.*

104. *Id.* at 990.

105. N.Y. Times, Sept. 18, 1979, at A1, col. 1.

106. *Id.*

107. *Id.*

punishment of anyone who communicates<sup>108</sup> Restricted Data.<sup>109</sup> It further argued that the enforcement provisions of the Act entitled it to an injunction against publication.<sup>110</sup> *The Progressive* sought to distinguish "publication" from "communication," and asserted that, if Congress had intended to prohibit publication, it would have said so specifically in the statute.<sup>111</sup>

Although the Atomic Energy Act itself provides no indication as to whether or not the term "communication" includes "publication," the plain meaning of the former term tends to indicate that it does.<sup>112</sup> Analysis of the legislative history of the 1946 Act shows that both committee hearing "witnesses and Congressmen used the terms interchangeably."<sup>113</sup> In the case of the 1954 Act, analysis of its legislative history indicates that press and publication witnesses appearing before the Joint Committee regarded "communication" as embracing "publication."<sup>114</sup> These findings have led one commentator to conclude that the "prohibitions against communicating Restricted Data include, and were meant to include, prohibitions against the publication of the data."<sup>115</sup>

But concluding that the term "communication" embraces the term "publication" does not finally decide the issue of whether the government may prohibit publication of Restricted Data. The legislative history of the 1946 Act gives no indication that the communication prohibition section of the statute "would be read together with the injunction section to permit

108. 42 U.S.C. § 2274. The entire provision reads:

Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data—

- (b) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both.

*Id.*

109. *Progressive*, 467 F. Supp. at 993.

110. *Progressive*, 467 F. Supp. at 991.

111. *Cheh*, *supra* note 87, at 191 (citing Brief for Defendant at 26, *Progressive*, 467 F. Supp. at 990).

112. *See id.* at 191.

113. *Id.* at 192. *See, e.g., Hearings on S.1717, supra* note 87, at 117, 155, 165; *Hearings on S.3323 and H.R.8862, supra* note 90, at 40, 51-53, 240, 396.

114. *Id.* *See, e.g., Hearings on S.3323 and H.R.8862, supra* note 90, at 52, at 540-42. Some media representatives were concerned that the new provisions prohibiting communication of Restricted Data "would impose a burdensome obligation on the media by requiring prepublication determinations whether information to be published was restricted." *Cheh, supra* note 87, at 192.

115. *Cheh, supra* note 87, at 192. *See also* Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 75 COLUM. L. REV. 929, 1032-38, 1075 (1973).



prior restraints.”<sup>116</sup> As for the 1954 Act, one commentator concluded: “The statutory history . . . presents no evidence that Congress was aware that the injunction section of the Act could or would be used to impose prior restraints on newspapers or magazines.”<sup>117</sup>

In addition to this statutory obstacle, government prohibition of the publication of Restricted Data also faces constitutional barriers. The first amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>118</sup> Although considerable controversy surrounds the interpretation of this amendment, it is generally agreed that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>119</sup> The government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>120</sup> In *New York Times Co. v. United States*,<sup>121</sup> Justice Brennan wrote that “only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea can support even the issuance of an interim restraining order.”<sup>122</sup> It is unlikely that the government can satisfy this requirement in seeking to prohibit publication of Restricted Data.<sup>123</sup>

Government efforts to stop publication of Restricted Data run afoul of the first amendment not only as an invalid prior restraint. The information control provisions pursuant to which the government acts also may be unconstitutionally overbroad. A law is void on its face for overbreadth if it “ ‘does not aim specifically at evils within the allowable area of [govern-

116. Cheh, *supra* note 87, at 192.

117. *Id.*; see also Edgar and Schmidt, *supra* note 115 at 1075.

118. U.S. CONST. amend. I.

119. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Prior restraint has long been considered a “more drastic infringement on free speech than subsequent punishment.” J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 741 (1978). In his *Commentaries on the Laws of England*, Blackstone noted that “the liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.” 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151-52 (2d ed. rev. 1872). For more modern expressions of the principle see *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *Near v. Minnesota*, 283 U.S. 697, 713, 720 (1931).

120. *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

121. 403 U.S. 713 (1971).

122. *Id.* at 226-27 (Brennan, J., concurring).

123. See Cheh, *supra* note 87 at 199-200. This conclusion is especially compelling given the fact that the government lacks clear statutory authority for imposing a prior restraint on the publication of Restricted Data. In *New York Times*, several Justices expressed reluctance to allow the government to meet its heavy burden when no statute expressly authorized the imposition of a prior restraint. 403 U.S. at 720-22 (Douglas, J. concurring), 731-34 (White, J., concurring), 742-47 (Marshall, J., concurring). The Atomic Energy Act of 1954 contains no authorization of prior restraints, nor does it appear that Congress anticipated that the statute’s injunction provisions would be used to effect prior restraints. See *supra* text accompanying notes 116-17.

ment] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights."<sup>124</sup> In *United States v. Robel*,<sup>125</sup> for example, the federal government prosecuted the defendant under a statute that prohibited members of "communist action" organizations from working in certain defense facilities.<sup>126</sup> The Supreme Court found the statute unconstitutional, but not because it disapproved of the state interest supporting the statute. The Court recognized that protecting against sabotage in defense facilities was an important substantial governmental purpose.<sup>127</sup> Rather, the Court struck the statute down because it "casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed."<sup>128</sup> Thus the statute lacked the "[p]recision of regulation" which forms the touchstone of protection of constitutional rights.<sup>129</sup>

The information control provisions of the Atomic Energy Act of 1954 may well suffer from the same defect. The government no doubt has a substantial state interest in protecting information that is vital to national security. But "the scope of the information control provisions is not limited to information that, if communicated, will present or will likely present a clear and present danger of harm to national security."<sup>130</sup> The controls apply to all atomic energy information, whether "harmful, helpful, or innocuous."<sup>131</sup> They certainly apply to information which the government has a valid interest in protecting. But they appear to apply as well to information in which the government has no such interest. In all likelihood, then, the controls suffer from overbreadth.

In addition to colliding with constitutional rights, the information restrictions of the Atomic Energy Act have a serious impact upon the public's right to know about the operations of government. This general civic principle finds expression in the Freedom of Information Act<sup>132</sup> (FOIA) and other "open government" laws such as the Federal Advisory Committee Act<sup>133</sup> and the Government in the Sunshine Act.<sup>134</sup> For the most part, these acts apply only to the departments and agencies of the

124. L. TRIBE, *CONSTITUTIONAL LAW* 710 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

125. 389 U.S. 258 (1967).

126. *Id.* at 259-60. The defendant was prosecuted under the Subversive Activities Control Act of 1950, § 5(a)(1)(D), 50 U.S.C. § 784(a)(7)(D) (1976).

127. 389 U.S. at 264.

128. *Id.* at 265-66 (citations omitted).

129. *Id.* at 265 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

130. Cheh, *supra* note 87, at 196.

131. *Id.*; see also *supra* text accompanying notes 22-28, 40-41.

132. 5 U.S.C. 552 (1976 & Supp. IV 1980).

133. 5 U.S.C. App. §§ 1-15 (1976 & Supp. IV 1980).

134. 5 U.S.C. § 552b (1976).

Executive Branch of the federal government.<sup>135</sup> In general, the statutes create a presumption of public access to information which can only be overcome by proof that the information sought is properly exempt.<sup>136</sup> Privileged matters include those "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."<sup>137</sup> Both "Restricted Data" and "Safeguards Information," as defined in the Atomic Energy Act,<sup>138</sup> can be withheld from disclosure under this provision.

The ambiguous scope of the "Restricted Data" and "Safeguards Information" concepts denies the public access to a considerable quantity of information about atomic energy matters. Moreover, unlike records protected by the President's executive order on security classification, Restricted Data remains eternally secret.<sup>139</sup> There is always the chance that Restricted Data may be brought to light by use of open government laws. However, the mid-level civil servants responsible for administering open government laws such as the FOIA have discretion only to determine whether requested information falls within the Restricted Data category; if it does fall within the category, it cannot be released. The FOIA offers no assistance for determining whether information was properly given Restricted Data status. When an FOIA request involves classified national defense or foreign policy information, the departments and agencies concerned must review the materials to determine whether they have been properly classified.<sup>140</sup> In the case of Restricted Data, however, no such requirement applies since the information is "born classified;"<sup>141</sup> there is no executive branch decision to review. Thus, only an affirmative decision by high level Nuclear Regulatory Commission officials can remove information from the Restricted Data domain.<sup>142</sup> Restricted Data may be released through voluntary declassification, but the combined forces of bureaucratic inertia and timidity, plus an institutional bias favoring a broad interpretation of the term "Restricted Data," militate against such release.

135. 5 U.S.C. § 551(1) (1976); 5 U.S.C. App. §§ 3(2)-(4), 4(b)-(c); 5 U.S.C. § 552b(a)(1) (1976).

136. 5 U.S.C. § 552(c) (1976 & Supp. IV 1980); 5 U.S.C. App. § 4(a) (1976); 5 U.S.C. § 552b(b) (1976).

137. 5 U.S.C. § 552(b)(3) (1976).

138. "Restricted Data" is defined at 42 U.S.C. § 2014(y) (1976). "Safeguards Information" is defined at Pub. L. No. 96-295, § 207, 94 Stat. 780, 788 (amending Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976 & Supp. III 1979)) (to be codified at 42 U.S.C. § 2167).

139. See *supra* text accompanying notes 22-28.

140. See 5 U.S.C. § 552(b)(1) (1976).

141. *Id.*; see *supra* text accompanying notes 22-28, 40-41.

142. See *supra* text accompanying notes 21-25.

The "born classified" status of Restricted Data also immunizes materials against court-ordered declassification. The FOIA provides for in camera inspections of withheld documents.<sup>143</sup> A court finding that national defense and foreign policy papers have not been properly classified in accordance with the President's executive order may thus lead to their release.<sup>144</sup> A similar ruling that atomic energy information does not meet the statutory definition of Restricted Data is less likely, given the breadth of the Restricted Data label, the technical expertise needed to reach such a decision, and the courts' traditional deference to the legislative and executive branches in matters of national security. In the event that a court might order release via a rejection of the Restricted Data definition itself, on grounds such as unconstitutional overbreadth, the President might protect withheld information under the security classification executive order.<sup>145</sup>

Although public access to atomic energy information by means of the FOIA is thus limited,<sup>146</sup> records of some significance nevertheless have been disclosed. Press accounts over the past few years indicate that FOIA requests have resulted in the release of materials on unreliable safety precautions,<sup>147</sup> inadequate security efforts at nuclear power plants,<sup>148</sup> dangers existing within operating facilities,<sup>149</sup> the nuclear capabilities of other countries,<sup>150</sup> questionable administrative practices,<sup>151</sup> and near accidents.<sup>152</sup>

At the same time, however, the failure to disclose atomic energy information has had many negative effects, ranging from the creation of a false sense of military superiority to widespread anxiety about the dangers of nuclear fuels used by private industry. In some situations it appears that Restricted Data secrecy contributed to incomplete and misleading explanations regarding the effects of atomic weapons testing and the safety of

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143. 5 U.S.C. § 552(a)(4)(B) (1976).

144. *See id.* § 552(b)(1)(A).

145. *See supra* note 23 and accompanying text.

146. While public access to government information is limited, access to atomic energy records of private utility companies is even more restrained. Although "clothed in the public interest" as a consequence of federal regulation of atomic energy materials and state control of quasi-governmental entities, the activities and operations of utilities are only indirectly discernible by the people, and even then visibility is quite limited. Federal and state information access laws, such as the FOIA, do not appear to apply to these companies. *See* 5 U.S.C. §§ 551(1), 552(e), 552(a)(1), 552b(a)(1) (1976). However, records filed by these firms with federal and state agencies may be available to the public, provided that state law places no burdens on such access, that allowances for protecting trade secrets and confidential commercial information do not preclude disclosure, and that Restricted Data or Safeguards Information is not being sought. *Id.* § 552(b) (1976). *See supra* text accompanying notes 119-20. All of these factors can be formidable barriers to obtaining nuclear industry records.

147. Washington Star, August 19, 1975, at A1, col. 1.

148. N.Y. Times, March 30, 1976, at 32, col. 2.

149. *Id.*, June 10, 1976, at 11, col. 1.

150. Washington Post, July 19, 1976, at 1, col. 1.

151. N.Y. Times, April 4, 1979, at A16, col. 1.

152. *Id.*, March 3, 1980, at A14, col. 6.

atomic energy facilities.<sup>153</sup> Perhaps more serious implications for responsible government were recognized shortly after the implementation of the Atomic Energy Act of 1946: “[i]n the field of atomic energy, the process [(public scrutiny and protest)] which has always been our main reliance for a healthy direction of national effort is virtually nonexistent.”<sup>154</sup> By limiting public access to information about atomic energy policy, the sweeping information controls of the Atomic Energy Act may themselves contribute to the misguidance of that policy.

The information controls of the Atomic Energy Act affect more than the public’s abstract right to know about the affairs of government; more concretely, they subject many people to security clearance requirements and procedures. Anyone with access to Restricted Data—federal government employees, private atomic energy industry employees, contractors, individuals participating in the access permit program—must undergo a searching examination of their character, associations, and loyalty.<sup>155</sup> Important civil liberties questions may be raised about the manner in which background investigations are conducted, the substance and quality of the information they place in government files, the criteria which are used to evaluate these findings, and the effects of access denials. Such intrusion into the lives of workers in the atomic energy field may be seen as a direct result of this sweeping concept of information control.

#### IV

#### CONCLUSION

Official secrecy has a long history in American national government. The information restrictions of the Atomic Energy Act, because of their instant application, broad embrace, eternal duration, and severe penalties for violation, may well be the most formidable version of government secrecy ever known in this country.<sup>156</sup> Criticism of these restrictions, however, should not suggest that secrecy is not necessary but, rather, that it should be more narrowly and thoughtfully applied. For a variety of reasons, ranging from the constitutional to the practical, the atomic energy information protections created over a quarter of a century ago bear reexamination and modification. In a democracy, pointed questions about various issues, including atomic energy, are desirable. As Thomas Jefferson said over a century and a half ago: “I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion,

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153. *Id.*, May 13, 1979, at A1, col. 5; see CONG. REC. S7628-32 (daily ed. July 15, 1981); see also N.Y. Times, May 8, 1979, at A1, col. 5.

154. Marks, *supra* note 65, at 843.

155. See *supra* text accompanying notes 29-30, 47-50.

156. See *supra* note 2.

the remedy is not to take it from them, but to inform their discretion.”<sup>157</sup> Government information policy and practice in the nuclear power area, while providing for limited official secrecy, should be compatible with this principle.

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157. 15 THE WRITINGS OF THOMAS JEFFERSON 278 (A. Lipscomb & A. Bergh, eds. 1904).