DISCUSSION

ARYEH NEIER, MODERATOR: Any questions and comments?

AUDIENCE COMMENT: Dr. Relyea, I wondered if you think the (b)(3) exemption that Mr. Adler described is a serious problem and whether your office or any of the committees are monitoring whether that kind of exemption is being proposed in other legislation.

HAROLD RELYEA: The problem you are referring to is a serious one. The (b)(3) exemption in the Freedom of Information Act says that any statute that explicitly calls for secrecy will block the release of the information in question. To put it in not the most succinct terms, it is not "nickel and diming" the Freedom of Information Act but hampers it by twenty and fifty and hundred dollar bills. There have been a variety of attempts by agencies to get special dispensation to avoid public disclosure of classes of documents through a particular exemption. The exemption Mr. Adler referred to that the Department of Energy has is one of those. There is another, similar provision pending in an intelligence authorization bill that, in effect, exempts the Defense Intelligence Agency from the Freedom of Information Act. It is the same kind of provision as that which exempts certain kinds of tax records from disclosure.

The most difficult problem in all of this is that the Justice Department, which is the coordinating agency in this area, has consistently refused to take any hand in clearing bills as they come through the agencies. They say they would like to do this but they look the other way when it is about to happen. Congress, until recently, considered a requirement that any provision that provides a class of secrecy under FOI would have to be recodified. That proposal has been scrapped since the whole life of the Freedom of Information Act itself now hangs in the balance. If we get administration recommendations in this area, I think the (b)(3) exemptions will be the least of their concerns.

ALLAN ADLER: The (b)(3) method of overriding the Freedom of Information Act is basically political in nature. A provision which would directly amend the Freedom of Information Act to change the disclosure policy with respect to a category of records would go to the committees in the Senate and the House that are specifically charged with overseeing the Act. Their staffs tend to be much more familiar with the way the Act has been interpreted in the courts and with the way the agency actually administers it. These people, generally, would be less willing to recommend amendment to the Act. But the (b)(3) method does not require an amendment to the Act. It allows the exemption to be made as a wholly separate piece of legislation. Separate legislation to prevent disclosure of a category of information does not, as a

matter of jurisdiction, go to the FOI oversight subcommittees. Instead it goes to the committee that is concerned either with the subject matter of the information involved or has jurisdiction over the agency that is requesting the (b)(3) exemption. The result is that you have a situation where the deciding legislators and their staff are not particularly familiar with the Freedom of Information Act as it works in practice. They are more sympathetic to the particular concerns that are asserted by the agency requesting the additional withholding authority. In each of the cases where this exemption was obtained, not a single day of hearings was conducted to force the agency to justify this additional secrecy.

ARYEH NEIER: You portrayed the movement toward greater secrecy as originating with the Department of Energy. Are you aware of any role that the nuclear power industry as such has played in all of this?

ALLAN ADLER: As I have said, in the case of the Nuclear Regulatory Commission authority established two years ago, it became clear that the private security forces hired by the licensees were fostering this need for broader secrecy. Of course, they were also touting their own availability for hire. In the case of DOE's authority, it came about through its desire to have the same kind of authority and the same consideration as NRC.

ARYEH NEIER: That sounds like bureaucratic infighting rather than any particular push by the nuclear power industry.

ALLAN ADLER: The basic impetus behind the DOE's request for additional secrecy authority has been Admiral Rickover, who is in overall charge of the naval nuclear propulsion program.

JOHN SHATTUCK: I am Legislative Director of the ACLU, and I have followed the work that Allan Adler has been doing on this with great interest. It is extraordinarily complex, as I think you can tell from his presentation and that of Dr. Relyea.

I would like to ask a question and make a statement in connection with my question. This secrecy veil that covers the whole area of nuclear power is rather unique in the field of commercial activities in the United States. I think we need to identify more precisely what kind of information is not available to the public which is essential for the kind of debate that needs to occur in order to have the public give its informed consent to the development of commercial nuclear power. Is there any way that you can be more precise with respect to the kinds of data that are essential to the public debate that are either not readily available or are, in fact, protected by statutory exemption? I am speaking here of the basic "bread and butter" kind of information rather than technical information that we probably all would agree is necessary to protect.

HAROLD RELYEA: Two things come to mind that show the intertwining of the exemptions in the Freedom of Information Act. I will give the first one in hypothetical form but I believe it has happened several times.

A nuclear power plant, of course, reports regularly to the NRC in Washington. At some point they may disclose to the NRC that they had a problem and that something was dumped into a river and contaminated it. The substance could be anything, not necessarily radioactive, but some kind of industrial waste that should not be there. Now suppose the accident is discovered by someone in the public and information about it is sought under the Freedom of Information Act. The first problem is that the Act does not apply to the industry directly. It would apply only to the records held by the NRC. So you make your FOI request to them. But you can be kept from getting that information in a number of ways. First, your request may be construed to involve restricted data, that is, it may involve some nuclear technology, etc. A more likely bar is the (b)(4) exemption, the so-called "trade secret exemption." That a disclosure of what the material was would somehow reveal a trade secret is not an uncommon argument.

The second case that comes to mind was an actual suit that I think was brought in Hawaii. A group of people were seeking to find out whether any nuclear material, probably of a weapons nature, was stored there. They were seeking to require the filing of an environmental impact statement to that effect. They were prevented from learning anything more about it, and the necessity for an environmental impact statement was negated because of the fact that restricted data was involved. Whether or not weapons were actually involved is another question. But, in any case, that secrecy lid came down. Those are two examples where information was withheld that could have been important in the public decision-making process.

ARYEH NEIER: As I recall, in that last example, they were claiming that the material was on the path of the main runway of the airport in Hawaii.

ALLAN ADLER: What the Navy Department was arguing there was that whether or not they were storing nuclear weapons at that facility was classified information. They did not see the need to prepare an environmental impact statement because they believed that most of the information would be classified.

GERALD CHARNOFF: The question asked by Mr. Shattuck related to the civilian nuclear power controversy. Of the two points just mentioned by Dr. Relyea, the second has nothing to do with civilian nuclear power. But as to the first point, let this be clear. Any release of radioactive material reported to the NRC is public information. The documents are put immediately into the public document room. I know of no case involving a commercial nuclear power reactor where that information was withheld or where it was requested that it be withheld. It is not restricted data, and it is not classified data.

If you read Dr. Relyea's paper, the only area in which there may be some basis for the criticism about the withholding of information relating to civilian nuclear power activities is the recent legislation relating to plant security procedures. There is no basis for concern that information relating to the design of the plant releases from the plant, or operation of the plant is being withheld. Where a trade secret is involved in any public hearing, there are procedures for in camera proceedings where the intervenors can see the information under a protective order. This is available even when the issue concerns plant security. For instance, in the Diablo Canyon case, plant security matters were fully litigated by intervenors under protective orders.

The answer to John Shattuck's question is that secrecy does not affect the civilian nuclear power debate. If you are talking about nuclear weapons and the activities of the military, that is another matter. It is a sharp distinction.

ARYEH NEIER: Does anyone want to say anything more on that point?

ALLAN ADLER: I disagree with your statement that there is public disclosure when materials are unaccounted for.

GERALD CHARNOFF: We were talking about releases of radioactive material.

ALLAN ADLER: Well, what about unaccounted-for material?

GERALD CHARNOFF: That is separate from the civilian nuclear power debate. That problem may affect nuclear fuel fabrication facilities, but the term "unaccountable material" does not apply to power plants themselves at all. In the mid-1970's an estimate was made of the amount of unaccounted-for material by the AEC or NRC, but that did not come up in the context of nuclear power plants and has nothing to do with whether they operate safely or whether they are good for us or bad for us. However, it does involve those plants that process material for weapons. Any involvement of fuel fabrication facilities for civilian power plants is incidental.

ALLAN ADLER: Let me ask you about another issue that comes up, the question of the transportation of spent nuclear fuel. Prior to the enactment of a regulation two years ago, information relating to the routes, quantities, and times of shipments of spent nuclear fuel through local communities was consistently withheld by the Nuclear Regulatory Commission. That withholding was the subject of a good deal of litigation and a number of administrative proceedings. Only recently has the Nuclear Regulatory Commission specifically said that the information may be disclosed to the public. That is a safety issue because the question of who would have to deal with an emergency arising out of the transportation of spent nuclear fuel is one that is of grave concern to state and local governments. The federal govern-

ment, while refusing to keep them fully informed about such transportation would, at the same time, reserve the right to deal with any situation that would arise.

GERALD CHARNOFF: There is a current regulation requiring prior notice to local authorities of routes and shipments.

ALLAN ADLER: That only came about because it was enacted in a bill.

ARYEH NEIER: Are there other questions about this point?

AUDIENCE COMMENT: I am Eric van Loon from the Union of Concerned Scientists. There are now before Congress two pieces of legislation, virtually assured of passage, which would restrict public access to information and hearings on certain issues. For example, they would restrict access to information about the venting of radioactive materials, such as the venting that occurred after the Three Mile Island accident. The final procedures worked out for the venting of the radioactive krypton gas at Three Mile Island were never submitted in a formal public hearing. The venting of the gas began and citizens in the area brought suit to stop it. Their suit went to the D.C. Circuit Court of Appeals twice, and both times it ruled that the closed process by which it was determined to vent the gas was in violation of the provisions of the Atomic Energy Act. The NRC and the industry then went before the Senate Appropriations Committee in another closed session and introduced legislation to reverse those decisions so that those kinds of public hearings would no longer be required under the Act. Fortunately, since it was an appropriations measure, Rep. Tip O'Neill got involved and they subsequently removed that particular amendment and sent it back to the committee. But it has now come forward and is virtually assured of passage. A companion piece of legislation would severely limit the kinds of parties that would be able to intervene to raise safety issues in plant licensing proceedings. It would also limit the bases on which they would be able to intervene. Stepping back from the narrow issue of whether specific kinds of information will be made public, I think the broader question is whether we can even have informed consent by the citizens when their opportunity to participate through hearings and court action is being further restricted by these legislative proposals.

GERALD CHARNOFF: I'm surprised to hear you say that. There was an environmental impact assessment made by the commission. As a matter of fact, your group participated to some extent, by the invitation of the state, in submitting comments on whether the venting was safe or not. Your group had said the venting was probably pretty safe but people might get scared so we ought to look at it. But certainly the details of the proposed venting and the consequences were all matters of public record. There was no withholding of information.

The issue before the Congress is whether there needs to be a prior public hearing on an amendment that the commission considers to be of no safety consequence. You can debate whether this idea is good or bad or whether that is existing law and whether the court was right or wrong. However, here the issue is withholding of information. Certainly, I hope you would agree that there has been no withholding of information as distinguished from whether there must be a prior public hearing on the venting of the gases at TMI.

ARYEH NEIER: In fairness to Mr. van Loon, he did say that it was a question of informed consent rather than whether the information was available. He did point out that it was a question of the hearing, not the question of whether there is information.

GERALD CHARNOFF: I heard that at the end and if we all understand that, that is fine. However, it seems to me that you were replying to something I suggested. I agree, there is a debate over whether we should have prior public hearings. That is a different matter than withholding of information, which I thought was the subject of this colloquy.