DISCUSSION

JOEL GORA: Well, I must confess it was some surprise to learn that the forces of civil liberties have the forces of nuclear energy on the run, but I would be more surprised if nobody had any comments. So we'll open it up to comments either from the panel or from members of the audience.

AUDIENCE COMMENT: I hoped that somebody on the panel would respond to Mr. Lesch, but because no one did, I feel compelled to. On the whole I felt that your presentation really didn't speak to the issue of this panel. Your view, which I shall not attempt to criticize substantively, did not address their questions.

The matters addressed in this Symposium are important. If you had been here this morning, you might have understood why we think this discussion is more than just a silly exercise. I don't really have a question for Mr. Lesch. I just thought that his position should not go unchallenged.

JOEL GORA: Using whatever prerogative I have standing up here, I wish to ask Mr. Lesch what specific release is being sought in the *LILCO v. Shad* case and what is the precise nature of the litigation?

MICHAEL LESCH: The lawsuit has been brought by the Long Island Lighting Company and eight labor unions. The purpose of the litigation is to win a permanent injunction against blockades of the facilities.

On three separate occasions Long Island Lighting's facilities have been blockaded. On the last such occasion, there was a serious danger of conflict between the protesters and the workmen. The workmen were not at all in sympathy with the anti-nuclear movement. They are busily engaged in constructing the Shoreham Long Island plant, which is the source of their livelihood. On this occasion, they were intent on entering the plant at their normal work hour: six o'clock in the morning. The members of the Shad Alliance were intent on preventing that from happening. In this situation, I think the members of the Shad Alliance had much more to fear than hardhat laborers. Our purpose was to obtain a temporary restraining order. We were successful, so a large number of the demonstrators did not show up. Those who did were arrested.

The purpose of the present lawsuit is 1) to obtain an injunction, and 2) to collect damages for the damage done to property of Long Island Lighting on the occasion just described and on a previous occasion. On the previous occasion, fences were torn down, people were injured and work on the property was halted.

AUDIENCE COMMENT: I am Gordon Johnson, one of the attorneys for the Shad Alliance. The comments of my colleague, Mr. Lesch, are interesting

primarily because we have heard them for so many years. The government uses exactly the same jusitification for spying on the citizenry; the citizenry may be doing something violent, so we have to do something to protect our rights, our property and ourselves. That was the justification in the Felt, Miller Gray Trial, and it is the justification today for wiretapping. That is the justification that we are going to hear repeatedly.

The Shad Alliance is not going to topple the government, nor, unfortunately, will it topple LILCO. The Alliance has made it clear that it is nonviolent. The Alliance has also made clear that its actions have been, and will continue to be, symbolic. For a group accused of tearing down fences, they have been extremely cooperative with the police, going so far as to inform them of their plans. The Shad Alliance is not a violent group and thus the extreme measures of surveillance and infiltration are inappropriate.

One can argue that the state must learn the names and identities of those who have expressed opposition to various government policies, since one day those persons may decide to take violent or illegal action. The state must protect itself and its citizens. Our Constitution, however, prohibits that. Proper standards have been articulated to guard against such pervasive government intrusion.

I agree with Mr. Lesch, however, on the question of corporate power: corporations should be bound in some manner by the Bill of Rights. That is an issue which goes beyond the nuclear power industry. The importance of the nuclear power industry is that they can cite more fears and dangers than many other corporations. Thus, the arguments are perhaps more appealing for freeing nuclear power utilities from the restraints that society may eventually wish to place on other corporations. With the nuclear power industry civil liberties issues are posed more starkly. That is why the nuclear industry is the subject of this symposium. But I think the civil liberties problems posed by IBM spying on people, or by computer banks of large corporations are all issues which we must eventually address.

MICHAEL LESCH: Mr. Johnson and I have had this argument on numerous occasions. For now, I just want to make a couple of factual corrections and not go into the philosophical differences between us. We are not talking about the possibility of violence. When the Shad Alliance appeared at Shoreham in June of 1979, two hundred demonstrators crashed through the gates, hurled racial epithets at the local employees, and injured some of them. The object of the Shad Alliance was to destroy property. It is not a fair representation of what occurred—and LILCO has films of these demonstrations—to say that only a possibility of violence existed and that the Alliance's intentions were only peaceful.

The Shad Alliance was an outspoken group. In 1980, in order to gather support for the oncoming blockade, they circulated an enormous number of leaflets. The leaflets' captions described "an affinity group based action to block all access to the Shoreham Nuclear Plant." The Shad Alliance also

stated in this leaflet, "It is our intention to actually prevent construction for a specified period of time." They further stated, "The citizens' strike will include a wide variety of non-violent tactics, some legal and some extralegal . . . and will be proceeded and followed . . . by intensive local community organizing activities." So the Shad Alliance has itself said that its purpose was not merely to demonstrate. Neither LILCO nor any other utility would object to demonstrations. Indeed, as Burt Neuborne points out, the utilities are becoming great proponents of free speech, so that they may include their views on specific issues with their bills to customers. Our purpose in litigating was not to prevent the exercise of free speech, but to prevent physical and violent interference with LILCO's property.

There has never been a shred of evidence induced in the litigation to support allegations of the nuclear industry's surveillance, wiretapping, and the like. The facts, unfortunately, are master of us all, and in this case the facts do not support the allegations of the Shad Alliance.

AUDIENCE COMMENT: I am Morton Halperin from the Center for National Security Studies. I would like, in the interest of fair play, to put a question to the other members of the panel. I would like you to assume a hypothetical situation where there is political protest about the construction of a nuclear power plant in New York State. The governor of the state orders construction of the nuclear power plant to cease, due to the danger of violence arising out of the political protest. Would the construction of that nuclear power plant then become political activity protected by the first amendment? Would civil libertarians then be obliged to object to the governor's orders closing the plant, and if not, how would you distinguish it from other recent positions that civil libertarians have taken?

BURT NEUBORNE: I usually get a chance to ask hypotheticals, not answer them. But here I think the answer is not difficult. If the governor was not doing his job, and was not doing everything within his power to protect the lawful construction of the plant, then the governor would be caving in to political pressure and mob rule. He would be simply ratifying illegal activity. I would go to court to try to force the governor to rescind his order, and instead, to protect the legal rights of the utility to build that plant. When the side with the largest private army wins, then this is not a society in which one wishes to live. Whether you are plucking chickens, building nuclear plants or playing rugby, public officials do not cave in to political pressure and to mob rule, and then purport to have a society in which civil liberties has any existence.

ARYEH NEIER: Burt, I would like you to tell me how you would go about persuading a court, that, although due process considerations are not to be imposed on a utility, it is appropriate to require that a utility not interfere with the first amendment. I understand the practical argument, since the

courts have dealt explicitly with the due process issue. But I wish to know how you would make the argument that first amendment considerations are different.

BURT NEUBORNE: Let me try to answer on two levels: First, on an easy level and, second, on a more troublesome level. The easy answer is that courts have made that distinction. For example, if you take a look at the state action doctrine in the Second Circuit, you will notice that I did not think up this tripartite approach to state action by myself. The idea flows from a series of cases in which the Second Circuit appears to have adopted very different criteria to determine whether something is state action, depending upon the nature of the task being performed. For example, they have held that a private charitable foundation that receives a tax exemption under section 501(c)(3) of the Internal Revenue Code and provides a tax exemption to its contributors, is state action for purposes of analysis under racial discrimination statutes. In other words, if the foundation has excluded blacks as potential recipients in a racially discriminatory way, the Second Circuit has agreed that a cause of action exists for a violation of the Constitution.

Conversely, where procedural due process is at stake, the court has reached a different conclusion. The Second Circuit has taken the Legal Aid Society of New York and the OEO fund legal services corporations upstate and held that where the question is whether or not you have to give a due process hearing before firing somebody, there is no state action for the purposes of the fourteenth amendment. The court reached this conclusion even though these entities are one hundred percent state funded and can be said to be private only in a very formalistic way. So it seems to me that that distinction is beginning to emerge out of the cases themselves.

On the more troublesome point of how you can justify that distinction, it seems to me that one justifies it by asking why we have state action in the first place. It was not so long ago that we had precisely these same kinds of seemingly intractable state action issues. Those of you who have studied constitutional law may recall the primary calls arising out of Texas, the Jaybird cases, where an attempt was made by the state to delegate what would otherwise be a public function to a private entity so as to avoid the voting requirements of the Constitution. In those cases the Supreme Court applied precisely this kind of test. They looked to the value at stake in the dispute, and to what extent the state ought to control the exercise of power in so far as it impacts on that value. I think you can make a very plausible argument that, where due process values are at stake, you do not want to do that because you do not want to frustrate the reason you went private in the first place. But when first amendment and equality values are at stake where society encourages the accumulation of funds which are nominally private, but which would not exist without the assistance of the state, you have a different matter. We have a constitution to try to prevent society from

assembling power and using it in derogation of first amendment and equality goals.

JOEL GORA: Let me pursue that for one moment and see whether you think that it helps the argument at all to suggest that the particular form of action by the private company that one may try to interdict is a form of action we associate with a state.

BURT NEUBORNE: Sure. For example, a private police operated by a utility that exercised what are essentially public functions. The Supreme Court, by the way, has begun to deal with that: what happens when an entity delegates to private organs the performance of tasks which we have traditionally thought of as being governmental tasks? Additionally, there is speculation, for example, as to what would happen if a municipality decided to go out of the law enforcement business entirely and simply sub-contract out that function to a private company. Would that private company acting as a police force be subject to the Constitution? I think the answer is clearly yes. And it has to be under a public function analysis similar to the one you were suggesting.

PAUL CHEVIGNY: Something like that has happened. It is a very interesting argument because there is a lot of sub-contracting of police work, primarily infiltration work, mostly because of the stink raised about infiltration by government agencies. Also it is an enormously profitable business, especially out west. If there is a fly in the ointment, it would seem to be that your rights with relation to police action, particularly infiltration, as a due process matter are already so weak that it is difficult to control it.

AUDIENCE COMMENT: The avowal of non-violent ends has not very often been followed by the experience of non-violence. So, one justification for surveillance is to prevent violence from being done to utility personnel and property. The second question is: what do you mean by the word "surveillance"? Nobody, for example, is permitted to wiretap. That includes utility companies, just like it includes you and me. There are very considerable state law protections against certain types of surveillance. But, on the other hand, when there are open organizations such as the Shad Alliance, the Abalone Alliance or the Clamshell Aliance, who invite everybody to attend meetings, then at that point I see no Constitutional bar to having representatives of utility companies attend to see what the plans are. It very often is true that ninety-eight percent of the members of these organizations have no intention to do violence. But on the other hand, some of them do intend to do violence and have done so.

AUDIENCE COMMENT: I meant to clarify that when I say surveillance I would include all activities from photographing to infiltration. Let's take infiltra-

tion—the attending of public meetings without acknowledging a tie to a utility company. Can you see a justification for this?

MICHAEL LESCH: Well, to me that hardly ought to warrant a Constitutional prohibition. Although I know it will be difficult to get many of the people in this audience to accept this proposition, we must remember that the utility companies are not the all-powerful purveyors of evil that many people think. On the contrary, economically they are on the run. They feel, justifiably, that they must take certain actions to protect themselves, particularly when they have on their premises nuclear materials that must be secure. So I would draw the line where it is presently drawn. As to what should be permissible and impermissible, I would look to New York State law. There is nothing wrong with attending an open meeting when the interest is advertised as open. The fascist or communist participant does not have to declare his fascist or communist leanings, so why should the representative of a utility have to declare his leaning? On the other hand, things like wiretapping, mail-watching, incitement to violence are presently illegal and, I think, should be so. But I do not think that at this stage, this is a matter of Constitutional law. I think it is a matter of state law.

AUDIENCE COMMENT: I would like to express some of my frustrations with Mr. Lesch's comments. First of all, as an individual and also as a member of an organization that does extensive research into utility activities, I am tired of apologists for the utility industry and the nuclear utility industry in particular. These people portray the industry as being on the run economically, as being beleaguered. But all too often I see the fantastic bankrolling that is done by the utilities to defeat public initiatives against nuclear power, to defeat public initiatives in support of environmental legislation. I also see the fantastic amounts of money spent on public advertising campaigns to promote the images of nuclear power and the utilities. When groups like the Shad Alliance spend $100, or $200, or a $1,000, on leaflets, the utility companies are spending hundreds of thousands of dollars to promote their cause.

We are not talking about benign forms of surveillance, things like merely attending meetings unannounced. Jay Peterzell and others, including myself, have determined that there are a number of cases in which utility agents, or people employed by utilities, have tried to disrupt the activities of legal organizations. I would like you to address yourself to those more significant intrusions on civil liberties.

MICHAEL LESCH: I am not in favor of use of illegal methods, but I do not think that that is a serious issue. Few people representing utility companies are in favor of violating anybody's civil liberties. I do not think that is the question right now. I think the question is whether the nuclear power industry poses a serious threat to civil liberties. Notwithstanding the abuses

that have on occasion occurred on the side of the utilities, I do not think that it does pose a threat.

AUDIENCE COMMENT: Mr. Lesch, you made an assertion several times that I am not sure I understand. I wonder if you could just clarify it for me. You said that the utilities' stock is down and that it is trading at seventy-five percent of book value. You also said that the utilities are not making anywhere near their permissible rate of return, and on that fact you seem to base your argument that the utilities are somehow powerless and present no serious civil liberties threat. I am not sure I understand how that conclusion follows from your premise.

MICHAEL LESCH: What I am trying to point out is that the utilities do not present the type of aggregation of power which makes us fear for the preservation of civil liberties. The central concern of civil libertarians is that when you have a great aggregation of power, you are going to get abuse of that power. This is the underlying reason for the state action doctrine. This is also why we have the Bill of Rights, the fourteenth amendment, and incidentally, the Constitution of the State of New York. All of these protections are largely concerned with action by the state, because the state represents a tremendous aggregation of power. But where is the aggregation of power on the side of the utilities? What people point to generally is the tremendous aggregations of capital. I am saying that if you look at the economic facts with respect to that capital, you will see that these utilities cannot even earn their allowed return on their invested capital. It is one thing to say, as someone did earlier, that IBM might be a threat. I suppose every large corporation is conceivably a threat when it aggregates a lot of power. In the utility industry, however, I suggest you look at the history of their failures before the Public Service Commission, the history of their failures in trying to develop nuclear power. In 1970, approximately ten percent of the power in the United States was nuclear generated. That is approximately the same percentage as exists today. There has been virtually no progress since then. So, where is this tremendous power that everybody is so concerned about? Undoubtedly our society harbors many threats to civil liberties. But I suggest that if you are looking at the utilities, you are looking at an area where threats to civil liberties do not really exist.