

DISCUSSION

AUDIENCE COMMENT: I think that this issue is important to the question of whether having a commitment to civil liberties requires taking a position on nuclear power. I want to suggest a way to look at that question and to ask for your reaction. I think that one can really argue in three ways.

The first is that nuclear power and civil liberties are compatible. This argument is that any civil liberties violations which have occurred in connection with the anti-nuclear movement are merely because it is a protest movement and protest movements tend to be spied on, et cetera. Thus, according to this logic, there is nothing intrinsic to nuclear power that is any more violative of civil liberties than any other government or corporate policy which might give rise to a protest. And, so the theory goes, civil libertarians have no reason to oppose nuclear power, but merely specific civil liberties infringements.

The second potential argument is that although nuclear power and civil liberties might be compatible in theory, they are not compatible in practice. This is so because the dangers inherent in nuclear power are so great and, consequently, because the security interest is so strong. Furthermore, as John Barton has argued, once a country is committed to nuclear power development, it is difficult to abandon it, even if there is a serious terrorist threat or incident involving nuclear material or facilities. And so both public and private officials inevitably increase surveillance and repression. So, this argument goes, civil libertarians should oppose development of nuclear power.

The third and final argument is that nuclear power and civil liberties are inherently incompatible because the dangers of nuclear power are really so great that adequate safeguards require repressive forms of surveillance. Incidentally, I think that proponents of this argument focus on plutonium recycling or the breeder reactor.

IRA GLASSER: The ACLU's position is of course the first. I myself am less sure but am more inclined to the second.

It seems to me that the facts weigh heavily on all of them. What bothers me is that few people are able to answer those questions based on the state of the facts, and the absence of that kind of debate is itself a major civil liberties problem. What John Shattuck called informed consent is what democracy is all about. And I think that part of the clash between the protest movement and the suppression of debate, regardless of intention, is part of the problem. I doubt that a referendum, for example, would remedy that problem, for people would vote their instincts.

Sufficient fora, however, have not been developed even to debate those questions. It is fundamental that important policies should not be adopted without adequate preparation. With policy issues of that magnitude, a democratic society should not go forward until there is the opportunity for

public debate and decision-making. That, I think, is a major civil liberties issue.

As to the inherent incompatibility, I think that that is a political question. If I were persuaded of this incompatibility I would not want nuclear power. But then again, who would if they were so persuaded? That per se is not a civil liberties question; that is precisely the political question that has not fully or democratically been developed.

GERALD CHARNOFF: I would like to make the following observations about Mr. Glasser's remarks. Mr. Glasser is clearly correct in stating that scientists do not have a good record in prophesying the future. But I would suggest that not only scientists or technologists fail to prophesy accurately. For example, George Westinghouse said in the late 1800's that alternating current would not work. When the automobile was invented all sorts of people said that the automobile would not be practical and, furthermore, that it would be detrimental to society.

Econometricians, including some who work for me, have been predicting for the past ten years the need for power. They spent a lot of money and went through a number of calculations on how many power plants we would need, and they were dead wrong. If you go back far enough, however, Moses and Joshua promised a land of milk and honey. If they had turned right instead of left at the other side of the Sinai, they would have had all that honey today. The point I wish to make is that we have always developed new technologies, some of which have had adverse effects. But many have had positive effects. We live a lot longer today and probably in better housing than our forefathers did one hundred years ago. Those things are attributable to science and technology, and we need not be fearful of it. We must be sensitive and ask ourselves important questions about the long-term and short-term effects of a new technology.

While I am not opposed to hearings on power plant construction or similar issues, we ought to have some perspective. When a utility builds a power plant, whether it be coal or nuclear, there must be participation. But when a local steel mill, chlorine plant, or liquified natural gas plant is constructed, there are no public hearings. There are degrees of democratic or popular participation in the events of our lifetimes. There are limits to our ability to participate in all of these decisions in a large society with large numbers of people. An open and vigorous debate may inform consent, but I think that it would not necessarily improve prophecy.

Addressing the issue of referenda, there have been more referenda in this country on nuclear power than on any other industrial or technical activity. We do not have referenda on military power, on steel mills, or on airport siting, but we have had perhaps a dozen state referenda on nuclear power since 1976. Generally speaking, the majority of people in those referenda have voted for more nuclear power. Regardless of the wisdom of those decisions, there have been referenda on nuclear power. Now, suddenly

people are saying that we have suppressed debate. To the contrary, if there has been one area in which we have had abundant debate, that area is nuclear power.

Every civil libertarian says we ought to have more debate. I doubt it will improve prophecy, but I think we ought to have it as much as we have had recently. However, I do not think that we ought to quit on life. Such an extreme position is unnecessary. We all have questions, but let us not just turn that impulse into anti-science, anti-technology sentiment. Science and technology can do ill, but they can also do some wonderful things for us. We ought to focus on both the benefits and costs of science and technology.

IRA GLASSER: Well, that was a good try, but no cigar. This is the fundamental point that I thought I made at too great length, but which you seem to have missed; there is something fundamentally different about these technological advantages and these decisions. If you think that there is any significant debate over the existence of a difference between modern technology and prior technology, then you are utterly unfamiliar with the scientific literature. Modern technology is different. It is not to withdraw from life to point out the difference or to suggest that the consequences may be larger, more draconian and more nearly irreversible than ever before, warranting a higher degree of scrutiny. That is not a Luddite response.

You acquiesce in every call for more debate, but I heard you earlier argue against prior hearings. When someone said that there was not enough information, you disagreed and claimed that there is sufficient information. The issue is prior public hearings. In my view there is not enough information. There is not enough of it because our experience with nuclear power is limited.

The real question is: who is to decide? Your clients' interests are not the same as ours. The government's interests are not the same as ours. The Bill of Rights is premised on the notion that the interests of the governed are not the same as the interest of the governors. To the extent that corporations now have potential power equivalent to that of government, that premise applies to them as well, whether or not they intend to exercise such power. I am not quarreling with their decency. Decency is not an issue. If the Bill of Rights only applied to indecent people, it would not be what it is. It applies to everybody because it recognizes the basic fact that life-changing decisions that are important to the people who are the subjects of those decisions cannot be left to others whose interests are narrower. That is not a hostile point, but it is true. What is at issue here is who gets to decide those questions.

You said a moment ago that everything should not be decided democratically. I submit that the future of nuclear power should be decided democratically if its effects are as substantial as I suggest they are. That simply means that we must create new forms of decision making. Those new forms, if they exist, are going to disturb the solitude of your clients' decision

making. I understand why you would resist that. People do not relinquish that kind of power willingly.

GERALD CHARNOFF: It is too bad that you really do not appreciate what the issue is in the case involving the hearing. First of all, I am in favor of public hearings for siting, and starting, and operating of nuclear power plants. The sole issue in the specific case mentioned earlier was whether there must be a prior public hearing on an amendment to an existing license. Power plants, whether nuclear or non-nuclear, require myriad amendments to their licenses over their productive lives. The statutory scheme contemplates that when any amendment involves a significant hazards consideration, there should be prior public notice.

The simple issue in the case which was mentioned earlier and which is before the legislature is whether there must be a prior public hearing when someone requests one on an issue involving a non-significant hazards consideration. My position on that particular issue is that we cannot operate any industry or plant if we must have hearings every time anybody (whether well-meaning or not) formally requests one. That is the point of contention. No one, including myself, has argued against all public hearings. If you would examine the facts you too would conclude that there cannot be a prior public hearing before every action that does not involve a significant hazards consideration.

In that connection, an earlier speaker was the executive director of the Union of Concerned Scientists, which participated in the finding on behalf of Governor Thornberg of Pennsylvania that the release of gaseous material at TMI would not be hazardous. Partly on the basis of that conclusion, the NRC was prepared to issue an amendment to this operating license to permit that release. Another group, in turn, requested a hearing on that amendment.

That is the sort of overreaction to which I am opposed. That does not mean that I am opposed to public hearings. That does not mean that the industry should not have public hearings, and you really ought not to jump to that conclusion. What I am saying, and what you cannot deny, is that in the nuclear industry, for better or for worse, there are more public hearings than in any other industry in this country. Perhaps those hearings are needed, and I am not suggesting that we should not have them. I am suggesting that you unfairly criticized my statement without realizing what it was, although perhaps I was not clear enough.

To go beyond that misunderstanding and to reach the point you were making, to say that nuclear power is so different and that there are not enough hearings is remarkable. I have made a very good living out of hearings. I love hearings. I think that we should have more hearings on every license amendment. But as a practical matter, you could not operate the industry that way. In fact, you could not operate the ACLU if you had a public hearing before you intervened in every case. I am merely suggesting

that we need to balance things in our minds with some sense of perspective. That is my plea. We do need perspective, yet we fail to exercise it because we get carried away. That is the problem and that is my plea.

CLOSING REMARKS OF ARYEH NEIER: I am going to end this conference because I think that at this stage further remarks would only be marginally enlightening. We have talked for quite a long time, close to ten hours.

I am not sure how many people have made up their minds during this conference or how many people made up their minds long before they came and were impervious to the discussion. I started out without having made up my mind, and I still have not made up my mind on the question of whether nuclear power is itself so threatening to civil liberties that we should abandon nuclear power.

I will say just one thing in conclusion. To me the strongest argument against nuclear power enunciated during the course of this conference came from Mr. Lesch. He said that nuclear power was sufficiently dangerous to justify allowing nuclear power companies to engage in surveillance, and he apparently felt that certain kinds of surveillance do not endanger civil liberties and are proper for nuclear power companies to undertake. This argument would push me into the camp which maintains that nuclear power is sufficiently dangerous to civil liberties to warrant stopping the construction of nuclear power plants.

Thank you for taking part in this conference on behalf of the Committee for Public Justice and on behalf of the *NYU Review of Law and Social Change*. I am grateful to all of the speakers for their part, and I am equally grateful to all of the participants in the conference for taking part in it.

