DISCUSSION

ARYEH NEIER: Thank you very much. I have a friend who is a poet, Joseph Brodsky, who maintains that poetry does not so much attempt to express meaning as to absorb it linguistically. I thought of that as Frank Donner spoke about the "rachet-like logic of spookery." He absorbs meaning linguistically. At this point we are open for discussion.

GERALD CHARNOFF: I would like to comment on some of the discussion this morning. In my earlier participation in civil liberties issues, I used to be terribly concerned about tarring groups. What puzzles me about the presentations this morning was the tarring of groups. I have heard a discussion of surveillance, or counterintelligence, or call it what you will, that was allegedly done by utilities, by private groups, by local police, by state police, by the FBI and by the U.S. Labor Party. I head Mr. Donner talk about the Atomic Industrial Forum and the Edison Electric Institute. And I heard Mr. Peterzell say that in 1976 the federal Energy Research and Development Administration had circulated some literature to counter anti-nuclear arguments made during the referendum in California. I was just amazed at the so-called discussion of civil liberties this morning. Let me make a few specific points to clarify my position.

First, it puzzles me how ERDA's publication of literature offering its pro-nuclear bias is offensive to civil liberties. As I understand it this is called free speech. But I take it that if a government agency offers information, free speech is not permitted. And what is so troublesome to civil liberties if the Atomic Industrial Forum, which operates completely in the open, distributes its information? In my view, trade associations are voices of expression, of free speech. The same goes for the Edison Electric Institute. I did not hear anybody argue that either of those two groups is sponsoring or participating in infiltration or doing anything abhorrent. All I heard was the brush.

Then comes that remarkable tie, the U.S. Labor Party. The U.S. Labor Party is a very interesting group. They came to me a couple of years ago and asked, "How can you help us get money from the utilities for our groups?" I threw them out of my office. And I know three or four other nuclear lawyers in Washington who threw them out of their offices. And I know for a fact that there was a letter sent through the Edison Electric Institute to all utility presidents cautioning them not to support the U.S. Labor Party.

For heaven's sake, we are talking about civil liberties. Let us point to the infractions, and surely there are some, and deal with them. But let us not tar everybody associated with this great monolithic group, utilities. I thought there was common ground between Mr. Donner and myself when he lamented the fact that surveillance condemns the entire anti-nuclear movement as deviant. I agree with him. The anti-nuclear movement consists of disparate groups. But so does the utility industry. The nuclear industry is even more disparate in fact, and the so-called establishment is equally

disparate. So let us not be one-sided and lose perspective. This is a civil liberties discussion. I was pleased to come because I wanted to participate in something that is dear to me, civil liberties. But the broad-scale, slander-type activity in which we have engaged this morning is not in the tradition of civil liberties.

I think that Mr. Donner is right in asserting that the fear of subversion feeds on itself to justify surveillance. A lot of people have preyed on this fear. There are countless entrepreneurs out there doing just that, selling their techniques and their machines as much as they possibly can. But you know the anti-nuclear movement, disparate though it may be, also feeds on fear. I am not saying that it is wrong for the movement to do this. I am saying that we should look in the mirror and recognize that what we say about others is also true of ourselves.

The greatest fraud, as far as I am concerned, is the allegation that the anti-nuclear struggle is just an echo of the anti-war struggle. That is nonsense. It has no basis in logic. I have sat in on meetings with utilities concerned about riots, and in every one of those meetings people defended the demonstrators' right to express themselves. Moreover, they were wise enough to realize that if they decided to repress the demonstrators, the situation would worsen.

Most of the activities that I heard discussed here today were carried out by police authorities. I am not going to defend or attack local police. I do not know whether they do anything to anti-nuclear groups that they do not do to other concerns, whether legitimate or illegitimate. But for you to tar the utility industry or the nuclear industry on the issue of civil liberties versus nuclear power with that kind of broad-scale attack is unfair, and it does not move us very far in our debate. I would agree with you that to the extent there is agreement on some of the things that Georgia Power did, they went overboard. To the extent PG & E did it, they went overboard. Neither utilities nor anybody else should do such things. But is that a legitimate, broad-scale indictment of nuclear power or nuclear energy? Are civil liberties abuses inherent in our use of that power?

For Mr. Kairys to start talking about private institutions versus public institutions brings to mind the first case I litigated in this area in the mid-1960s. It was the Northern States Power Company case, and the intervenor was the Minnesota Environmental Coalition or some such organization. Their counsel was a guy named Larry Cohen, who later became mayor of St. Paul. Larry was a very impressive, formidable opponent. He made a speech that I remember hearing to this day. He was addressing the question of whether nuclear power should be controlled by big private enterprise or by government agencies. He made a very profound statement which I urge you to consider. He said, "You know, if the private utility companies were nationalized and they developed nuclear power, to whom would we go to complain about monitoring them?"

This same issue arose after the Three Mile Island incident. In testifying before Senator Ted Kennedy's committee I was asked: "Wouldn't we be

better off it we had large public power entities deal with this question?" But I know for a fact that, apart from Three Mile Island, the major nuclear incidents have occurred at the Tennessee Valley Authority. This is a public group which would have a hard time hiding behind your public versus private distinction. But let us not move this debate into the public versus private quagmire, because it is not meaningful in terms of nuclear power. If TVA did the things you suggested that other people have done, I do not think that the public versus private distinction would apply. The issue is not public versus private. That is a separate debate. My own personal view is that private industry will not build any new nuclear power plants. Any further nuclear power plants will be built by TVA-like agencies. But that is not the issue. What is needed is some intelligent, rational debate that does not get swamped in the anti-nuclear controversy.

There is a great deal of debate on the merits of nuclear power, but I thought the issue here was civil liberties. If we are going to tar every other group that comes along, then we are guilty of the very things about which we should be concerned.

DAVID KAIRYS: Do not take my silence on anything Mr. Charnoff said as agreement, because I cannot respond to everything. There are three points I want to quickly make. First of all, I did not say that what happened in the 1960's is being replayed now. Those were your words. My point was that many people talk as if a presumption of decency and uprightness should apply to government officials and corporate leaders. To me there is no such presumption. Somebody could have said that in 1962 or 1963, and we would have believed them. We would not have believed that the FBI would harass Martin Luther King. But then we found out it did. And we found out over and over again. It is patently naive to believe that public and private officials are all just decent folks who simply do not engage in abuses. Decent folks do commit abuses, and they have done so for a long time.

Your comment about the broad brush sounds a lot like balming the victim to me. People are being smeared. An anti-nuclear movement that is very important to me is being undercut, is being tied to terrorism and to violence, and the ties are not real. Yet you tell me that we cannot mention the names of the groups that are doing this? That somehow smacks of a reverse redbaiting I do not find myself very bothered by that problem at all.

I also am somewhat familiar with the Atomic Industrial Forum and the Edison Electric Institute. They are not the open organizations you depict them to be. For instance, we asked both of them to testify in the hearing in the Keystone case about promotional activities, not necessarily surveillance. Both organizations refused to attend. Although they have provided access to some of their materials, I would not characterize either as open. One aspect of that case is that large sums of rate-payers' money are being used to promote nuclear power. One of the ways Philadelphia Electric Company does that is by paying dues of $300,000 a year to the Edison Electric Institute.

We have also had testimony that at committee meetings of those organizations, particularly the Edison Electric Institute, issues surrounding the anti-nuclear movement were discussed. Also, ways of dealing with the anti-nuclear movement were discussed by security officials from various utilities. I cannot recall at this point which subcommittee of the Edison Electric Institute deals with this issue. I cannot say that these groups are performing the kind of networking or national coordinating function that Jay Peterzell talked about. We really do not know if that is happening yet. But if it does happen, these two organizations will be key. It is something to watch out for. I do not feel that I am smearing them or endangering some sort of civil liberties position by mentioning their sacred names in this vein. I do believe that they are part of a very vicious effort to promote nuclear power that undercuts the character and the personal life of anybody that gets in the way. I could give you many examples of that if you like.

FRANK DONNER: I just want to add a couple of comments. First, there really is a very impressive (or depressing) list of utilities that are involved in surveillance activities. There is a pattern that has emerged. I am an historian, and I feel it is my duty to search for the truth, to discern those patterns, to determine whether or not it is fair to find here a repetition of abuses that have occurred in the past. You cannot assure me that you are less biased than I am. You certainly cannot assure me that what we have seen does not represent a growing trend. You can say that your client is not involved in it, but what I am saying is that there is a pattern which history teaches us is evolving into a dangerous form of abuse of rights.

GORDON JOHNSON: I practice with the firm Rabinowitz, Boudin, Standard, Krinsky, and Lieberman, and like David, we are also general counsel to the National Emergency Civil Liberties Committee. We represent among others the Shad Alliance, which is an anti-nuclear group in the New York area. They were sued by the Long Island Lighting Company (LILCO) to enjoin activities that LILCO said would result in trespass on their property and defeat their right to absolute access to their Shoreham Plant, which is being built out on Long Island. LILCO also sought two million dollars in damages they maintain are occasioned by the protest activities of the Shad Alliance. Shad counterclaimed, but as David's article and comments make clear, it is difficult to make out a counterclaim that can withstand a motion to dismiss. We had five counterclaims, all of which were dismissed. Our right to privacy claim was dismissed because there is no right to privacy in New York. Our section 1985 claim regarding private conspiracies was dismissed because private companies are not bound by the Bill of Rights. Our intentional infliction of mental distress claim was dismissed because of the absence of a truly outrageous act. Surveillance is not an outrageous act, I presume, though the opinion of the court on this point was not too clear. Our interference with economic relationships claim was dismissed because the Shad Alliance is a non-profit organization, and hence it has no economic

relationships. Finally, our prima facie tort was thrown out, I suppose because everything else was thrown out, and the prima facie tort is always your last chance.

I have two comments about the preceding discussion. First, David mentioned almost a need for an accidental or chance disclosure of activities. One of the problems we faced in this case was one of pleading. We are unsure exactly what activities were directed against Shad and the fifty or so individuals who have been served or named in the complaint. LILCO did not display its pictures on television or have a turncoat investigator who squealed. Thus our complaint was not particularly precise, and that is a very serious problem, especially in state courts. In federal court you can plead almost anything and get by. In state courts, your pleading grounds are much more narrow and it is difficult to plead enough facts when you do not have the facts. And since you can make a motion to dismiss before you are forced to answer a complaint, there is very often no record of the utility's response to even your broad allegations which you might have very good reason to make.

Second, for a period of time our case was in the federal courts by removal. While in the federal courts we had discovery proceedings. LILCO, adding insult to injury, used the discovery proceedings to try to find out more about the Shad Alliance. They demand the membership lists, the name of every person who ever attended a meeting, the names of all contributors and so on and so forth. They justified these demands on the basis that they wanted to find the names of more defendants who they could hold liable for the two million dollars damages. The result was that litigation became a sword to further what we believe is a violation of civil liberties, a means to find out everything about an organization and the people who attended meetings.

One of the people who has been sued attended only two meetings, sat in these meetings for a total of about an hour to an hour and a half, and listened. It appears, though, that her name turned up somewhere so LILCO named her and served her as a party. Perhaps in my more optimistic moods, I would agree with Frank Donner and say that litigation may work, that one day the courts will recognize the invasions of privacy. However, there are some serious drawbacks to litigation that can easily be used against the anti-nuclear movement and in further violation of civil liberties.

ALLETTA D'ANDELOT BELIN: Picking up on the point that Mr. Kairys and Mr. Peterzell made very well this morning, a lot of these surveillance activities may not in fact be technically illegal and thus may be quite difficult to approach in the context of a lawsuit. Nonetheless, I wonder whether one handle on this matter is the gap between the rationale for surveillance activities and the reality of the activities themselves. Two examples illustrate this point.

One example is the Virginia Electric and Power Company (VEPCO), the owner of the Surry Nuclear Power Plants, where the first documented

incidents of sabotage of a commercial nuclear plant in this country occurred last year. In that incident, two employees of the company poured a caustic substance on some of the unloaded nuclear fuel rods in order to demonstrate the inadequacy of the plant's protections against such sabotage. It has been shown, however, that VEPCO has, among other things, infiltrated the anti-nuclear group in that area. Is that really what the company should be spending its time on? Is it really seriously trying to safeguard the plant?

Another example which highlights the incongruity between the ostensible goals and reality of nuclear power "security" occurred in the Dallas, Texas area. There were some bombings of utility company substations that were not nuclear, and there was an alleged threat to bomb the Commanche Peak nuclear plants that were being constructed near Dallas. In the context of those events, the Federal Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (BATF) launched an in-depth investigation of local, non-violent anti-nuclear groups. BATF had undercover agents infiltrate the group, obtain a wiretap, and investigate its members in detail. These people had no idea where those non-nuclear substations were or that they even existed; they are avowedly non-violent.

ARYEH NEIER: I assume that those were rhetorical questions and that it is not necessary for the panel to respond.

AUDIENCE COMMENT: Mr. Kairys, you mentioned once or twice that you felt the courts really were failing to recognize the need to extend traditional civil rights to what you called the private sphere. But what constitutional basis does a court have to do that? Must there not be something more than simply a felt social need?

I agree that it is indefensible that a private corporation can infringe upon rights, but that the government cannot. Yet is the court the proper place to change that? Do the courts have the power to accomplish that end even if they wanted to?

DAVID KAIRYS: That is a very good question. I view courts as very political places, but significant reforms in this area will not happen there in the absence of a mass movement demanding it. A close analogy is the extension of the first amendment to the states. This is supposedly based on the fourteenth amendment. Although the fourteenth amendment had been in effect since the Civil War, it was not until 1925 that it became the vehicle for applying the first amendment to the states. What caused that? There was a mass movement, the labor movement, that demanded the right to use the streets to speak, to distribute literature, and to organize unions. This movement was very powerful, transforming the law both in the legislative arena, including passage of the National Labor Relations Act, and in the courts. Two years after the National Labor Relations Act came the decision in *Hague v. CIO* which unequivocally protects the right of people to distribute

literature on the street. These phenomena are political. The Court's decision to extend the first amendment to the states was based on the fourteenth amendment to the Constitution, although the Court had previously rejected that argument. Suddenly the fourteenth amendment was rediscovered in the context of a changed political situation.

There are other similar examples. For instance, there is the changed character of corporations in the United States. It is more likely that reform is going to occur in the political arena, and the courts, if they act at all, will follow the political branches of government. Some doctrine or rationale will be devised; it might be a legislative act or constitutional amendment. From my perspective, however, a political movement will be invaluable as a catalyst to change.

ARYEH NEIER: Allow me to supplement that answer, if I may, in two respects. First, there is a panel this afternoon which will address exactly this question. Second, as a general observation, the trend may be a little bit counter to what Mr. Kairys said. My recollection is that prior to *Jackson v. Metropolitan Edison* every lower court that had considered the issue had come out on the other side. The Supreme Court in *Metropolitan Edison* held that the fourteenth amendment did not compel the utility to provide a hearing before the termination of electrical service. All the lower courts that had previously considered that issue, including several circuit courts, had ruled that utilities had to provide a hearing before terminating electric power in accordance with the Supreme Court decision in *Goldberg v. Kelly*. So the Court has moved away from the notion that state action limits the activities of the public utilities. The panel this afternoon will explore in greater detail theories by which to bring the activities of public utilities within constitutional limits.

DAVID KAIRYS: I agree entirely with what Aryeh has just added. But to me Aryeh's observation reflects a political shift to the right that is reflected in the law. Corporations, as another example, have gained full free speech rights. Freedom of speech, to me, is something that humans have as personal autonomy rights; that theory has been turned around the same way as, say, the Sherman Anti-Trust Act was turned against labor.

ARYEH NEIER: These are not questions that we are going to resolve at this moment, so we are going to move on to a discussion of information, secrecy, and atomic energy. Our speaker in this segment of the conference is Dr. Harold Relyea, who is a specialist in American National Government in the Congressional Research Service of the Library of Congress. Alan Adler, who is Legislative Counsel of the ACLU National Security Project, Center for National Security Studies, will respond to Dr. Relyea's article.