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## Panel: State Action and the Constitutional Accountability of Private Utilities

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PANEL:  
STATE ACTION AND THE CONSTITUTIONAL  
ACCOUNTABILITY OF PRIVATE UTILITIES

JOEL GORA, MODERATOR

JOEL GORA:\* This part of the program deals with legal remedies. Yesterday one speaker said that he was not sure what kinds of civil liberties issues were raised by the existence of the nuclear power establishment and all of the rules, regulations and procedures created as a result of its existence. I think that since yesterday afternoon the discussion has clarified many of those problems. It's not necessarily clear what the solutions are, but I think the issues have been effectively and persuasively identified. It seems to me that the core of almost any civil liberties concern is the notion of holding power accountably, holding power responsibly. We look primarily to the Constitution to do that. Failing that, we look primarily to other sources in law and conduct. The sequence of discussions is natural. The civil liberties implications and problems of the existence of a nuclear power establishment having been identified, the question now is: What remedies are available through our constitutional scheme? And if our constitutional scheme appears lacking, what remedies are available otherwise?

One of the predicates for this inquiry is that nuclear energy and the nuclear establishment are different. How much so is an open question, but they do differ from other forms of sources of power and influence over our lives. The Supreme Court treats nuclear power as different, and that was one justification for upholding the Price-Anderson statutory limitation on nuclear liability. The court said at least three times that nuclear power possessed a uniqueness which other forms of energy did not. So, given that uniqueness, given the civil liberties problems that the nuclear industry raises, the issue now is accountability and control through our Constitution or other forms of authority. The first speaker to address that issue is Burt Neuborne, a professor of law at New York University Law School and one of the most creative civil liberties theoreticians and litigators around.

REMARKS OF BURT NEUBORNE:† Joel's introduction points up a general problem that we have to face in the next decade: the development of theories to restrain huge, private accumulations of power. Providing a legal framework for dealing with nuclear power is thus really part of a larger social problem.

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*Ed. Note:* The footnotes to these remarks have been supplied by the editors for the reader's information.

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The core concern of civil liberties is creating antidotes to the exercise of large aggregations of power, whoever exercises it. If we have learned anything from the history of the last several centuries, it is that power unchecked is an enormous danger to the values of individual freedom and dignity. We have been trained to perceive government as the major danger to civil liberties because historically government alone has had the capacity to marshal power sufficient to threaten civil liberties.

In large part, because we have looked at government as the source of the danger, we, as civil libertarians, have encouraged the growth of organizations which mediate between individuals and the government. Two examples of mediating organizations that we have encouraged during the twentieth century are labor unions and business corporations. The existence of these private organizations standing between the individual and the state has provided a valuable mechanism to set entities off against each other and to curb what would be an uncontrollable source of power. In consequence, these mediating organizations have kept us freer by checking the power that flows from the government. Frankly, that is why many civil libertarians applauded when corporations were given free speech rights by the Supreme Court<sup>1</sup> and when labor unions were given exemptions from the antitrust laws by the Supreme Court.<sup>2</sup>

The problem we face now and will face increasingly in the future is how to protect the individual, not only from the government but from the mediating organizations themselves as they acquire power. Thus, one of the greatest challenges that civil libertarians face in the years to come is to forge theories by which we can begin to place restraints on the mediating organizations, just as we have forged theories to place restraints on the government. One approach that is obvious to somebody in the American legal system is to try to bring private power centers under the same kind of control as the state by attempting to make the Constitution applicable to these private power centers.

In legal shorthand, the issue is whether or not the actions of these private power centers can be deemed to be state action for the purposes of the Constitution.<sup>3</sup> If they are state action, then we can bring to bear certain

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1. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n. of N.Y.*, 447 U.S. 530 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

2. *United States v. Hutcheson*, 312 U.S. 219 (1940).

3. *See, e.g.*, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (privately owned and operated utility's termination of service held not to constitute state action for the purpose of the fourteenth amendment); *Evans v. Newton*, 382 U.S. 296 (1966) (land which was willed in trust to the Mayor and City Council of Macon, Georgia, to be used as a park for white people only and over which city was trustee for some time held to constitute state action); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (racially discriminatory operation of a restaurant physically located in a publicly owned and operated parking building and leased from a state agency held to constitute state action).

constitutional restraints upon their activities, just as we bring those restraints to bear on the government. If we cannot, then we have to seek other, more creative theories to restrain these entities. It does not much matter whether you call it state action or something else, as long as you have a theory which effectively places restraints on the acting agency. The Constitution has, by and large, operated relatively well in our system as a restraint on the government, and we must now experiment with and develop other theories that can be brought to bear on these enormous private aggregations of power.

Let me explore a moment the extent to which the easy route is open. Can we say, for example, that a public utility is state action and therefore that we have a ready-made set of concepts all set to be used against the utility in an attempt to rationalize the exercise of its power?

I should say—and I think it is important at a conference like this to say it—that the attempt to rationalize power should not be confused with the attempt to strangle the entity that is exercising the power. The purpose of the Constitution is not to prevent the government from operating; rather, the purpose of the Constitution is to rationalize the government's operations in a way that, at minimum, does not violate civil liberties. Similarly, the way to look for a theory to deal with private entities is not to look for a theory that will crush or strangle a private entity. Such an approach guarantees that the theory will never be accepted. Put simply, if all you have is a theory that is a disguised way of preventing the development of nuclear power, then I can assure you that no court is going to buy it, nor should it. If you hope to formulate a theory that has a chance of working, it has to be a theory that is designed to rationalize the exercise of power and not to strangle the organization exercising the power.

The argument for state action in a public utility context is an obvious one. A public utility exists because the government bestowed a profit-making monopoly on a private group of people to insulate that private group of people from any competition. It exists only because the state decided that it was more efficient or politically preferable to have these goods and services delivered by a private monopoly than by the state itself. Therefore, it might follow that the public utility should be treated as an arm of the state.

The problem with this argument is twofold: First, the state action argument has been flatly refuted by the Supreme Court on more than one occasion.<sup>4</sup> Of course, as Robert Frost once said, "Why abandon a belief merely because it ceases to be true?" Just because the Supreme Court has rejected an argument on one or more occasions, is no reason to stop pressing it if there is an underlying validity to the argument. Thus, although I believe that there is little likelihood of getting the argument accepted in the

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4. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

short term, one must, nevertheless, explore the underlying validity of the argument.

The second problem is that when you look at the underlying validity of the argument, I think it is in trouble on the merits. I think there is a very serious problem in attempting to characterize everything that a public utility does as state action. The argument runs into trouble in the following way. Fundamentally, a public utility represents a governmental decision to assemble private capital to fulfill a given social purpose more efficiently than using the government's taxing power to assemble the same capital.

This is precisely the reason that business corporations arose in America in the nineteenth century. That means that we made a political judgment that we want a private entity, not government, to do something. Of course, that is a hotly debatable political point, and you may disagree with the decision to sanction private, rather than publicly owned, utilities, but that arrangement does accomplish certain ends. However, by definition, if you have a public utility, that argument is lost. The decision has already been made to let a private entity assemble and manage capital.

If you then seek to impose on that private entity precisely the legal restraints that are imposed on the government by insisting that private entity be treated as state action, then the effect is to checkmate the benefits that are supposedly going to flow from having private, instead of public, utilities. If the private entity must act precisely the same as a public entity, then you have to ask the question, why use a private entity in the first place? I suspect that that argument is going to doom any attempt at a full-scale imposition of state action on public utilities, and perhaps it should in order to maintain economic efficiency.

All of this is not to say that the battle is over on the state action issue. It is simply to say that the battle must become more sophisticated. Thus far advocates have attempted to impose wholesale the doctrinal implications of the state action label. They have attempted, for example, to require public utility decisions to terminate an employee or to site a plant to be treated as though they were the decisions of government. A more sophisticated way of approaching this problem is to ask whether a public utility is state action for certain purposes, not for all purposes, and certainly not for its economic operations.

Is certain public utility behavior state action? Frankly, I think the state action label is nothing more than a legal conclusion that for certain purposes large accumulations of power ought to be subject to constitutional constraints. I think that if you divide entities' behavior into three general areas, equality, free speech, and procedure, then perhaps there is room for the development of a theory.

Taking equality, for example, suppose there were no public statutes regulating racial and ethnic discrimination in hiring and firing. If a public utility were to announce that it was going to hire only whites or Republicans or that it was going to exercise some other form of invidious discrimination,

then it seems that there would be a plausible argument that such economic entities which owe their advantageous positions to society's sufferance, ought never to discriminate against the equality norms of the Constitution. Therefore, for equality purposes, a plausible argument can be made that utilities' actions are state action. Indeed, the precedent that stands in the way of making public utilities state action is procedural due process precedent,<sup>5</sup> not equality precedent. The two should be clearly distinguished. The procedural due process cases are at the other end of the spectrum. For precisely the economic reasons that I have discussed, the courts have consistently rejected that state action argument in a procedural due process context.<sup>6</sup>

So on the one hand are the equality cases, and on the other hand are the procedural due process cases. In the middle are the first amendment cases, the free expression cases. When an agglomeration of power begins to exercise its power contrary to free expression or contrary to free expression principles, what constitutional guarantees can be brought to bear on that power? That is a very different question than asking whether procedural due process guarantees can be brought to bear on that power.

I suggest to you that it is in the areas of equality and first amendment rights that the fight on state action is going to be waged in the next several years. It is a fight which is not as hopeless as the current precedents might suggest. The only way the battle can be lost for sure is to view state action as a whole without making sophisticated judgments about what should be covered by the Constitution's guarantees. There is at least a fighting chance to establish state action for the purposes of equality and free speech norms, especially if advocates give up the Custer-like attempt to impose procedural due process norms on privately-owned utilities.

If a private entity, any private entity, adopts rules under government pressure, then there is a much stronger traditional argument for state action.<sup>7</sup> If one can show, for example, that utilities established surveillance rules or security rules in response to governmental pressure, then you have a totally different ball game in terms of state action. Those types of rules may well be considered as state action regardless of what they regulate. But, in the absence of that governmental pressure, I think the three-tiered approach that I suggested is the way that this problem should be analyzed in the future.

Finally, the world does not begin and end with the Constitution. State action is not the only way to go. There are a whole host of interesting and innovative devices to check private entities under tort law and under con-

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5. See, e.g., *id.*

6. See, e.g., *id.*

7. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1157-61 (1978 & Supp. 1979).

tract law. The notion of wrongful discharge, for example, has only begun to evolve in the last few years.<sup>8</sup> That notion had never been taken seriously in the law before, but the existence of that tort of wrongful discharge is evidence of the fact that some courts are becoming aware of the need to restrain private as well as governmental power. It would be, I think, a serious mistake for lawyers working in this area to focus solely on the Constitution, because I suspect that more creative and effective means lie with traditional state law theories.

JOEL GORA: Thank you, Burt. The next member of our panel, Paul Chevigny, is also a professor of law at NYU Law School. Prior to coming into teaching, he spent a decade as a lawyer with the New York Civil Liberties Union, trying to bring a little accountability and responsibility into the law enforcement establishment. Tackling the nuclear industry will be a piece of cake after that. Paul.

REMARKS OF PAUL CHEVIGNY:\* This talk to some extent provides detailed footnotes to Burt Neuborne's presentation. I agree that an across-the-board application of fourteenth amendment concepts to private entities, even large private entities, is unlikely to succeed in the foreseeable future. In this connection, it is valuable to note David Kairys' thesis about the radical break in American constitutional jurisprudence between private and state action. As he mentioned, the distinction is quite arbitrary, and many private entities are larger than those that are treated as state entities. For instance, a great many private corporations are larger than most municipalities, and some multinational corporations are more powerful than the countries in which they have their headquarters.

The Supreme Court has refused to treat private entities uniformly as public entities because of the attendant problems, such as possible interference with their freedom of association. Insofar as there is a tradition of pulling private entities into the public sphere, it has been limited to those private enterprises whose activities resemble the activities of the state. The classic case is *Marsh v. Alabama*,<sup>1</sup> the company town case. *Marsh* involved a piece of private property which assumed the aspect of a municipality, and the Court therefore treated it as a state entity.

8. E.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Monge v. Beede Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). See generally Comm. on Labor and Employment Law, *At Will Employment and the Problem of Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170 (1981); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

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1. 326 U.S. 501 (1946).

The better example for our purposes is the famous set of cases involving shopping centers. *Logan Valley Plaza*<sup>2</sup> was a case in which a shopping center in the middle of a suburb served the same function as the company town's business district in *Marsh*. In that case, the Supreme Court prohibited the use of state trespass laws to enjoin picketing at the shopping center, even though it was privately owned. The difficulty with that case is that it was overruled in *Lloyd Corp. v. Tanner*<sup>3</sup> and *Hudgens v. NLRB*.<sup>4</sup> Shortly after that group of decisions, however, the Supreme Court handed down the *Pruneyard Shopping Center*<sup>5</sup> decision which points a way out of the *Logan Valley* problems so long as one is not confined to the federal constitution. *Pruneyard Shopping Center* was a California case in which, under the California state constitution, the state supreme court expanded free speech rights in relation to the real property rights of a shopping center's owners.<sup>6</sup> In other words, the California court reinstated the rule that persons have a right to speak in privately owned shopping centers, notwithstanding the private property rights of their owners. The California decision, which the U.S. Supreme Court upheld, effectively revived the *Logan Valley Plaza* doctrine under California law.

The upshot of *Pruneyard* is that there is power in the state constitution, and presumably in state legislatures and administrative agencies like public service commissions, to regulate economic relations in the interest of increasing the civil liberties of the people. The question that went to the Supreme Court in *Pruneyard* was: If there is a conflict between an increase in the liberties under state law and the right to manage one's private property as one wishes, which should triumph? In this case state law triumphed. The Court held that California had the power to expand the liberties of its citizens as against the solely economic rights of *Pruneyard*'s owners.

*Pruneyard* alone is not going to solve the problem, however, because *Pruneyard*'s owners had no first amendment interests, or at least they advanced none, in the expression at their shopping center. On that basis the Supreme Court distinguished all the cases in which there were competing first amendment interests. For example, in *Miami Herald Publishing Co. v. Tornillo*<sup>7</sup> the Supreme Court held that a state cannot force a newspaper to print a particular editorial in answer to another editorial. The Court reasoned that such a law would be a content-based restriction on the freedom of the press, repugnant to the first amendment, rather than merely an

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2. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

3. 407 U.S. 551 (1972).

4. 424 U.S. 507 (1976).

5. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

6. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

7. 418 U.S. 241 (1974).



interference with private property rights. *Pruneyard* did not involve such considerations.

*Pruneyard* is only the beginning. There are some other cases which provide further insight into whether there is a right to reply to public utility speech with respect to nuclear power problems. In the Supreme Court decisions concerning the public utility speech, the *Central Hudson*<sup>8</sup> and *Consolidated Edison*<sup>9</sup> cases, the Supreme Court held that the New York Public Service Commission could not prohibit a utility from mailing written materials with its bills. In other words, a utility could not be prohibited from sending out its ideas in its bills. The Court did say something in dictum which is really very peculiar, however. They said it might be possible to require the utility to include a reply in the envelope.<sup>10</sup>

The salient question is thus: On what theory could one, consistent with the constitution, require a private entity to include a written reply in its regular mailings? There are cases which address such a right of reply, particularly in connection with television and radio broadcasting, in which the owner controls access to a uniquely limited means of communication.<sup>11</sup> In those cases, the Supreme Court has consistently held that a state has the power to provide for some sort of reply with respect to the information broadcast over the airwaves. Another case involving the first amendment speech of corporations is *First National Bank of Boston v. Bellotti*.<sup>12</sup> In that case, the argument was made that limits on corporate speech are needed because corporations have such enormous economic power; however, the Court found no proof in the record that the First National Bank of Boston had any such power.<sup>13</sup> The implication is that if there had been such proof, the Court might have reached a different decision.

Taking all those decisions together, it might be argued that a state can, as a matter of state law, require a right of reply to public utility speech concerning nuclear energy. There is a monopoly of information with respect to nuclear power under the Atomic Energy Act,<sup>14</sup> a monopoly which is derived from the government. Furthermore, there is a special state function with respect to nuclear power which is delegated to the utilities. The utilities have, of course, a state-created monopoly on the production of power. Finally, energy consumers pay for the mailing, so there is the interest of dissenting ratepayers. Taking all of these factors together and analogizing to

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8. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n* 447 U.S. 557 (1980).

9. *Consolidated Edison Co. v. Pub. Serv. Comm'n* 447 U.S. 530 (1980).

10. *Id.* at 543.

11. *E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

12. 435 U.S. 765 (1978).

13. *Id.* at 789-90.

14. 42 U.S.C. §§ 2011-2296 (1976 & Supp. IV 1980).

the FCC cases, I think that states may well be able to compel the utilities to mail replies.

This may seem like very small game, but I am using it to illustrate a way to cut into the problem. Some might say at this point that this is hopeless, that it is futile to press state legislatures, agencies, or courts to adopt these ideas. But, as Mr. Kairys said with respect to Supreme Court doctrine, it is at bottom a political matter, and I venture to say that it is a much easier political task than getting the Supreme Court to change its views with respect to state action. Moreover, it is obvious from the *Pruneyard* case that it is a great deal easier to persuade a state legislature or a state court using the state constitution to adopt these ideas than it is to persuade the Supreme Court to change its views.

I want to say a couple of other things about state-created limitations upon the property rights of utilities. There is constant talk about abusive "spookery" by the utilities, to borrow the term used by Frank Donner. Utilities do not have a right, as far as I can see, to spy upon other people. Thus, a rule imposed either by a public service commission or by state law limiting the use of surveillance seems to me to present no constitutional problems. Similarly, state legislatures can control broadly the abuse of private detective services through licensing and other controls. For instance, states have recently passed laws which forbid the use of lie detectors as a condition of employment,<sup>15</sup> and at least two of these laws have been upheld against constitutional attack.<sup>16</sup> The abuse of power by private investigative agencies is clearly within the power of the state to regulate.

The problem is that there is no political will on the part of the states to halt abuses. But that, you see, is part of the endemic problem of a protest against a set of conditions such as the conditions with respect to nuclear power. The modification of such conditions is basically a political problem which must be approached through political means. Those political means may use the law as their instrument, but reform cannot be realized by force of the Constitution alone. It can only be realized through political power: action through the courts, through the legislatures, and through state constitutions.

I have one final point. It has been said here over and over again, somewhat to my surprise, that private nuclear power is in its twilight and that the future development of nuclear power is going to be remitted to the government. If that is so, then the due process problems of reaching out to control private abuses are considerably simplified, although they certainly do not disappear.

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15. *E.g.*, MINN. STAT. § 181.75 (1981 Supp.).

16. *Minnesota v. Century Camera*, 309 N.W. 2d 735 (1981); *New Jersey v. Community Distrib.*, 64 N.J. 479, 317 A.2d 697 (1974).

JOEL GORA: The third member of the panel is Michael Lesch, a partner in the law firm of Shea & Gould. Mr. Lesch has represented several public utilities in a number of matters and, more particularly, is counsel to the Long Island Lighting Company in the *Shad Alliance* lawsuit. Mr. Lesch is going to talk about some of these problems from that perspective. Mr. Lesch.

REMARKS OF MICHAEL LESCH:\* Thank you. When I saw the title of this Symposium, I asked several participants what was intended, because I for one did not see any civil liberties implications peculiar to nuclear power development. And then I sat here and heard John Shattuck say that, according to his analysis, nuclear power is threatening to civil liberties, but not uniquely threatening. Then I heard Burt Neuborne say that what civil liberties is really all about is the protection of the individual against any great aggregation of power, but that historically this has been limited to cases involving state action.

Having heard these gentlemen and having considered the matter further, I now suggest to you that the decision whether or not to use nuclear power does not raise civil liberties issues. First, utilities do not represent enormous aggregations of political power threatening to the individual, which is the historic concern of civil liberties law. In recognition of this fact, the Supreme Court has held that a utility's summary termination of service is not state action for purposes of the fourteenth amendment.<sup>1</sup> Nor should we expand the state action doctrine to encompass investor-owned utilities. It is simplistic to believe that because utilities control tremendous aggregations of capital in the form of generators, transmission and distribution lines, poles, substations, and other operating equipment, they have power of the sort which constitutes a threat to civil liberties (which I will hereinafter refer to as "political power").

One indication of utilities' lack of political power is the electric utility industry's lack of success in fostering nuclear power plants in this country in the 1970's. A second indication is that utilities are so heavily regulated by state public service commissions (to say nothing of federal regulation)<sup>2</sup> that the industry now is in a poor, if not precarious, financial condition. Twenty or thirty years ago utilities' stocks and bonds were the investments of widows and orphans. Now anybody who invests in utility securities is taking

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1. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

2. *See, e.g.*, Atomic Energy Act of 1954, 42 U.S.C. § 2232 (a) (1976) (authorizing the Nuclear Regulatory Commission to issue licenses for nuclear power plants upon a finding that the facility "will provide adequate protection to the health and safety of the public"); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1976 & Supp. IV 1980) (providing for regulation of the structure and financing of utility companies); Federal Power Act, 16 U.S.C. §§ 791a-828c (1976 & Supp. III 1979) (regulating interstate transactions in electric power).

a substantial risk. Overall, electric utility common stocks are selling at approximately 80% of book value, compared to more than 140% of book value in the mid-1960's. Not only that, but most utilities cannot even earn their allowed rates of return. Indeed, that is probably a principal reason why the prices of electric utility common stocks are currently so low.

A third factor demonstrating utilities' lack of political power is that many states have encouraged governmental authorities to take over private utilities' assets, to manage them, and to sell power directly to the public.<sup>3</sup> For example, the Power Authority of the State of New York has recently encouraged several counties to pass resolutions to study the establishment of county authorities to operate such utilities and to sell low-cost hydropower directly to the public; Westchester County, Orange County, Niagara County and others in New York State are considering submission of this issue to the public in the form of a referendum.

In addition to the fact that electric utilities do not represent enormous aggregations of political power which threaten individual freedoms, there is another reason why nuclear power does not present civil liberties issues. Civil liberties issues are constitutional issues to be decided by the courts. The decision as to the type of fuel to generate electricity is in no sense a constitutional issue, but is a classic problem for popularly elected legislatures because it requires the resolution of conflicts among divergent interests in the community.

A close examination of the energy problem confirms this view. One fuel is oil. But oil, particularly foreign oil, is very expensive, and its use will result in rate increases. Thus, if this choice is made the ratepayers will protest, and there will also be less oil available for other enterprises which may not have as many alternative fuels available. Another fuel is coal, but coal causes environmental problems. A third alternative is solar energy, but almost everyone agrees that its use on the scale necessary to satisfy the requirements of the utility industry is impractical. A fourth alternative is hydropower, but it is indisputable that there is insufficient hydropower available to keep the nation's electricity generators operating at their current level. A fifth alternative is nuclear energy. As you are aware, nuclear energy raises questions concerning the health and safety of populations residing near nuclear power plants.

To analyze the alleged "civil liberties abuses" of utility companies is to confirm the foregoing views. Mr. Peterzell's report,<sup>4</sup> for example, is the source principally cited by persons at this Symposium who urge the need for civil liberties safeguards on utilities' use of nuclear power. But, to a large extent, the examples of abuses which Mr. Peterzell cited were not by utility

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3. See, e.g., *Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 382 N.E.2d 1139, 410 N.Y.S.2d 276 (1978).

4. J. Peterzell, *Nuclear Power and Political Surveillance*, Center for National Securities Studies, Rep. No. 106 (1981).

companies, but by governmental agencies called in on the occasion of threats to utility company property. Accordingly, such abuses are protected against by well-established constitutional doctrines and are in no sense peculiar to the nuclear power industry.

Indeed, I submit that the utilities in many of these incidents are the victims, not the perpetrators, of tortious and criminal acts. For example, Long Island Lighting Company, which I represent, has sought an injunction against the physical blockading of its properties by members of an organization known as the Shad Alliance who sought to prevent the construction of a nuclear generating station at Shoreham, Long Island.<sup>5</sup> I emphasize that Long Island Lighting has not been the victim of demonstrations, because everyone is entitled to demonstrate, and no utility with which I am familiar contests that principle. Rather, Long Island Lighting company has been the victim of physical interference with its ongoing activities as a public utility.

In 1979 demonstrators pulled down a fence, attacked guards, and trespassed upon the Shoreham property until they were arrested. In fact, a principal item of evidence in our case is a Shad Alliance pamphlet which advocated a blockade on September 29, 1980 "to block all access to the Shoreham nuclear plant!" The pamphlet showed on its cover a large number of people with their arms linked together in front of a fence to bar the entrance of workers into the construction site. The pamphlet stated, in relevant part:

The Citizen's Strike is seen as part of a continuum of actions, begun in 1967 and continuing until the successful halt in construction and ultimate sealing of the plant. The Citizen's Strike will include a wide variety of nonviolent tactics, some legal and *some extra-legal*, and will be preceded [sic] and followed by intensive local community organizing activities. . . . *the Blockade will depend upon large numbers of people placing their bodies between the nuclear power plant and all worker and material traffic. Clusters of affinity groups will sit, lie down, camp out, at the three gates on North Country Road. Creative affinity group activities such as possibly chaining gates shut, forming human chains on pyramids, etc., are to be encouraged.* As this is a rural setting, all workers either drive or are bused to the work site. We will probably not be confronting pedestrians, but instead will need to form human blockades large enough to discourage vehicular passage.<sup>6</sup>

Long Island Lighting Company went to court to seek an injunction to prevent actions such as those described above which, notwithstanding pro-

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5. Long Island Lighting Co. v. Shad Alliance, No. 80-17, 790 (N.Y. Sup. Ct. filed Sept. 18, 1980).

6. Shad Alliance pamphlet 4-6 (emphasis added).

tests to the contrary, presented an obvious risk of violence. On September 25, 1980 the United States District Court for the Eastern District of New York issued a temporary restraining order enjoining such a blockade.<sup>7</sup> In violation of the order, on September 29, 1980 hundreds of persons blockaded the entrance to the Shoreham plant, and 150 were arrested for criminal trespass. In short, it is my view that if that particular case raises a civil liberties issue, it is the liberty of the utility company to pursue its work without violent intrusions by others. There is no civil liberties issue at all presented by persons seeking to conduct an illegal blockade.

On the other hand, anti-nuclear activists have raised claims about improper "surveillance" or "infiltration" by the utility companies.<sup>8</sup> I suggest to you that the concepts of "infiltration" or "surveillance" are meaningless when applied to these groups because they proclaim that they have no members and that their meetings are open to everyone. Moreover, when a utility company is threatened by violent action, not demonstrations but "blockades" and the destruction of utility properties, then the utility has a right to protect itself by gathering information.

The Peterzell report also cites instances where individuals unsuccessfully urged the demonstrators to adopt violent tactics.<sup>9</sup> Obviously to the extent that such speech is not protected by the first amendment, that constituted an improper act, and there ought to be a legal remedy against it.

Similarly, where individuals are arrested by state police for distributing anti-nuclear literature, as Mr. Peterzell says happened in 1977 pursuant to orders of Governor Meldrin Thompson of New Hampshire,<sup>10</sup> I would agree that such action is unconstitutional. Remedies are available in actions for false arrest under state law and for violation of federal constitutional rights under 42 U.S.C. §§ 1981 *et. seq.*

However, in these cases the defendant was not the utility company but a state or federal officer, so state action was clearly present. Further, in

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7. The company filed suit in New York state court. Defendants removed the action to federal court. Defendants removed the action to federal court. After the court issued a temporary restraining order (and after the defendants violated that order), it determined that it lacked jurisdiction and remanded the case to state court.

8. This is a principal thrust of the Peterzell report, *supra* note 4. An earlier "civil liberties" claim was that the licenses of all nuclear plants and virtually all other nuclear fuel cycle activities should be revoked under the fifth and fourteenth amendments' prohibition against deprivation "of life . . . without due process of law." This contention was decisively laid to rest in a scholarly opinion by the Nuclear Regulatory Commission. *See* 46 Fed. Reg. 39,573 (1981). The Commission noted that the fifth and fourteenth amendments prohibit government action taken with the overt purpose of depriving particular individuals of life. *See, e.g.,* *Screws v. United States*, 325 U.S. 91 (1945). Indeed, if these amendments prohibited government-authorized activity which could foreseeably lead to deaths among members of the public, they would preclude, among other things, air, sea, and land transportation and the use of certain fuels such as coal, all of which, even without negligence, can result in some fatalities.

9. J. Peterzell, *supra* note 4, at 25-26.

10. *Id.* at 29.

these cases it was not "infiltration" or "surveillance" that was improper, but incitement to violence or the arrest of a person exercising her constitutional rights.

So I leave you with the proposition that there is little reason to apply constitutional principles designed to protect civil liberties to utility companies seeking to build nuclear power plants, just as there is little reason to apply such principles to most other private institutions in our society. Perhaps this Symposium would do well to address the more serious threats that emanate not from the private sector, but from the government, which are, after all, the traditional concerns of those seeking to protect our civil liberties.