THE ATOMIC ENERGY ACT: PUBLIC ADMINISTRATION WITHOUT PUBLIC DEBATE

HERBERT S. MARKS*

IN THE midst of noise it is difficult to perceive areas of silence. Since the appointment of the Atomic Energy Commission in October 1946, millions of words have been published about the administration of the Atomic Energy Act.¹ But the very quantity of material has obscured the fact that critical analysis and insight have been negligible. Even more remarkable, the range of issues which has excited any active public debate has been exceedingly limited despite the many intrinsically controversial questions with which the Atomic Energy Act is concerned.

Actions of the Atomic Energy Commission that are the subject of press release are duly reported in the newspapers—but rarely with more penetrating comment or follow up than that which accompanies the society news. The old argument over military versus civilian control has some continuing vitality; whether or not the secrets of the atomic bomb are being securely kept also gets attention; the patent provisions of the law and their administration are discussed in professional quarters.² The list could be extended, but not significantly.

* Member of the District of Columbia and New York bars. Former Assistant General Counsel, War Production Board; Special Assistant to the Undersecretary of State; and most recently General Counsel, Atomic Energy Commission.

The author is deeply indebted to Mr. John G. Palfrey, a member of the Legal Staff of the Atomic Energy Commission, for his invaluable assistance and suggestions throughout the preparation of this article. The opinions expressed, however, are the personal views of the author.

¹ 60 Stat. 766, 42 U.S.C.A. § 1810 (Supp., 1947). The Act became law August 1, 1946. The President appointed the five members of the Commission on October 28, 1946. The properties of the Manhattan Engineer District were formally transferred to the Commission by Executive Order 9816 on December 31, 1946. But it was not until April 9, 1947 that the recess appointments of Commissioners and General Manager were confirmed.

² On March 15, 1948 Senator Wherry, majority whip, introduced and spoke in favor of a bill to return atomic energy to military control. 94 Cong. Rec. 3574 (March 25, 1948).

The most sensational security cases during the past year concerned the revelation that prior to the appointment of the Commission, two army sergeants personally appropriated highly secret documents from the Los Alamos reservation. See statement to the Senate of Senator Hickenlooper, Chairman of the Joint Committee on Atomic Energy, on July 7, 1947. 93 Cong. Rec. 8664 (July 9, 1947).

On patent matters, see Ooms, *Atomic Energy and U.S. Patent Policy*, 2 *Bulletin of the Atomic Scientists*, No. 9 and 10, at 28, and No. 11 and 12, at 30 (1946); Miller, *The First Official Report on AEC Patent Problems*, 4 *Bulletin of the Atomic Scientists*, No. 3, at 77 (1948); Newman and Miller, *Patents and Atomic Energy*, 12 *Law & Contemp. Prob.* 746 (1947); American Bar Ass'n, *Section of Patent, Trade-Mark and Copyright Law*, Committee reports to be presented at annual meeting September 1947, p. 11; *First Report of Atomic Energy Commission Patent Advisory Panel*, Atomic Energy Commission Press Release No. 56, Sept. 21, 1947.

Of late a handful of informed appraisals have appeared concerning such matters as the relationship of the Commission's program to business,³ the Commission's special problems with respect to loyalty investigations, and the status of research at Oak Ridge.^{3a} What is strange, however, is not so much the infrequency of perceptive commentary: The striking fact is that neither in depth nor scope is the public discussion which prevails for other government affairs even approximated in the field of atomic energy.⁴

Most recently the Congressional controversy over the reappointment of the Commissioners might have been expected to stimulate critical review of the broad field of operations of the Atomic Energy Commission. In fact, however, what has been observed in these legislative proceedings is little more than a series of election year maneuvers.^{4a}

The absence of wide debate and criticism concerning the administration of this far reaching law is a phenomenon unique in the conduct of important public affairs. There are, of course, strong reasons for this peculiar situation. Some, like the requirements of secrecy, will appear obvious; others may appear more subtle. The significance of the unusual present

³ "Atomic Energy—1948," *Business Week*, p. 47 (April 10, 1948).

^{3a} The New York Herald Tribune recently ran an impressive series of articles on the Atomic Energy Commission's loyalty investigations and on general conditions at Oak Ridge. See New York Herald Tribune, p. 1 (May 19, 1948); pp. 5, 22 (May 20, 1948); p. 18 (May 24, 1948). On loyalty investigations, see O'Brien, *Loyalty Tests and Guilt by Association*, 61 *Harv. L. Rev.* 592, 598 (1948).

⁴ See Report of the Chairman of the American Society of Newspaper Editors Standing Committee on Atomic Energy, Editor and Publisher, p. 22 (April 24, 1948). The New York Herald Tribune, the Bulletin of the Atomic Scientists, and *Business Week* show some signs of a level of reporting and comment in the field of atomic energy comparable to that which exists in other areas of public affairs; see New York Post, p. 41 (May 28, 1948): "The Herald Tribune [is] one of a few U.S. papers which realizes what atomic energy—and atom bombs—mean to the future of the world. . . ." As examples of high quality reporting and comment on atomic energy matters see Editorial, *A Year of Civilian Control of Atomic Energy*, 4 *Bulletin of the Atomic Scientists* No. 2, at 33 (February, 1948), and "Atomic Energy—1948," *op. cit.* supra note 3.

^{4a} Under Section 2 of the Atomic Energy Act of 1946 the terms of the Commissioners first appointed expire on August 1, 1948. The President on April 20, 1948 renominated the five members of the Commission for new terms commencing August 1, 1948, giving to the chairman, Mr. Lilienthal, a five year appointment, the longest permitted under the system of staggering prescribed in the Act. The Republican leadership in the Congress countered President Truman's move by proposing bills, S. 2589 and H.R. 6402, to extend the terms of the five Commissioners automatically for two years from August 1, 1948, thereby giving to the President elected in November, 1948 power to appoint an entirely new Commission during the next presidential term. The ground asserted by the Republican leadership for this action was the necessity of a further period of probation for the "overall evaluation of the atomic energy program and its theory of operation." See S. Rep. 1342, 80th Cong. 2d Sess. (1948); H.R. Rep. 1973, 80th Cong. 2d Sess. (1948). A minority, led by Democratic Senator McMahon, filed a report strongly attacking the bills, among other reasons, as a blow to "the spirit of political non-partisanship in which the entire program was conceived and established" under the original Act.

conditions will be clearer, however, if first viewed in the light of the normal attitude toward public affairs.

I

Throughout the history of this country we have rarely tolerated departure from the principle that the chief protection of society against incompetence, unfairness, and corruption in government is the unlimited opportunity for public scrutiny and protest. We have believed also that this is the chief means of assuring that officials will pursue the course upon which the public is set. Sixty years ago Lord Bryce observed "a healthy and watchful public opinion" as a commonplace of the American political system: "Mischiefs are checked in America more frequently than anywhere else by the fear of exposure or by newspaper criticism in the first stage of a bad scheme."⁵ And in a current opinion the United States Supreme Court quotes Bentham's century-old observation: "Without publicity all other checks are insufficient; in comparison of publicity all other checks are of small account. . . ."⁶

In observance of this principle, the physical and social sciences could find their most important common ground. Science, says a distinguished physicist, "is not a field in which error awaits death and subsequent generations for verdict—the next issue of the journals will take care of it."⁷ Perhaps the test of our faith is our firm belief that it is the fatal weakness of communism and all other forms of totalitarianism that they can find no substitute for the self-correcting process of open discussion and criticism which is the democratic tradition.

We pay a high price to maintain this tradition. Ordinarily there is no need to encourage criticism of large government enterprise; the danger is rather than it goes too far. The able administrator is harassed and disgusted, the timid administrator is paralyzed, public affairs suffer from endless delays. Yet even in the conduct of the war agencies, whether civilian or military, we have insisted upon this principle. On balance we have always been convinced that the price was not too high. Nevertheless, in the case of the administration of the Atomic Energy Act critical debate has been largely absent.

The lack of such discussion by no means signifies an inactive atomic energy program. We know that the Atomic Energy Commission operates

⁵ Bryce, *The American Commonwealth*, 321 (2d ed., 1891).

⁶ *In re Oliver*, 68 S. Ct. 499, 506 (1948), quoting from 1 Bentham, *Rationale of Judicial Evidence* 524 (1827).

⁷ Oppenheimer, *Physics in the Contemporary World*, 4 *Bulletin of the Atomic Scientists*, No. 3, 65, at 68 (1948).

a capital investment of three billion dollars; that it spends well in excess of a half billion dollars annually; that it employs 60,000 people; that it has important business relations with hundreds of business concerns and educational institutions; and that its regulatory activities affect business, the press, and other private institutions. We profess to know that there is no activity of government more important than the Atomic Energy Commission, by which presumably we mean that there is none which now or potentially affects us so vitally.^{7a}

Nor is it really possible that the absence of debate and criticism is simply a reflection of the high public respect and confidence which the present Commission and its staff rightly commands. Our theory and practice are such that it is a matter of indifference whether government officials are able and incorruptible public servants—a David Lilienthal or a General Groves—or suspected machine politicians.

The public servant, on his part, is rarely aware that the pressures and attacks from which he suffers during all his official life are frequently a source of strength and almost always a source of guidance. It is public pressure which helps weed out incompetent associates when official inertia would retain them. It is an interested, critical public which often supplies the only adequate forum for resolving conflicts between executive agencies, between Congress and the Executive, or between government agencies and special interests. Above all, it is the public reaction to what he does or fails to do which tells the administrator what is expected of him. It is his duty to provide leadership, but leadership in the direction of the public's expectations.

But how can the Atomic Energy Commission be responsive to the impulses and expectations of a society which in relation to this subject matter are not expressed, which seemingly are not even felt? The men who compose the Atomic Energy Commission have been conscious of the vacuum in which they operate and have sensed the dangers which it portends. For many months in their reports and speeches, they have made eloquent pleas to the public to get educated about and take an active interest in atomic energy.⁸ Mr Lilienthal has warned that without such "active par-

^{7a} For a general summary see address of David E. Lilienthal, *The Business Side of the Atom*, before the Chamber of Commerce of Boston, Massachusetts, March 18, 1948 (Atomic Energy Commission Press Release). As to regulatory activities of the Commission, the agency has issued regulations governing commerce in the raw materials uranium and thorium (12 Fed. Reg. 1855, March 20, 1947), and regulations governing commerce in facilities for the production of fissionable materials (12 Fed. Reg. 7657, Nov. 18, 1947); the Commission's "security guidance" service is similar in effect to the government censorship practiced during the war. See Third Semi-Annual Report of the United States Atomic Energy Commission, S. Doc. 118, 80th Cong. 2d sess. at 27 (1948).

⁸ E.g., addresses of David E. Lilienthal, *Atomic Energy is your Business*, before a Community Public Meeting in Crawfordsville, Indiana, September 22, 1947; *Democracy and the*

ticipation in these fateful matters the substance of democracy" is "lost."⁹

To these pleas the most common public response appears to be: "What is it that they want us to know? Why don't they tell us? Then we may know what to do."¹⁰ The pleas have somewhat puzzled the public; the public response has somewhat puzzled the Atomic Energy Commission.

Meanwhile, the normal interplay of forces between the government and the governed does not take place. In the field of atomic energy, the process which has always been our main reliance for a healthy direction of national effort is virtually nonexistent.

II

Nor have any adequate substitutes for the usual processes of public criticism been found. The two that are sometimes referred to as assuring a measure of public accountability, the Congressional Joint Committee on Atomic Energy and the Commission's public advisory committees, are certainly of great value, but they alone are clearly insufficient.¹¹

We know from its recent reports to the Congress that the Joint Committee, established by the McMahon Act and composed of nine members of the Senate and nine members of the House, is generally interested in all activities of the Commission.¹² We may assume, too, that it takes a critical attitude toward these activities and that the Commission benefits from this attitude.¹³ But there has been even less public discussion and

Atom, before the American Education Fellowship, Chicago, November 28, 1947; *The People, the Atom and the Press*, before the New York State Publishers Association in New York, January 19, 1948; *Atomic Energy—Where Do We Stand Today?* before the Radio Executives Club in New York, February 5, 1948; also the address of Sumner Pike, *Imperatives in Atomic Understanding*, before the National Education Association in Cincinnati, February 17, 1948, and addresses of W. W. Waymack, *Education in the Atomic Age*, before the Institute of Higher Education in Nashville, Tennessee, July 31, 1947, and *Atomic Energy Implications*, before the Illinois Welfare Association in Chicago, November 26, 1947. (Atomic Energy Commission Press Releases). See also Third Semi-Annual Report of the United States Atomic Energy Commission, *op cit.* supra note 7, at 26-28.

⁹ Lilienthal, *Democracy and the Atom*, *op. cit.* supra note 8, at 8.

¹⁰ See, e.g., letter to the editor, *What Do the Scientists Wish Us to Know*, from L. McDonald, N.Y. Herald-Tribune, p. 16 (Feb. 23, 1948).

¹¹ See Lilienthal, *The People, the Atom and the Press*, *op. cit.* supra note 8, at 14-16, and Waymack, *Atomic Energy Implications*, *op. cit.* supra note 8, at 10. See also Third Semi-Annual Report of the United States Atomic Energy Commission, *op. cit.* supra note 7 at 31-32, 34.

¹² First Report of the Joint Committee on Atomic Energy to the Congress of the United States, H. Rep. 1289, 80th Cong. 2d sess. (1948). The Committee was created by Sec. 15(a) of the Atomic Energy Act of 1946. See also the Reports on S. 2589 and H.R. 6402, *op. cit.* supra note 4a.

¹³ "The very fact of the existence of the Joint Congressional Committee is security against the exercise of arbitrary power by the Commission. While we on the Commission, vested with a kind of quite terrible responsibility find in it a great reassurance." Lilienthal, *The People, the Atom and the Press*, *op. cit.* supra note 8, at 16.

comment about the Joint Committee and its work than there has been about the Commission. Fortunately, the membership of the Joint Committee of Congress includes some of our most trusted and respected legislators.¹⁴ But just as we rely upon the self-correcting process of public scrutiny in the case of all agencies of the executive branch, good or bad, so too we may be apprehensive of an arm of the Congress, however distinguished its members, whose activities are not the subject of public debate. As long as this condition lasts, it must not be assumed that the Joint Committee will provide an adequate device to assure public accountability in any usual sense. The unreviewed action of eighteen legislators is not likely to be better than the unreviewed action of five administrators. In fact, such a situation could easily lead to an unwholesome domination of executive action by a small group of legislators which would not be tolerated if the public were alert and critical.

The Advisory Committees, too, are important in establishing connection between the atomic energy program and the country at large. The General Advisory Committee created by the McMahon Act, and the numerous other committees set up by the Commission as authorized by that law, bring to bear upon the problems of the atomic energy program the diverse talents of leaders in many phases of American life.¹⁵ But however valuable this form of participation by "outsiders" may be, it is not a substitute for the kind of public scrutiny to which we have been accustomed. It is indeed as different from what we have relied upon in the past as it would be to preserve the principle of jury trial in criminal proceedings but to permit the trials to be conducted in secret without the presence of press or public.

¹⁴ "The present membership of this 18 man permanent Committee is an indication of the importance Congress itself assigns to it in charting the difficult policy course ahead. Its Chairman is Senator Bourke B. Hickenlooper of Iowa, a former Governor of that State, a Member of the Committee on Foreign Affairs, an experienced administrator as well as legislator. Its Vice Chairman is Representative W. Sterling Cole . . . , who . . . is among the most respected and influential Members of the House, with long experience in matters of national security. The Committee includes the Chairman and the ranking Member of the Senate Committee on Foreign Affairs, Senators Vandenberg and Connally of Michigan and Texas; it includes Senator Brien McMahon of Connecticut, who as Chairman of the Special Senate Committee on Atomic Energy in the 79th Congress sponsored the Atomic Energy Act and who follows with keen interest the international situation on atomic energy control; it includes Senator Eugene D. Milliken of Colorado, Chairman of the Finance Committee. On the roster of the Committee are other men of both Chambers most of whose names and reputations are familiar. . . . In all, the Committee is unusually broadly representative of the country, both geographically and in its group interests." Lilienthal, *The People, the Atom and the Press*, op. cit. supra note 8, at 15.

¹⁵ The list, membership, and functions of the numerous advisory committees are set forth in the Third Semi-Annual Report of the United States Atomic Energy Commission, op. cit. supra note 7, at 31-38. The General Advisory Committee was established by Sec. 2(b) of the Atomic Energy Act of 1946. The other advisory groups were set up by the commission pursuant to Sec. 12(a)(1) of the Act.

III

Perhaps the requirements of secrecy are such that there can be no public participation in the problems of atomic energy in any customary sense. As the question is subjected to analysis, however, this answer may appear less clear. At all events, while secrecy may seriously inhibit debate, that factor alone hardly accounts for the silence of the interests that are directly affected by the atomic energy program.

Ordinarily the reaction and response of special groups, favorable or unfavorable, to any particular government action give rise to and sustain public debate. With limited exceptions, nothing of this sort has happened in the atomic energy program. In a variety of ways the Commission's program has an important daily effect upon national life. Procurement of raw materials, letting of contracts, construction and operation of plants involving hazardous new industrial processes and hazardous industrial waste products, administration of regulatory powers—all these activities and many others in this three billion dollar enterprise are in fact affecting the public at many points.

These Commission actions fall in areas of public sensitivity which, judging by the experience of all other government agencies, should produce a vocal response from those groups which are disappointed by Commission decisions. Indeed, some decisions of the Commission occur in the most sensitive areas of public concern. The effect which Commission action has upon the press itself is the best example.

Under Section 10 of the Atomic Energy Act the Commission is given broad powers to control the dissemination of restricted data. Simply stated, practically all information relating to atomic energy is classed as restricted by the Atomic Energy Act. The Commission is authorized to remove information from this category whenever it concludes that it may be published without impairing the national security. We need not concern ourselves here with the question which is sometimes raised as to whether the law is merely an official secrets act or whether it includes broader censorship powers.¹⁶ The press and the publishing industry have apparently accepted the principle that whether or not the Act, strictly construed, applies to unofficial as well as official secrets, they will publish

¹⁶ See Newman, *Control of Information Relating to Atomic Energy*, 56 *Yale L. J.* 769 (1947), and Newman and Miller, *The Control of Atomic Energy* Ch. 10 (1948). These writers take the position that the prohibitions on disclosure in Section 10 apply equally to official and unofficial information falling within the broadly defined category "restricted data." While this view may be an accurate statement of the effect which the draftsmen intended, neither the statute nor the legislative history seem sufficiently explicit on the point to avoid a question of statutory construction if the issue is ever tested. In that event, it is to be anticipated that questions of constitutionality would also be raised.

nothing in the face of advice by the Commission that publication would be prejudicial to the national security.¹⁷ In short, for practical purposes, they seem to have accepted in the field of atomic energy an arrangement somewhat similar to the one which existed more generally during the war under the Office of Censorship.

This voluntary restraint on the part of the press and the publishing industry, and their wholehearted cooperation with the government in maintaining security, are deserving of highest praise. But what is surprising is that there has not even been any open debate concerning the details of administration. How does it happen that the public bickering between press and government over the scope and details of censorship so frequently observed in connection with the war agencies does not occur here?¹⁸ Are we then to conclude that the Commission's "security guidance" has been so satisfactory to the press that there has never been occasion for debate concerning it or public notice of the debate? Considering the diversity and character of the American press, there must be other explanations for the unbroken silence that exists in this area of legitimate discussion.

There are many other areas of activities and many incidents in the atomic energy program where, despite secrecy, lively concern and comment on the part of the public might be expected but where almost none has occurred. The Commission's decisions with respect to its Clinton Laboratories is a good illustration.

In May 1947 the Commission publicly announced that the contractor for the Clinton Laboratories at Oak Ridge would be changed because the then contractor was unable to manage the laboratory unless it was transferred to a new location remote from Oak Ridge.¹⁹ It was explained in the release that "the Clinton Laboratories constitute a vital part of the atomic energy program and certain projects at Clinton are among the most important in this field." "After comprehensive review," it was said, "the

¹⁷ "It was—and is—evident that the public communications media of the Nation desire overwhelmingly to avoid harm to the national defense and security through publication of restricted data. There is a heavy continuing demand for security guidance service. . . ." Third Semi-Annual Report of the United States Atomic Energy Commission, *op. cit.* supra note 7 at 27.

¹⁸ Compare the immediate reaction to Secretary Forrestal's recent proposal to establish a voluntary system of censorship in connection with security matters in general. See, e.g., Security Consciousness, Editorial, Washington Post, p. 4B (March 28, 1948). The first significant criticism of Commission practice in this connection appeared at the end of May. See Editorial, Policy in Secret, New York Herald Tribune, p. 22 (May 29, 1948).

¹⁹ Atomic Energy Commission Press Release, Joint Statement of United States Atomic Energy Commission and Monsanto Chemical Co. at Oak Ridge, Tennessee (May 28, 1947).

Commission has concluded that in the light of the overall research and development program in atomic energy, the work of the Clinton Laboratory must continue at Oak Ridge." In September 1947 it was publicly announced that a new contractor had been selected for the Clinton Laboratories.²⁰ In addition to naming the new contractor, it was announced that fourteen southern universities and a score of industries and industrial representatives would participate in the important research, development and training programs at the laboratory. On January 1, 1948 the Commission announced a drastic realignment in the September arrangements for the Clinton Laboratory.²¹ Important work conducted at or contemplated for that location would be transferred to Chicago. In addition, the contractual arrangements originally forecast in the September release were to be fundamentally altered and a third contractor was to enter the picture. All these changes were duly reported in the Commission's release.

The three public releases of May, September, and January described major decisions concerning major industrial interests, major university interests, major geographic interests, major alternatives of national policy. It is not at all clear from the face of the three releases that they are consistent with one another. Were any other important government agency to issue three such announcements about one of its main operations, the press and affected interests would immediately engage in a storm of public discussion. Such discussion would occur if only because the watchful journalist would discern that on their face the three announcements appear to be contradictory. But such discussion would even more certainly occur in the case of other agencies because important decisions and successive changes in them would inevitably disappoint or at least disturb some of the special interests affected by them. It seems highly improbable that the Commission, alone among government agencies, possesses a Solomon-like faculty for always harmonizing and satisfying all affected interests.

The point of this recital is not to suggest that the Commission's actions as reflected in these announcements were wrong. The point is that almost no one among our individualistic, normally critical public was impelled to debate them openly. No one was impelled to debate them even though

²⁰ Atomic Energy Commission Press Release No. 57, Clinton National Laboratory established at Oak Ridge (Sept. 25, 1947).

²¹ Atomic Energy Commission Press Release No. 80, Atomic Energy Commission Consolidates Reactor Research and Development at Argonne, National Laboratory Near Chicago; Enters New Contract for Clinton National Laboratory at Oak Ridge and Adds Chemical Engineering Development at that Laboratory (Jan. 1, 1948).

on the face of the releases themselves, without going further for information, there was ample material to excite public discussion.^{21a}

IV

Secrecy is certainly the most important factor in accounting for public inertia in relation to the administration of the Atomic Energy Act. In the present state of world affairs, the requirements of security altogether remove from public view certain activities and certain problems of the Atomic Energy Commission. In addition, there is everywhere an air of secrecy which seems impenetrable, even when it is not. The mere mechanics of securing a pass into a Commission installation for a routine interview appear formidable, even for the visitor who knows he is entitled to the pass. The areas of information that are shut off for reasons of security inevitably seem to obscure those which are open. No matter how much the questioner may be assured that he can understand what he needs to know without access to what is hidden, he always has a lurking uneasiness that his interpretation of what is in sight will be distorted by what is unknown.

Much of the subject matter—even that which is completely open—is technically complex, and therefore hard to understand. It is not only complex, it is totally unfamiliar. One of the Commissioners has suggested that the subject of atomic energy is less complex than taxation.²² But when Franklin wrote "Nothing is more certain than death and taxes," he gave expression to a thought already thousands of years old. The background of ancient familiarity, not to mention suffering, makes it relatively easy to do in the field of taxation what the Commission urges us to do here; that is, distill "out of very complex and superficially bewildering things, relatively simple, quite comprehensible basic issues that the people are capable of understanding."²³

There is, moreover, a general frame of mind which inhibits the active curiosity without which scrutiny and debate does not take place. A taboo-like quality attaches to atomic energy, which is perhaps no more than another way of saying that the immense proportions of the new physical force, the seeming magic and real mystery connected with it, its tradition-shaking consequences, and the walls of secrecy and epic drama which

^{21a} It was not until many months after the release of January 1, 1948 that critical public discussion of the Clinton Laboratories decision began to occur. See "Why Morale Sags at Oak Ridge," *New York Herald Tribune*, p. 18 (May 24, 1948).

²² Waymack, *Atomic Energy Implications*, op. cit. supra note 8, at 6.

²³ *Ibid.*

surrounded it from the first, make of it a subject from which we instinctively shy away.

Also important in suppressing curiosity is the belief that to ask questions in this field is unpatriotic. We have come to feel that because it is wrong to disclose secret information it is somehow wrong and possibly illegal for the uninitiated to seek information about the subject. Thus, a Washington taxi driver, on being asked by a fare to go to the Public Health Building, the Commission headquarters, inquires "That's where the Atomic Energy Comm . . .," and then exclaims, "Oh, I mustn't mention that!"

In addition, large and important sectors of the public and the press seem to have been restrained from any generally critical scrutiny of the administration of the Atomic Energy Act, perhaps unconsciously, by a sense of partisanship. These sectors of press and public joined in the fight to secure enactment of the McMahon Bill.²⁴ Hardly had the bill become law before another fight took place over the confirmation of the President's nominees for membership on the Atomic Energy Commission. The same forces, construing the opposition to the President's nominees as a renewal of the original effort to defeat the McMahon Bill, again joined to support the President's appointments.²⁵ That the Bill was enacted after a notable unanimity in the vote of the Senate committee which sponsored it, and that confirmation was voted by overwhelming majorities, were regarded not as evidence of the weakness of the opposition, but rather of the strength of the forces that were marshaled in support. Ever since, the feeling has persisted that at the first opportunity these original opponents would reassert themselves to destroy the McMahon Act. In these circumstances, the supporters of the Atomic Energy Act and of the President's nominations to the Commission seem to have assumed that any display of critical attitude toward the administration of the law would play into the hands of these opponents.

There may be other factors at work in preventing the free play of the normal forces of public scrutiny and criticism. Because so many of the barriers are intangible, it is extremely difficult to assess their relative importance. But secrecy, security, complexity, unfamiliarity, self-restraint

²⁴ A summary of these events can be found in Newman and Miller, *The Control of Atomic Energy*, c. 1 (1948).

²⁵ During the opening remarks of the Senate debate on the confirmation of the Commissioners and the General Manager in March 1947, Senator Hickenlooper, speaking of Mr. Lillienthal, described the very significant and widespread "editorial approval of his appointment of leading newspaper editors of both major parties from coast to coast." 93 Cong. Rec. 2530 (Mar. 29, 1947).

—whether occasioned by taboos, suppression of curiosity, or partisanship—together compose a formidable array. We may hopefully agree with Mr. Lilienthal that “there is nothing in the nature of atomic energy, nor in the necessary requirements of secrecy in certain areas of knowledge that prevents the people as a whole from exercising their historic role of judging what shall be the course of public policy.”²⁶ But the people are not now exercising that historic role and it is plain that if they are to do so very special exertions will be required of them.

V

The fact that the traditionally powerful forces of public scrutiny and criticism do not now exist in this field in itself suggests the difficulty in devising a program to create for the Atomic Energy Commission the public environment of other governmental agencies. A beginning has been made in the speeches of the members of the Atomic Energy Commission during past months. The awareness of the problem that they reflect, and the emphasis they have given in many forums to the need for public interest and education should contribute materially to the creation of a climate favorable for public action.

It will also help if we become conscious of misconceptions that have interfered with the normal process of scrutiny and criticism. Active curiosity, far from being improper or illegal, is a normal, lawful public responsibility.²⁷ It has been asserted on behalf of the Commission that “by and large the sources of information on public issues are already open.”²⁸ And it is a fair estimate that the official material made available by and about the Commission up to the present time compares in quantity and content with the official material that is made available about other large government operations in a comparable period of operation.²⁹ Here

²⁶ Lilienthal, *Democracy and the Atom*, op. cit. supra note 8, at 8.

²⁷ Actually, the criminal sanctions of Sec. 10(b)(3) of the Atomic Energy Act apply to attempts to acquire information involving or incorporating “restricted data” only when the act is done “with intent to injure the United States or with intent to secure an advantage to any foreign nation.” It can hardly be imagined that such intent could be read into any normal efforts of press and public to secure information about atomic energy. On the other hand, the provisions relating to disclosure of “restricted data” (Sec. 10(b)(2)) include sanctions when the person has “reason to believe” that the above consequences will ensue.

²⁸ Lilienthal, *Atomic Energy Is Your Business*, op. cit. supra note 8, at 11.

²⁹ The list includes the following:

a) Commission Reports to Congress: The First Semi-Annual Report of the Commission, S. Doc. 8, 80th Cong. 1st Sess. (1947); the Second Semi-Annual Report of the Commission, S. Doc. 96, 80th Cong. 1st Sess. (1947); the Third Semi-Annual Report of the Commission, op. cit. supra note 7.

b) Congressional Hearings: Independent Offices Appropriation Bill for 1948. Hearings on H.R. 3839 before the Subcommittee of the Committee on Appropriations, U.S. Senate, 80th Cong. 1st Sess., at 46 et seq. (1947); Hearings before the Joint Committee on Atomic

and there one will see the censor's hand in the official material concerning the Commission's activities. But such material is mainly distinguished from the information about other government agencies in that it has not been illuminated by public reaction.

It takes active curiosity on the part of the press and public to give meaning to official handouts, no matter how enlightening the government tries to make them. The official material of other government agencies is subjected to searching public analysis and questioning which uncovers and evaluates the reasons behind decisions and the consequences implicit in them. Because of security restrictions, an effort to subject the available materials about the Commission to the same treatment would sometimes be frustrating. Surprisingly often, however, the results would be illuminating.

It should be understood that the general public on the one hand and the Commission on the other have different responsibilities in respect to security. It is the duty of the Atomic Energy Commission under the law to see to it that those things are kept secret which in the interest of national security should be kept secret. It is the duty of the public to cooperate with the Commission in this effort, and this the public has been doing with remarkable effectiveness.³⁰ But, as the Commission itself has repeatedly asserted, it is also a public responsibility to find out and to understand those things which need not be kept secret. This can only be accomplished through incessant questioning.

Energy on labor relations at Oak Ridge, Tennessee, 80th Cong. 2d Sess. (1948); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, on First Deficiency Appropriations Bill, 80th Cong. 2d Sess., at 861 et seq. (1948); Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, on the Supplemental Independent Offices Appropriation Bill for 1949, 80th Cong. 2d Sess., at 747 et seq. (1948); see also H.R. Rep. 589, 80th Cong. 2d Sess., at 8 (1947); H.R. Rep. 2245, 80th Cong. 2d Sess., at 2 (1948); H.R. Rep. 1618, 80th Cong. 2d Sess., at 2 (1948).

c) A large number of reports and documents released by the Commission, including 1700 individual declassified documents made available to the public through the Office of Technical Services of the Department of Commerce; over seventy-five statements for press and public giving facts of new developments; reprints of public speeches made by members of the Commission; and reports of advisory boards of the Commission, namely, Report of the Medical Board of Review, June 20, 1947, and the Report of the Patent Advisory Panel, September 17, 1947. See Third Semi-Annual Report of the Commission op. cit. supra note 7, at 24-28 for a description of material.

d) Reports of Congressional Joint Committee on Atomic Energy, op. cit. supra note 12.

³⁰ Public compliance with the Atomic Energy Act has been so effective that thus far there has been no test of the extremely difficult evidentiary questions which would arise in any prosecution for unlawful disclosure of secret information. See Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 Harv. L. Rev. 468 (1948); *Secret Documents in Criminal Prosecutions*, 47 Col. L. Rev. 1356 (1947). However, there have been a number of unreported convictions under Sections 47 and 128 of the Criminal Code (18 U.S.C.A. §§ 100, 234), including one in which such questions were involved. *United States v. Paporello* (D.C. N.M., 1948).

The Atomic Energy Commission is no more omniscient than any other Government agency in its capacity to determine precisely what information within its vast area of nonsecret knowledge the public needs to know. It is the duty of a democratic public to direct to its government every question that its curiosity provokes. It is the Atomic Energy Commission which must bear the responsibility of deciding whether an answer to any particular question may prejudice the national security.

Once this relationship is clearly defined, it will be possible for the public to begin to develop insights about the atomic energy program. Such insights can come about only through a constant interchange between the government and the people. The questions raised in Congressional hearings, in Congressional debates, in news stories and editorials, the questions raised by all manner of special interests—these and the government's answers to them, and the further questions thereby suggested, can produce a broad and endless process, through which understanding will evolve and influence will exert itself.

This process is especially necessary if the public is to overcome the difficulties growing out of the complexity and unfamiliarity of the subject matter. The Acheson-Lilienthal Report and the Baruch proposals on international control of atomic energy were understood clearly enough in the course of the extensive discussion that they provoked. In comparison, the official material which has been published about the Atomic Energy Commission seems less complex. Once the same process of scrutiny, questioning, and discussion which illuminated the proposals on international control is brought to bear upon the available information in the domestic field a comparable measure of understanding can result.

Not only is it essential that there be an active curiosity about the atomic energy program—a curiosity which expresses itself in incessant questioning—there must also be a willingness to criticize. Partisanship that exercises a restraint upon legitimate criticism out of a fear that such criticism will aid the enemies of the McMahon Act defeats its own purposes. The sectors of the press and public which thus refrain from critical comment are the very groups which by virtue of their participation in the fight on the McMahon Bill and on confirmation acquired an informed background on atomic energy. In refraining from criticism, these groups have no doubt spared the Commission a considerable amount of annoyance. But they have deprived the administration of the Atomic Energy Act of a much more important source of strength—the strength that comes from constructive exposure of weakness and error and the opportunity thereby created for correction.

In any effort to quicken the forces of public scrutiny and criticism, account must be taken of the attitude of public officials toward these forces, and particularly toward the quest for information which these forces stimulate. The usual but never tolerable condition of a government official is one of continual harassment by a seemingly specious, unfair and unsympathetic press and public. That this condition makes officials wary and that it often makes the process of getting information from a public agency difficult is not surprising. The fear of embarrassment which the official or his agency may suffer as a result of disclosing information can be a more important factor in deciding whether or not to answer a question than the public need for an answer.

These considerations are as relevant to atomic energy as to any other subject. The staff of the Commission will be conscious that what they say may be used to discredit them, in ways that are frequently unfair and always painful. The members of the Atomic Energy Commission have urged earnestly and often that the public take a critical interest in their work. It should not be thought, however, that the express recognition by the Commissioners and their staff of the need for scrutiny will make the path of the questioner and potential critic easier than it would be with any other public agency. A party in power may assert that a strong opposition is essential to democracy; but it cannot be expected willingly to supply what might be used as ammunition by its opponents.

In the case of the Atomic Energy Commission, there is, moreover, a special hazard to the process of debate and criticism. The line between what must be secret and what can be open is not a sharp one. When areas of information involving possible embarrassment are probed, the temptation must always be present to draw the line so that embarrassment will be avoided rather than to draw the line only where the reasonable requirements of security dictate. The danger is not that the Atomic Energy Commission or its staff would thus act deliberately. The danger is rather of unconsciously confusing the needs of security with the desire for self-protection from critical comment.³¹ During the war, journalists developed a sixth sense which enabled the press to tell whether the Government's releases and its response to questions were really as full and frank as security would permit. This experience may ultimately be repeated in the field of atomic energy. But it will not be repeated as long as it continues to be possible to say that "only about a dozen newspaper reporters in the

³¹ The Washington Post recently referred to "past military efforts to cover up mistakes under the guise of security and the tendency of some officers to classify virtually every thing controversial as 'top secret.'" *Op. cit. supra* note 18. It is certainly open to question whether the military is any more subject to this temptation than the civilian administrator.

United States are equipped to write about atomic information accurately and with understanding."³²

The absence of public scrutiny and criticism which the Atomic Energy Commission has so far experienced will not last indefinitely. The deep and powerful forces which have made our public alert and vocal in other public affairs will sooner or later assert themselves in this field. The question is not whether this will happen but when and in what form. If too long delayed, our atomic energy program will almost certainly grow so far out of touch with the American environment that when the forces of criticism finally begin to operate with their customary vigor they will produce drastic upheavals. Deprived of the continuous, corrective effects of public scrutiny, the atomic energy program will have developed so much that is weak and unsound that the public wrath which then seeks drastic change will be justified. By then the administration that is thus destroyed may not be worth saving. If this should happen, not only will the continuity essential to the success of the undertaking be destroyed, but the public, without the knowledge gained by prior participation in the problems of atomic energy, will not be in a position to insure the establishment of a sound administration in its place.

Any practical measures that may be proposed now for releasing the normal forces of critical scrutiny and debate will seem modest as compared with the proportions of the problem. What is important, however, is that the process commence. The best hope for constructive change lies in recognition of the fact that once started this process which is so close to our most basic traditions will find its own strength and its own new channels for growth.

³² Report of the Chairman of the American Society of Newspaper Editors Standing Committee on Atomic Energy, *Editor and Publisher*, 22 (April 24, 1948).