

NUCLEAR FACILITIES LICENSING: ANOTHER VIEW

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My view differs drastically from that of Professor David F. Cavers concerning problems of organization and procedure for the handling of the Atomic Energy Commission's licensing cases. Because the problems are vital, and because the Commission seems to me to be floundering, the presentation of more than one view may be useful. Therefore, I shall discuss (1) procedure in licensing of reactors, (2) the combination of promoting functions with licensing functions, and (3) the creation of a safety board whose decisions would be unreviewable by the AEC.

I. PROCEDURE IN LICENSING OF REACTORS

A. The "Value" of Trial-type Hearings

All AEC cases to date involving the licensing of reactors have been uncontested, with a single exception. The outlook is that nearly every case will continue to be uncontested. What happens is that the AEC staff and the applicant work over the only substantive problems in the cases—safety problems—until a complete agreement is reached. The Advisory Committee on Reactor Safety, on the basis of informal consultations with the applicant, reviews independently.

My firm opinion is that after the applicant, the AEC staff, and the ACRS have come to complete agreement, so that no one is disagreeing with anyone about anything, a trial, with direct and cross-examination and a determination on the record, is a procedural absurdity. All the various trappings of examiners, evidence, witnesses, decisions on the record, separation of functions, and the substantial-evidence rule seem to me totally out of place in an uncontested case. The decision of an uncontested safety problem is not an adjudication; it is not judicial; it is not quasi-judicial. In absence of contest, all judicial analogies are false.¹ I strongly disagree with the Commission's

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¹ My criticism of the use of trial-type hearings in uncontested cases is spelled out in an article entitled *Dueprocessitis in the Atomic Energy Commission*, 47 A.B.A.J. 782 (1961). In the present commentary I am trying to avoid a repetition of what I said in that article.

statement, in discussing uncontested cases, that "the conduct of proceedings through oral testimony is an affirmative contribution to due process."² Such a statement is pure poppycock, even if it has apparently motivated the Commission.

Because of its attitude that uncontested cases are "adjudications," the Commission has a hearing examiner conduct a trial in each case, even though no one is in disagreement with anyone, even though issues are completely absent, and even though no parties oppose each other. Furthermore, the examiner is legally trained, not technically trained, and in writing his report he is forbidden to consult the Commission's technical staff. The Commissioners, some of whom are not technically trained, are likewise forbidden to consult the technical staff. I think the Commission is fundamentally mistaken in treating uncontested cases as if they were adjudications and in having officers who are not technically trained to decide technical questions without consulting the technical staff.³

Professor Cavers seems to me to fall into the same trap the Commission has fallen into; he thinks and writes about the question of review of AEC staffwork in judicial terms. He even assumes that the relation between the staff and the Commissioners is somewhat like the relation between a trial court and an appellate court.

When cases are uncontested, the proper analogy, in my opinion, is to the relation between an executive and his staff. Professor Cavers asks the wrong question in his heading: "Is a Review of Uncontested Staff Decisions Needed?" The question for the Commissioners is not whether to "review" or not, for an uncontested case is not an adjudication; the question for the Commissioners is how to get the results it wants by keeping the responsibility in themselves but by having the staff to do nearly all of the work. In none of the thousand executive and operating tasks performed by the Commission through its staff does one inquire whether the Commissioners "review" the staffwork, for the problem, instead of "review," is one of delegation subject to

² 2 STAFF OF JOINT COMM. ON ATOMIC ENERGY, 87TH CONG., 1ST SESS., IMPROVING THE AEC REGULATORY PROCESS 410 (Jt. Comm. Print 1961).

³ The amazing system of having officers who are not technically trained to decide technical questions without consulting the technical staff, even in uncontested cases, stems from analysis of Section 5(c) of the Administrative Procedure Act's requirements with respect to separation of functions. See 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1958). That section forbids a presiding officer to "consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate" But it has no application to an uncontested case for many reasons, three conclusive ones being: (1) The provision is by its terms limited to "adjudication," and a case without issues and without opponents is not an adjudication. (2) The provision is limited to "adjudication required by statute to be determined on the record," and no statute concerning licensing of reactors requires a hearing on the record. (3) A presiding officer can hardly consult "on any fact in issue" when no fact is in issue.

instructions and supervision and mutual confidence and spot checks. The delegation is a matter of degree, and the degree is necessarily uneven from one activity to another and from time to time. The Commission, like any other executive with a large staff, uses informal, complex, subtle ways of assuring itself that its staff is doing what the Commission wants it to do. Only one of many facets of the relation between executives and staff has to do with "review." To the extent that Professor Cavers thinks of the relation between Commissioners and staff in judicial terms, his thinking seems to me basically unsound.

Until the Commission recasts its thinking about uncontested cases so as to escape from the judicial analogy with all its courtroom trappings, the procedure of the Commission for handling uncontested cases will continue to be gravely unsound. The Cavers commentary does little to assist the Commission in making that escape.

For clarity, let me state in this one paragraph the main outline of procedure that I think the Commission should follow in the licensing of reactors. After the applicant, the AEC staff, and the ACRS have come to an agreement, I think that fairness to the parties obviously does not require a hearing of any sort, in absence of disputed issues. But because the question is whether the reactor is sufficiently safe, the public in the vicinity of the proposed reactor has an interest; any hearing to be held should be designed to assure the public an appropriate opportunity to influence the decision. It is for that reason that Congress in 1957 made hearings mandatory even in uncontested cases: "The Joint Committee concluded that full, free, and frank discussion in public of the hazards involved in any particular reactor would seem to be the most certain way of assuring that the reactors will indeed be safe and that the public will be fully apprised of this fact."⁴ This, in my opinion, makes sense. I like Senator Anderson's statement that he wanted Commissioners "to be sure they have to move where everyone can see every step they take; . . . a hearing should be required and a formal record should be made regarding all aspects, including the public aspects."⁵ The hearing, then, should be in the nature of "discussion in public," since the purpose is to inform the public and to assure that the action will be out in the open. I would first publish the reports of the AEC staff and of the ACRS, and then I would publish translations into laymen's language, going as far into technical questions as is feasible in such language. In order to implement public understanding of the reports, I would hold a hearing in the nature of

⁴ 1957 U.S. CODE CONG. AND AD. NEWS 1814. See STAFF OF JOINT COMM. ON ATOMIC ENERGY, 87TH CONG., 1ST SESS., A STUDY OF AEC PROCEDURES AND ORGANIZATION IN THE LICENSING OF REACTOR FACILITIES 17-35 (Jt. Comm. Print 1957).

⁵ 103 CONG. REC. 4093-94 (1957).

a press conference in the vicinity of the proposed reactor, allowing reporters or anyone else with a legitimate interest an opportunity to question representatives of the AEC staff and of the applicant. (I proposed such a press-conference type of hearing last spring,⁶ and the Commission has adopted the proposal;⁷ such hearings have been held in at least two cases and are scheduled in others.) I would schedule a public hearing for thirty days after the press-conference hearing, but if no one comes to the public hearing to object to the program on which the applicant, the AEC staff, and the ACRS have agreed, I would not hold any further hearing. In the absence of an intervenor, I would send the case directly to the five Commissioners for final decision. If an intervenor comes in, or if a disagreement otherwise develops, I would use a trial procedure to resolve issues of fact, and an argument procedure to resolve issues of law, policy, or discretion.⁸ If extra care and thoroughness, further checking, additional reviewing, or special supervision of staff is required because of the importance of the safety problems to the public—and I have no doubt that something of the sort is indicated—then I would have management engineers, not lawyers, help the Commission work out the procedures that are needed, and I would not expect the management engineers to resort to anything resembling judicial procedures. They might draw, not from courtrooms or other hearing processes, but from military experience in safeguarding explosives, from technical experience in the planning and preparation of missiles, and from I do not know what other areas of experience where the purpose is to compel staffs at a high level to be especially careful and thorough in dealing with extremely complex and difficult subject matter. Since the need for acting publicly and openly has already been satisfied, the safeguards will not be cross-examination

⁶ STAFF OF JOINT COMM. ON ATOMIC ENERGY, 87TH CONG., 1ST SESS., VIEWS AND COMMENTS ON IMPROVING THE AEC REGULATORY PROCESS 25 (Jt. Comm. Print 1961).

⁷ *Hearings on Radiation Safety and Regulation Before the Joint Committee on Atomic Energy*, 87th Cong., 1st Sess. 299 (1961) (statement of Commissioner L. K. Olson):

As a further step in making information available to the local community we are trying a new approach in connection with the application by the General Electric Co. to construct a superheat reactor at its Vallecitos site. I might say that Professor Davis deserves credit for initiating this new approach. A public meeting will be held on June 19 in Pleasanton, Calif. This meeting, which will follow by approximately a week the release of a staff hazards analysis, is designed to give the public a better understanding of the issues, and of our regulatory procedures, and the nature and extent of our review of the proposed project, and to answer any questions. The meeting will be held in the evening at a local school house. Such a meeting is, of course, not a substitute for the hearing required by statute.

⁸ For a further elaboration of the law about trials and arguments, including a discussion of case law, see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01 (1958).

and rebuttal evidence—they are more likely to be checks, double checks, checklists, supervision methods, written records of each step taken or not taken, and the like. And the management engineers may find it especially desirable to kick the lawyers out of this area.

My most emphatic disagreement with Professor Cavers has to do with the procedure to be followed after the applicant, the AEC staff, and the ACRS are all in agreement, and after outsiders have had full opportunity to intervene and have not done so. His position is that something in the nature of a hearing is then desirable. My position is that the manner of handling an uncontested case, after every opportunity has been given for contest, has to do with executive management. Professor Cavers hands this problem to legally trained people to work out some kind of procedure like courtroom procedure. I would hand this problem to management engineers to work out the best ways to assure thoroughness and to protect against human frailties of the staffs.

In another caption, Professor Cavers puts the question, "What Procedure Should Be Employed in Reactor Licensing?" He then discusses six italicized propositions. With much that he says I am in full agreement, including his ideas that the procedure should inform the general public as fully as is reasonably practicable, that the AEC staff should defend its positions publicly, and that those who decide should not be sealed off from all communications not made in the public proceeding. Whether the Cavers thinking is shifting away from trial procedure in uncontested cases is hard to say. The Joint Committee staff, to which he was consultant, recommended hearings at which oral testimony would be presented by witnesses, even in uncontested cases. Of possible significance is the fact that Professor Cavers presents his six italicized propositions and discusses them without mentioning "oral testimony" or "witnesses."

In trying to understand and to accept Professor Cavers' six italicized propositions, I have seven main difficulties:

(1) In speaking of contested cases, he uses the words "no more procedural formality than would be necessary in an uncontested case,"⁹ but nowhere does he say what "procedural formality"—whatever that means—he would use in an uncontested case. Would he have the decisionmaker formulate findings of fact on the evidence in the record? Would he use an argument procedure, after the manner of an appellate court? Even though he avoids use of the words, does he mean that he would have "oral testimony"? His description does not answer these questions.

⁹ Cavers, *Administrative Decisionmaking in Nuclear Facilities Licensing*, 110 U. PA. L. REV. 330, 356 (1962) [hereinafter cited as Cavers].

(2) For "a serious disagreement" he would have "a more formal hearing on issues involved."¹⁰ I do not know what he means by "more formal." In the literature of administrative law, "formal hearing" usually means a trial-type hearing. If he means that for every serious disagreement he would use trial procedure, then I am unable to go along. When parties disagree about questions of law or policy or discretion, but not about facts, no court would use trial procedure, and I think the Commission should not use trial procedure. If "more formal" does not mean trial procedure, then what does it mean? He does not say.

(3) Professor Cavers withholds his approval from my view that trial procedure should be used to resolve issues of fact, and that argument procedure, not trial procedure, should be used to resolve issues of law, policy, or discretion. My view is not a radical one and it is not original; it is the view that the Anglo-American courts have been following for centuries. No court would use trial procedure unless facts are in issue; courts use argument procedure on issues of law, policy, and discretion. Nowhere does Professor Cavers give reasons for his refusal to go along with the general types of procedure that courts use to decide contested cases.

(4) For contested cases, Professor Cavers says that the procedure "should turn not only on the nature of the issues but on the interests and temper of the contestants and the extent to which they may contemplate seeking a review in the courts."¹¹ I cannot even begin to understand this. Would he have the Commission or the Board ask the parties about their "temper" and about "the extent they may contemplate seeking a review in the courts" and then fix the procedure accordingly? Will he use trial procedure if parties expect to go to court and argument procedure if they do not? Or what? I think the procedure in contested cases must depend upon the nature of the issues—trial procedure on issues of fact, and argument procedure on issues of law, policy, or discretion.

(5) Professor Cavers says in his fifth proposition that the procedure he prescribes ought not to be used "at every stage in a long and complex process."¹² Most cases of reactor licensing are "long and complex," and he never says what procedure should be used when the procedure he does prescribe ought not to be used because the process is long and complex.

¹⁰ Cavers 360.

¹¹ Cavers 356.

¹² *Ibid.*

(6) Professor Cavers rejects my idea that the Commission should use a press-conference type of hearing. His reason is: "If . . . AEC representatives address themselves to the safety merits of the reactor, they put the AEC in the position of defending the reactor's safety to the general public before a decision has been reached that it is safe enough to be licensed."¹³ But Professor Cavers himself does not believe in this reason, for several pages later, in outlining his own system, he adopts the very idea that he here rejects. For the hearing he recommends, he says the same AEC staff members, before the final decision is made, should prepare their positions, and then he says in italics in his second proposition that the staff "must defend these positions publicly before their peers."¹⁴ My opinion is that his thinking is unsound when he says the AEC staff members should not defend their position in public, and that his thinking is sound when he says that the AEC staff members should defend their position in public. I would have them defend their position at the press-conference type of hearing, and I think Professor Cavers has not yet stated a valid reason for their not doing so.

(7) For more than two pages he purports to discuss my procedural proposals,¹⁵ but in doing so he wanders far away from them. He is pursuing his own imagination, not mine, when he says that he "must indulge in conjecture" about how my ideas would affect the personal participation by the five Commissioners.¹⁶ I have heretofore made one and only one suggestion for change in what the five Commissioners now do in deciding a licensing case: I would abolish the present prohibition against their consulting the technical staff in uncontested cases. This would decrease, not increase, the burden on the Commissioners, because deciding technical questions with the help of the technical staff ought to be less time-consuming than deciding technical questions without the help of the technical staff. My opinion is that Professor Cavers is dipping deeply into unrealism when he talks about an "informal appellate-court type of review" in uncontested cases.¹⁷ The uncontested case involves an executive task like the making of a contract. It is like thousands of other executive tasks which the Commission performs through its seven hundred employees. Does Professor Cavers think the Commissioners are confronted with a dilemma of doing either too much or too little about each of their other executive tasks? No effective executive will join Professor

¹³ Cavers 354-55.

¹⁴ Cavers 355.

¹⁵ Cavers 357-59.

¹⁶ Cavers 357.

¹⁷ *Ibid.*

Cavers in thinking of his relations with his staff in terms of "court type of review." What we need here is what all good executives understand, even if lawyers and law professors fail to understand it.

B. The Hearing Requirement of the 1957 Amendment

One special problem about the use of trial-type hearings in uncontested cases remains. The Commission takes the position that the 1957 amendment to the Atomic Energy Act require a trial-type hearing in all cases, including uncontested ones.¹⁸ The question seems to me a vital one, especially since the only pending legislation leaves the hearing requirement unchanged. Professor Cavers avoids the question, stating that "since, no matter which view is to prevail, the problem of which answer would be better for the future will remain."¹⁹ This seems to mean that Professor Cavers is content to have the Commission continue trial-type hearings in uncontested cases, although nowhere does he say that explicitly. I am disappointed that he refrains from joining me in condemning the Commission's interpretation of the 1957 amendment.

At the June hearings before the Joint Committee, Commissioner Olson and I debated the question whether the 1957 amendment of section 189(a) of the Atomic Energy Act requires a trial-type hearing in an uncontested case.²⁰ Later AEC General Counsel Neil D. Naiden wrote the Joint Committee: "Professor Davis states . . . that 'no statute concerning the licensing of reactors requires a hearing on the record.' . . . Section 189(a) of the Atomic Energy Act explicitly requires a hearing on the record conducted in accordance with the APA [Administrative Procedure Act]."²¹

Mr. Naiden's word "explicitly" makes it possible to contradict him by merely looking at the words of section 189(a). The provision requires "a hearing," but it does not require "a hearing on the record." The word "record" does not appear in the statute. Neither does the statute mention or refer to the APA.²²

¹⁸ See AEC Memorandum Concerning Mandatory Hearing Requirement under Atomic Energy Act, in *Hearings on Radiation Safety and Regulation* 382-85.

¹⁹ Cavers 354.

²⁰ *Hearings on Radiation Safety and Regulation*, *supra* note 7, at 372-89 (1961).

²¹ Letter From Neil D. Naiden, General Counsel, Atomic Energy Commission, to James T. Ramey, Executive Director, Joint Committee on Atomic Energy, in *Hearings on Radiation Safety and Regulation*, *supra* note 7, app. 6, at 424.

²² The 1957 amendment, in full, reads as follows:

Section 189(a) of the Atomic Energy Act of 1954, as amended, is amended by adding the following sentence at the end thereof: "The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 103 or 104(b) for a license for a facility, and on any application under section 104(c) for a license for a testing facility."

71 Stat. 579 (1957), 42 U.S.C. § 2239(a) (1958).

Responding to my article in the *American Bar Association Journal*,²³ Commissioner Olson, in a letter to the editor of the *A.B.A.J.*, said:

Professor Davis mentions in a footnote section 189a. of the Atomic Energy Act, which in 1957 imposed on the Commission the requirement that it hold public hearings before the issuance of a construction permit and an operating license for power and test reactors. Notwithstanding this, he proceeds to assert that "no statute concerning the licensing of reactors requires a hearing on the record." This is a basic error of law which vitiates the basic premise of Davis' article.²⁴

Commissioner Olson, I think, is simply mistaken. His mistake is at a very elementary level. He assumes that a requirement of a hearing is necessarily a requirement of a trial-type hearing. It is not. Let me explain. I shall spell out my explanation rather fully, in elementary terms, because I have failed to reach Commissioner Olson or Mr. Naiden by my earlier, shorter explanations.

On issues of fact, a trial court uses what is known as trial procedure. Such procedure involves the taking of evidence, subject to cross-examination, and a determination is made on the evidence presented, that is, "on the record." The terms "trial" and "a hearing with a determination on the record" are synonyms. The longer phrase is often shortened to "a hearing on the record," but the meaning is the same.²⁵ When the Administrative Procedure Act in § 5 says "adjudication required by statute to be determined on the record after opportunity for agency hearing,"²⁶ it means adjudication for which a statute requires trial procedure.

Many statutes require a hearing without requiring trial procedure, that is, without requiring "a hearing with a determination on the record," or "a hearing on the record."²⁷ A common example of a hearing without trial procedure, that is, of a hearing which is not "on the record," is a typical hearing before an appellate court. The court hears

²³ Note 1 *supra*.

²⁴ *Hearings on Radiation Safety and Regulation*, *supra* note 7, app. 6, at 425.

²⁵ The stenographic recording of what is said at an argument type of hearing does not turn the hearing into either (1) a trial, (2) a hearing with a determination on the record, or (3) a hearing on the record. All three of these procedures are the same. The language may be confusing to some, but it should be obvious that one cannot turn an argument into a trial by recording it. Some of the legislative history of the 1957 amendments shows an intent that the "discussion in public" should be recorded, but that is not a reason for calling the discussion a trial.

²⁶ Administrative Procedure Act § 5, 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958).

²⁷ For instance, the statute required the Tariff Commission to afford a "hearing" in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), but the Court specifically held that the determination need not be made on the record.

argument, not evidence, and it does not allow cross-examination. It does not conduct a trial. It does not conduct "a hearing with a determination on the record," or "a hearing on the record."

The word "hearing," whether used in a statute or elsewhere, can mean trial procedure, argument procedure, a conference, informal consultation, a public meeting with speeches, or a roundtable discussion. But we do not interpret the word "hearing" to mean a trial unless questions of fact are in issue, because the whole Anglo-American tradition, developed through the courts, as well as the intrinsic nature of the trial process, makes clear that the purpose of a trial is to resolve issues of fact. Section 189(a) requires "a hearing." The words do not say "a trial" or "a hearing on the record." The tradition and the intrinsic nature of a trial should control, in absence of legislative history to the contrary. Nothing in the legislative history specifies either a trial or a hearing with a determination on the record. Since a trial without issues of fact is contrary to all our tradition, the lack of a requirement—either in the statute or in the legislative history—of a trial or a hearing with a determination on the record is more than an ample basis for drawing the conclusion that neither a trial nor a hearing with a determination on the record was intended. Neither Commissioner Olson nor General Counsel Naiden, even though challenged to do so, has come up with one word of legislative history about an intent that trials should be conducted in uncontested cases.

But the case against trials in uncontested cases does not stop there. In addition, we have an affirmative indication from the Joint Committee that what was intended was "discussion in public": "The Joint Committee concluded that full, free, and frank discussion in public of the hazards involved in any particular reactor would seem to be the most certain way of assuring that the reactors will indeed be safe and that the public will be fully apprised of this fact."²⁸ The language "full, free, and frank discussion in public" seems to me utterly inconsistent with a trial procedure, that is, inconsistent with a hearing on the record or a hearing with a determination on the record.

The hearing was properly an argument type of hearing, not a trial type of hearing. For other authorities, see 1 DAVIS, *op. cit. supra* note 8, §§ 6.05, 7.01.

That trials are no good for nonfactual issues is so clear that the courts seldom have occasion to assert this proposition. A good statement of the traditional attitude is this: "[I]t is fundamental to the law that the submission of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided. . . . Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument." *Producers Livestock Marketing Ass'n v. United States*, 241 F.2d 192, 196 (10th Cir. 1957), *aff'd sub nom. Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n*, 356 U.S. 282 (1958). The Supreme Court opinion did not advert to the specific question.

²⁸ Note 4 *supra*.

I think discussion in public is entirely appropriate in an uncontested public safety case. I would have the "discussion in public" in a hearing in the nature of a press conference, not in a trial.

I think a trial of an uncontested case is (1) perfectly preposterous and (2) not required.

II. COMBINATION OF PROMOTING AND LICENSING FUNCTIONS

The Commission is primarily an operating agency and only incidentally a regulatory agency. It promotes the development of peaceful uses of atomic energy, it operates its own facilities, and it subsidizes projects of private corporations. In some cases, the Commission may negotiate with a private corporation, enter into a contract concerning the type of reactor to be constructed, and agree to subsidize the project—and then later the Commission may have to pass upon the safety problems in determining whether or not to grant the construction permit and the operating license.

Is the combination of promoting and licensing functions harmful? What Professor Cavers' view is on this question I do not know. His article does not answer the question of whether he believes the combination to be harmful. He goes no further than to pass the buck to the opinions of others—others who are not identified. Thus, he says that "a worried community" may fear that a Commission which promotes and even subsidizes may not "achieve disinterested detachment."²⁹ He does not say whether he shares the worries and the fears. Under the heading of "The Problem of the Commission's Dual Responsibilities," he discusses other people's views but he never states his own. Furthermore, at no point in his entire article does he discuss the problem on the merits—the pros and cons of the combination. Presumably he agrees with the Joint Committee's staff "study," to which he was consultant. But the "study" does no more than make assumptions, defer to other people's views, and refrain from an examination of the merits of the problem.³⁰

²⁹ Cavers 330-31.

³⁰ The staff study devotes nearly one page to a discussion under the heading, "The problem of dual responsibilities." The only attempted appraisal of the problem is in two sentences: "In all these situations, the Commission is trying to view objectively from a safety standpoint the same reactors it has already viewed and approved from a promoter's or a developer's viewpoint. No other regulatory agency is subjected to a comparable strain of conflicting roles in reaching its decisions in particular cases." 1 STAFF OF JOINT COMM. ON ATOMIC ENERGY, 87TH CONG., 1ST SESS., IMPROVING THE AEC REGULATORY PROCESS 48 (Jt. Comm. Print 1961). I doubt the validity of the second quoted sentence. No mention is made of separation of the Commission's promoting staff from the licensing staff, of the limitation of the combined functions to the level of the five Commissioners, or of the easing of the problem by the slight extent of personal participation in licensing by the Commissioners.

I am a bit inclined to the old-fashioned view that a problem ought not to be resolved without taking a look at its merits. If this were a full-dress article, I would want to make a full investigation; in this quick reply to an article, I shall attempt no more than to bring out some of the major considerations that have been ignored by the Joint Committee staff and by Professor Cavers.

When we say that "the Commission" both promotes and licenses, we are missing most of the essence of the problem, because most of the work of both promoting and licensing is done by the Commission's staff, and the staff for the one function is different from the staff for the other function. Promoting, negotiating, and subsidizing are done through the Division of Reactor Development. Work on safety problems is done by the Division of Licensing and Regulation.

The problem is thus not whether each Commissioner may personally engage in promoting a reactor and then personally decide the safety question. The problem is approximately this: Can a Commissioner who wants a particular type of reactor to be built in a particular place, who has approved what the staff has worked out with a private corporation for such a reactor, perhaps including arrangements for subsidy, and perhaps with some personal participation on the part of the Commissioner—can such a Commissioner, without imbalance, approve or refrain from disapproving or rubber stamp or veto or modify the action or recommendation of the staff of the Division of Regulation and Licensing with respect to the safety of the particular reactor? Professor Cavers fails to discuss this question or any question resembling it.

Perhaps informed minds may differ on this question. Each reader may properly ask himself whether he could keep his balance if he were a Commissioner. My guess is that the typical reader is likely to conclude that if he were a Commissioner he could promote a particular reactor, even with some enthusiasm, while at the same time saying to the representatives of the private corporation that he is reserving judgment about all safety aspects of the project, and that he could in truth and in fact reserve judgment about safety; he could say, and he could genuinely think: "I don't yet know what the safety problems are, and I can't have any view about them until I get a report from the technical people in the Division of Regulation and Licensing. They will exercise their judgment without any influence from the promoting staff, and I have a good deal of confidence in their judgment. With their help, I think I can maintain a balanced judgment about safety problems to the extent that I participate in deciding them. In a safety problem, I do not have to start at the beginning and formulate my own

judgment; all I have to do is to pass upon what comes to me from the staff, who have worked on the problem much more intensively than I ever can."

Oddly enough, I do not know from Professor Cavers' article whether he fears that the Commissioners, on account of their promotion function, will develop imbalance in the direction of relaxing safety requirements or whether he fears that they will bend over backward and develop imbalance in the direction of strengthening safety requirements. When he refers to a "worried community" that needs reassurance that the Commission will "achieve disinterested detachment,"³¹ the worry must be about relaxing safety. The same is true when he says that "people to the leeward of Peach Bottom are entitled to confidence that for them there will be a long run."³² And the same is true when he suggests that "a staff supervised by a Commission that appears committed to support a particular reactor will tend toward bias in favor of that reactor."³³ But part of the time he has the opposite fear, as when he suggests that "one consequence of the combination of responsibilities may even be a tendency on the part of the Commission to bend over backward by overemphasizing safety."³⁴

Furthermore, because the staff of the Division of Reactor Development can be separated in any desired degree from the staff of the Division of Licensing and Regulation, the principal problem of combination of promoting and licensing must be at the level of the five Commissioners. Yet Professor Cavers says of uncontested licensing cases, without qualification: "The actual decisions—except on procedural issues—are made by the AEC staff and the ACRS."³⁵ At another point he says of the Commissioners' review of licensing cases that "the process of review on the record can scarcely escape from being a rubber-stamp operation in all respects save the time it consumes."³⁶ And he says flatly that "there is no effective review of the merits of the safety decisions."³⁷ If we can believe these various statements by Cavers about nonparticipation by Commissioners in deciding license cases, the combination of promoting and licensing completely disappears.

If I were merely trying to win a debate, I would claim a conceded victory on this question. But I am not merely debating. The idea

³¹ Cavers 330-31.

³² Cavers 341.

³³ *Ibid.*

³⁴ Cavers 340.

³⁵ Cavers 341.

³⁶ Cavers 348.

³⁷ Cavers 331.

repeatedly expressed by Professor Cavers that Commissioners have virtually nothing to do with the decision of licensing cases seems to me contrary to the fact. For instance, in the recent *Vallecitos* case, the Commissioners imposed safety requirements that went beyond those recommended by the Division of Licensing and Regulation.³⁸ The study by the staff of the Joint Committee said that Commissioners spend from one-sixth to one-third of their working time on regulatory problems.³⁹ The Commissioners do seem to have something to do with licensing. And I think that neither the Joint Committee staff nor Professor Cavers in his article demonstrates, or even comes close to demonstrating, that a Commissioner who has personally participated in promoting a particular reactor will as a result lose his balance either in the direction of unduly relaxing safety requirements or in the direction of unduly strengthening safety requirements.

Now, another problem about the combination of promoting and licensing has to do with appearance as distinguished from reality. Just as we want courts and agencies not only to do justice but also to appear to do justice, we want Commissioners who decide safety problems not only to be free from imbalance but also to appear to be free from imbalance. Conceivably this is all that Professor Cavers is talking about, although I cannot be sure.

Neither the article by Professor Cavers nor the staff study to which he was a consultant comes up with facts about the extent or the nature of the assumed "public concern" about possible contamination of the licensing function by promotion activities. We have no survey either of informed opinion or of uninformed opinion. For all we know, whatever "public concern" exists is only in the minds of people who make assumptions about the opinions of others. My unscientific guess is that "the public" has never heard of the question. If the handful of lawyers and others who follow the work of the AEC have any consistent view, Professor Cavers fails to bring that out.⁴⁰ The Commission may well be right in saying that this aspect of the problem is merely one of public relations. At all events, the Cavers case for "public concern" is a weak one in the absence of supporting facts.

³⁸ In the Matter of General Elec. Co., 2 CCH ATOM. ENERGY L. REP. ¶ 11236 (AEC Nov. 2, 1960).

³⁹ Letter From AEC Commissioner J. S. Graham to James T. Ramey, Executive Director, Joint Committee on Atomic Energy, Oct. 28, 1960, in 2 STAFF OF JOINT COMM. ON ATOMIC ENERGY, 87TH CONG., 1ST SESS., IMPROVING THE AEC REGULATORY PROCESS 574 (Jt. Comm. Print 1961).

⁴⁰ Those who commented on the proposal to establish an independent safety board agreed with the Joint Committee staff. See *Hearings on Radiation Safety and Regulation*, *supra* note 7, at 301. The vote would probably have been an approving one if the recommendation had been the other way. No letter of comment showed any penetration into the problem of combined functions.

I do not conclude that the combination of promoting and licensing is harmless. Without a deeper study of the problem, I think no clear conclusion either way is warranted. With adequate resources at its disposal, the staff of the Joint Committee should have studied the problem. It is clearly susceptible of further study. For instance, each Commissioner, past and present, should be interviewed; he should be asked to what extent he has tended to make mental commitments on account of his promoting activity, to what extent such commitments have affected his decisions in licensing cases, to what extent he is aware of an influence from his promoting experience either toward relaxing safety requirements or toward bending over backward and strengthening safety requirements. Members of the Commission's staff should likewise be interviewed. The extent of Commissioners' personal participation in licensing decisions should be clarified. All the details should be spelled out in a full report which the Commission's critics can study and understand. After the report has been widely circulated, opinions of interested observers should be sought, in an effort to appraise "public concern," if any. Then and only then should a conclusion be drawn as to whether or not or to what extent the combination of promoting and licensing is harmful.

III. AN INDEPENDENT SAFETY BOARD

Professor Cavers advocates the creation of an Atomic Safety and Licensing Board which will be separate and independent of the AEC in that the AEC will have no power to appoint, remove, or supervise Board members, or to review Board decisions, and Board decisions will be binding upon the AEC no matter how strongly the AEC disagrees.

I oppose the creation of such an *independent* board, although I have no objection to a new *subordinate* board. Replacing the present legally trained examiner with a board two of whose three members would be technically trained would be an improvement. I object to making the Board independent, because that would destroy the present unitary command of the Commission. Frustrations and stalemates would probably result.

Men who make decisions by weighing considerations of safety against considerations of development should, in my opinion, have responsibility for both safety and development, not merely for safety.

The disadvantages of the proposed Board, in my opinion, have been inadequately recognized by the Joint Committee staff and by Professor Cavers. The main suggestion of a disadvantage in the Cavers article is a brief quotation from me about the negative function of the

proposed Board,⁴¹ but the quotation is presented in a context of discussing the combination of promoting and licensing, where it does not belong, and not enough is presented to make it persuasive. I shall spell out my reasons for opposing an independent board.

The power of the proposed Board would be almost wholly negative. The AEC would continue its affirmative program of promotion, of operation, and of research. Although the Board could require modifications as a condition of withholding its veto power, its principal assignment would be to make choices between interfering with the AEC's affirmative program and not interfering with the AEC's affirmative program. The proposed Board could have no affirmative program of its own for furthering the development of atomic energy.

The AEC, I should think, will continue to be able to attract men of the highest caliber as Commissioners. But why should men of stature, men who are alert and resourceful, be willing to serve on an agency whose principal job is to choose between saying no and not saying no to plans formulated by someone else?

Because the function of the proposed Board would be almost entirely negative, I think it would surely develop an imbalance in a negative direction. It would achieve its mission only by doing something, but the main thing it would be able to do would be to say no. It could never get credit for success of the atomic energy program; the credit would properly go to those who make the affirmative contributions.

If the responsibility for safety were transferred from the AEC to the proposed Board, the AEC would naturally put less emphasis on safety and more emphasis on affirmative programs. The Board members, limited to the negative power, would almost surely gradually exaggerate safety needs; AEC members, freed from primary responsibility for safety, would almost surely emphasize or overemphasize the affirmative needs for developing atomic energy. A difference in point of view between the AEC and the proposed Board would thus be built into the system or organization.

Decisions about safety should be made by men who have a balanced view of the entire program, not by men who are assigned to focus only upon the safety factor of the program. Anyone who is given the job of focusing upon any one facet of any program will in time tend to believe that his facet is more important than it is, in relation to other facets. People who have responsibility for all facets, as the Commissioners of the AEC do now, are most likely to maintain a good balance.⁴²

⁴¹ Cavers 339.

⁴² I disagree with Professor Cavers when he says: "In discharging its regulatory responsibility, the Commission's prime duty is to give the nation reasonable assurance

The most difficult and crucial problems about safety involve the determination of whether the estimated risks are too great despite the estimated gains. The relatively less difficult tasks involve finding ways to increase safety without impairing the project too much. On the difficult problems of weighing risks against gains, what is wanted is a balanced judgment that will weigh the one against the other, not a judgment that will tend to favor either. Members of the proposed Board, who would be given an assignment to protect the public safety, would be very likely to make it their business to protect the public safety, with minds that would emphasize safety at the expense of the affirmative programs of the AEC, for which they would have no responsibility.

A unitary command is better than divided authority. Divided authority would be at its worst if the Commission, stripped of primary responsibility for safety, were encouraged to emphasize development, and if the Board, without responsibility for development, were encouraged to emphasize safety.

The only good system for producing sound decisions in the weighing of development against safety is to have the decisions made by men who have responsibility for both development and safety.⁴³

IV. CONCLUSIONS

At almost every crucial point, I disagree with Professor Cavers.⁴⁴ I think trial procedure in uncontested cases is an absurdity; he does

that the reactors it licenses do not create undue risks to the communities that are exposed to them." Cavers 363. This statement is just as objectionable as would be the opposite statement that the Commission's prime duty is to assure proper development of peaceful uses of atomic energy. My view is that the Commission's prime duty is to work out a proper balance between the often-conflicting considerations of safety and development.

⁴³ The proposed Board would have a brake but no accelerator and no steering wheel. The AEC would continue to have all three—brake, accelerator and steering wheel—but would be discouraged from using its brake, since the responsibility for that would be transferred to the Board. Is a bus more likely to avoid accidents if it has not only the usual driver with the usual controls but also an extra operator with only a brake? I think the man with a brake would tend to use it too much and at the wrong times, and that the divided responsibility would increase the probability of accidents. Accidents are avoided by using the accelerator and the steering wheel, not just by using the brake, and especially are accidents avoided by the coordinated use of all three.

If we are to give the public the best protection we know how to provide, we will not have an extra operator with only a brake. We will trust the one driver who can coordinate the use of all the controls. We won't establish an independent board.

⁴⁴ I disagree even on the meaning of the Pastore-Holifield bill. He says he cannot appraise it until he knows what the Commission will do with the power the bill would give the Commission to establish a board and to make its decisions either "intermediate or final . . . on an *ad hoc* or permanent basis." S. 2419, H.R. 8708, 87th Cong., 1st Sess. (1961). But the Commission's position against an independent board is known to the bill's sponsors. I think the sponsors have at least for a time rejected the proposal for an independent board which Professor Cavers now for the first time publicly assumes responsibility for "putting forward."

not condemn it. He speaks of "informal procedure" and of "formal procedure" and of "more formal procedure," but he never suggests what criterion should be used in choosing one or the other; I think trial procedure should be used for issues of fact, that argument procedure should be used for issues of law or policy or discretion, and that a press-conference type of hearing is enough when all parties are in agreement and the only purpose of a hearing is to inform the public.

Professor Cavers thinks of the five Commissioners' supervision of their staff in uncontested cases in terms of "informal appellate-court type of review." I think supervision of staff in uncontested cases is like supervision of staff in any other executive tasks. Law professors may see dilemmas about supervising too much or too little, but good executives know how to avoid the dilemmas. The problem of assuring adequate thoroughness of staffwork on safety problems should be resolved by management engineers, not by lawyers or law professors.

Professor Cavers wants to change the system of combination of promoting and licensing in the five Commissioners, but he does not say whether he thinks the combination harmful or whether his concern goes only to what he calls "public concern." I recognize that a problem exists about this combination, but no demonstration has been made that it is harmful in fact, or that it in fact arouses what Professor Cavers calls "public concern." The problem in my opinion calls for further study.

Professor Cavers advocates creation of an independent board. I want to keep the unitary command of the Commission. Safety must be weighed against development, in my opinion, by men who have responsibility for both safety and development.