Nuclear Power and Legal Advocacy by Constance Ewing Cook

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BOOK REVIEW


Reviewed by John V. Galiette*

In the spring of 1979, an event occurred which thrust the entire debate surrounding the proliferation of nuclear power into the living rooms of America. The accident at Three Mile Island both shook the confidence which many people had in the safety of nuclear power and reinforced the distrust which many others harbored towards the nuclear industry. Understandably, future nuclear development ceased as the experts sought an explanation of the cause of the incident and a mechanism for preventing similar occurrences in the future. However, the true impact of Three Mile Island on the nuclear industry was not as significant as one might infer from these facts. In truth, by the spring of 1979, the nuclear power industry had already reached a state of near paralysis. Or­ders for new reactors had lessened to a mere trickle, despite the continuing need for the United States to develop domestic sources of power capable of weaning the country from dependence on for­eign oil. Some of the reasons for this seemingly anomalous result regarding nuclear power are the subject of analysis by Constance


1 C.E. Cook, Nuclear Power and Legal Advocacy xii (1980).
Ewing Cook in her book *Nuclear Power and Legal Advocacy*.

Before analyzing the content of the work, two important points must be made concerning the author's approach to the subject matter. First, rather than giving a mere chronology of the events surrounding a particular struggle between those groups supporting and opposing atomic energy, the author instead analyzes the processes which operated beneath the surface to direct the course of the controversy. This approach gives the book relevance beyond the debate concerning nuclear power since similar processes undoubtedly are at work in other advocacy situations. Second, the author remains refreshingly objective throughout the work. A reader would be hard pressed to state whether Ms. Cook's personal sympathies lie with the proponents or opponents of nuclear power. Given the plethora of strident tracts on both sides of the controversy, an objective analysis of the debate is greatly appreciated.

The discussion of the nuclear power controversy begins with a description of the various forces involved. In all, four groups are discussed: the anti-nuclear environmental groups, the nuclear industry, the Nuclear Regulatory Commission (NRC) and the judiciary. While the first three groups would naturally be included in any discussion of nuclear power, the inclusion of the judiciary as an independent force in the nuclear debate gives the book its unique perspective. Ultimately, in any controversy over atomic energy, the pro- and anti-nuclear forces and the government become players in the arena provided by the courts. How well each group utilizes its access to this arena is determinative of whether or not it successfully attains its aims.

The anti-nuclear forces generally are composed of citizen and public interest groups, although they have been joined by such other organizations as labor unions and associations of scientists. The factors which motivate these forces to oppose the development of atomic energy fall into three categories: fear regarding the safety of nuclear power, dislike of industrial expansion, and concern about the centralization of economic power in the hands of a few powerful organizations. Consequently, the fight against nuclear power is, for many, merely one facet of a larger struggle against the forces of the economic system in the United States. An understanding of this premise makes it clear that, even if all the safety

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* Id. at 11.
* Id. at 10.
factors surrounding nuclear energy were resolved, some individuals would still oppose its proliferation based on economic and social grounds.

The nuclear industry is composed of the manufacturers of nuclear reactors and the utilities which operate them, along with such energy industry trade associations as the Edison Electric Institute. Although it has available significant amounts of money and legal expertise, the nuclear industry lacks visible, long-term leaders who can expeditiously present its position. There is no pro-nuclear advocate comparable to such an anti-nuclear activist as Ralph Nader. Consequently, the nuclear industry often fails to effectively mobilize its potential supporters.

The Nuclear Regulatory Commission is the governmental agency charged with establishing nuclear plant regulatory standards and issuing plant licenses. The licensing process is basically a two-step procedure. First, the utility seeking to build a nuclear plant must obtain a construction permit. The application for a construction permit entails the submission by the utility of volumes of technical and other data. After review by the NRC staff, the application is subjected to an independent technical review by, first, the Advisory Committee on Reactor Safeguards (ACRS) and, then, by the Atomic Safety and Licensing Board (ASLB). The ASLB is also required to hold public hearings in order to give interested parties an opportunity to comment on the plant’s construction. The ASLB’s approval of the construction permit is subject to appeal to the Atomic Safety and Licensing Appeal Board (ASLAB), whose decision is itself subject to final review by the members of the NRC. Following final administrative approval of the construction permit, the NRC conducts a continuing investigation of the plant’s construction. Well before the plant’s completion, the utility must initiate the second stage of the licensing process, the procurement of an operating license. Once again, the permit application is subject to review by the NRC staff, the ACRS, the ASLB, the ASLAB, and the NRC, with public hearings being conducted by the ASLB. Only

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* Id. at 15-18.
* Id. at 21

* The NRC was formed in 1974 as the result of a Congressional reorganization of the now-defunct Atomic Energy Commission (AEC). The AEC had been given the schizophrenic mandate of simultaneously fostering the growth of the private nuclear industry and ensuring adequate safeguards in plant construction and design. Congress abolished the AEC and created the NRC, giving it a clear regulatory mandate. Id. at 25.
after final administrative approval of the operating license can plant operations begin.\(^7\)

The intricacies of the licensing process provide ample opportunities for intervention by anti-nuclear activists. However, the activists are not limited to intervention in administrative proceedings only. Quite to the contrary, groups opposing atomic energy have often resorted to the courts for review of agency decisions. Their skillful use of the judiciary has enlarged the role of the courts and has permitted the anti-nuclear forces to effectively stop the proliferation of nuclear energy.

Certain aspects of the environmentalists' appeals to the courts have enabled those opposed to nuclear power to achieve this de facto halt to nuclear expansion. Most importantly, resort to the judiciary entails significant delays in obtaining final approval for the operation of a nuclear plant, with the total time allotment for building and licensing a nuclear plant now ranging from twelve to fourteen years.\(^8\) Such intervention-related delays add significantly to the projected costs of a nuclear project, thereby making it increasingly difficult for utilities to justify the cost of investing in atomic energy.\(^9\) As the attorney for one anti-nuclear group stated, dilatory tactics are used to make the commitment to nuclear power "as painful and expensive as possible for a utility."\(^10\) And, since delay is the apparent objective of the environmentalists, winning an appeal to the courts becomes of secondary concern. Thus, although almost every judicial ruling concerning atomic energy has been favorable to the nuclear industry,\(^11\) that industry is close to paralysis. Consequently, through skillful use of the courts, the forces opposed to nuclear power may be losing the battles but are winning the war.

The environmentalists have utilized the courts in other ways in the furtherance of their aims. Since the opponents of nuclear power have been the party initiating suit in all but one action regarding nuclear power policy,\(^12\) they have obtained certain strategic advantages. For example, as plaintiff, anti-nuclear forces have the option of selecting the most sympathetic court available to

\(^7\) Id. at 26-28.
\(^8\) Id. at 32.
\(^9\) Id. at 104.
\(^10\) Id. at 55.
\(^11\) Id. at 47-48.
\(^12\) Id. at 35.
hear their case. Moreover, knowledge that the environmentalists are prone to initiate suit has made the NRC extremely careful to comply with their procedural interpretations during the licensing process rather than those of the nuclear industry. By acquiescing to such demands, the NRC hopes to limit the grounds on which a court could later remand its decisions for reconsideration.

After the introduction to the processes at work in the nuclear power debate, Ms. Cook exemplifies these processes by means of a discussion of the controversy surrounding the construction of the nuclear power plant at Midland, Michigan. Through this analysis the reader witnesses the abstract forces detailed in the earlier chapters of the book personified in the various individuals who opposed and supported the project. Rather than giving merely a theoretical discussion of the intricate maneuverings of the antagonists in the nuclear power controversy, the author also leads us through the seemingly endless process of obtaining agency approval for the licenses for the Midland plant and of resolving the judicial challenges which inexorably followed that approval.

By analyzing the processes involved in the anti-nuclear debate, Ms. Cook has written what amounts to a handbook for the debaters, whether they be for or against nuclear power. Before any advocate attempts to present and proselytize his cause, he must first analyze the strengths and weaknesses of his own position, both substantive and procedural. Next, he must be aware of his opponent’s strong points. Only after these things are determined can adequate measures be taken both to propagandize one’s own position and to neutralize that of one’s opponent. The benefit of Nuclear Power and Legal Advocacy is that it lists all the strengths and weaknesses of the pro- and anti-nuclear forces. Thus, the book represents a handy reference work for anyone involved in the nuclear power controversy.

Yet this work is not meant only for the protagonists. By being aware of the underlying bases and procedural posturings of both sides, the general public can try to peel away the rhetoric and delve into the substance of the issue. However, such a task is not easy, basically because it is not in the interests of either side of the debate. The discussion of the Midland plant controversy illustrates this point. By the end of that discussion, the reader is left with the impression that the true merits and demerits of nuclear power have been lost amid the legal wranglings of the pro- and anti-nuclear forces. What began as a technical and economic question af-
ter the Second World War was transformed into a political issue during the succeeding years, and finally has become a judicial matter. Yet the judiciary is not the branch of government most efficaciously equipped to resolve this issue. The choice between the development and rejection of atomic energy requires a policy decision based on the merits of the issue, a decision which only Congress can rightfully provide. Resort to the incremental decision making of the judiciary only delays that ultimate choice. And it is delay which the nation must fear. For delay continues to leave the country in ignorance concerning what could constitute either the greatest achievement or the most direful discovery of this century.

Overall, I thought the book was well researched and well written. The structure of the work is especially perceptive. The combination of an analytic study of the processes of legal advocacy as applied to nuclear power coupled with a case study demonstrating the application of those processes made entertaining and informative reading. Although practical constraints may have been involved, I think it would have been interesting if Ms. Cook had been able to undertake a comparative study of two nuclear advocacy situations, comparing the Midland plant controversy with that involving a plant in another location. Another interesting work would be a comparative study, using the same analytic framework, of a nuclear controversy and some other environmental contest (as, for example, that relating to the Tellico Dam project). All considered, though, Ms. Cook has made a valuable contribution to the literature of nuclear power.

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13 Id. at 25.