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THE H-BOMB AND THE FIRST AMENDMENT

Erwin Knoll*

I. AN UNPRECEDENTED PRIOR RESTRAINT

It still happens to me with depressing frequency: I'm introduced to someone (or introduce myself) as the Editor of *The Progressive*, and immediately I observe a look of vague recollection. Then comes the inevitable question: "Isn't that the magazine that tried to tell people how to build their own atomic bomb?" I struggle to be polite, but can't resist the temptation to engage in a bit of flippancy. "No," I say, "*The Progressive* isn't a hobbyists' magazine. We don't teach people how to build things. You must be thinking of *Popular Mechanics*."

Still, the curious notion endures that *The Progressive*, which has been adamantly opposed to war and militarism of every kind since its founding eighty-five years ago by U.S. Senator Robert M. LaFollette, Sr. of Wisconsin (who opposed U.S. entry into World War I), somehow embarked on the ultimate exercise in nuclear proliferation by deliberately publishing an article that would make it possible for *everyone* to construct a nuclear device. Much of the responsibility for that bizarre misconception belongs to the United States Government, which mounted an unprecedented legal effort early in 1979 to suppress an article we called "The H-Bomb Secret."[1] The article was eventually published exactly as we had originally intended, but at tremendous cost to us, and only after an alarming threat to First Amendment rights.

For six months and nineteen days in 1979, *The Progressive* was enjoined by federal court order[2] from publishing free-lance writer Howard Morland's article, "The H-Bomb Secret."[3] Judge Robert W. Warren of the

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* Editor, THE PROGRESSIVE, 1973-1994. Unfortunately, Mr. Knoll passed away during the editing of this article. Mr. Knoll was *The Progressive*'s Washington correspondent from 1968-1973. Before 1968, he was a reporter and editor at *The Washington Post*, and covered the White House for Newhouse Newspapers during the Johnson Administration. He frequently wrote and lectured on First Amendment issues. Materials pertaining to this Article are on file at the law office of LaFollette & Sinykin, One East Main Street, Madison, WI, 53703, (608) 257-3911.

[1] Howard Morland, *The H-Bomb Secret: How We Got It—Why We're Telling It*, THE PROGRESSIVE, Nov. 1979, at 3.

[2] United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

[3] *See* Morland, *supra* note 1.

Eastern District of Wisconsin, who issued the injunction, acknowledged that it was "the first instance of prior restraint against a publication in this fashion in the history of this country."[4] He took this drastic step because the government assured him—in sworn affidavits signed by such luminaries as the Secretary of State, the Secretary of Defense, and the Secretary of Energy—that publication of Morland's article would endanger the national security.[5] "I want to think a long hard time," Judge Warren said, "before I'd give a hydrogen bomb to Idi Amin."[6]

The U.S. nuclear weapons program has been enshrouded in so much mysticism and mumbo-jumbo since the days of the World War II Manhattan Project that it came as no great surprise to see the mass media,[7] much of the public,[8] and even a federal judge taken in by the government's claims. Many people believed—and still believe—that there is an "H-Bomb secret" that can be written down on the back of an envelope (or in a magazine article). If that "secret" were to fall into the wrong hands—former Ugandan dictator Idi Amin's, for example—we'd all be in a heap of trouble.

One purpose of Morland's article was to dispel such foolishness. He described the U.S. H-Bomb production complex—a huge, far-flung, multibillion-dollar enterprise.[9] Only a major power could undertake such a monstrous task, he explained.[10] So far as the hydrogen bomb is concerned, governments—large governments—are the world's only nuclear terrorists.[11]

A second purpose of Morland's article was to demolish the myth of the "H-Bomb secret" by demonstrating that it wasn't a secret at all. The basics of nuclear fission, and in some cases the configuration of the bomb, were known to thousands of people around the world and could be found in undergraduate physics texts,[12] encyclopedias,[13] and documents declassified

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[4] *Progressive*, 467 F. Supp. at 996.

[5] Affidavit of Cyrus R. Vance ¶ 4, United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (No. 79-98); Affidavit of Harold Brown ¶ 8, *Progressive* (No. 79-98); Affidavit of James R. Schlesinger ¶ 5, *Progressive* (No.79-98).

[6] Bill Peterson & Charles R. Babcock, *Magazine Barred from Publishing H-Bomb Article*, WASH. POST, Mar. 10, 1979, at A1. Idi Amin Dada led a revolt that ousted a civilian government in Uganda in 1971. Between 1971 and his exile in 1979, Amin ordered the deaths of thousands of Ugandans and expelled tens of thousands of Asians from Uganda. *Dictators: A Rogue's Gallery*, L.A. TIMES, Dec. 27, 1989, at A14.

[7] *The Way the Press Saw It*, THE PROGRESSIVE, May 1979, at 44-46.

[8] *Letters on the H-Bomb Controversy*, THE PROGRESSIVE, May 1979, at 47-50.

[9] *See* Morland, *supra* note 1, at 3-6.

[10] *See id.* at 3-5.

[11] *See id.* at 3 (implying that the United States, Russia, France, Great Britain, and China all officially possess nuclear weapons).

[12] *See, e.g.*, DAVID HALLIDAY & ROBERT RESNICK, PHYSICS FOR STUDENTS OF SCIENCE AND ENGINEERING 565-66 (1962) (Howard Morland's own undergraduate physics text).

[13] *See, e.g.*, Edward Teller, Hydrogen Bomb, 14 ENCYCLOPEDIA AMERICANA 654-56

long ago by the U.S. Government.[14] "The secret" that had served as the rationale for spy scares, witch hunts, and loyalty purges since the beginning of the Cold War between the United States and the Soviet Union was a hoax.

In September 1979, after we had argued our appeal of Judge Warren's ruling, but before the Seventh Circuit Court of Appeals had a chance to issue its opinion, the government dropped its inane case.[15] By then, even the *Chicago Tribune* was threatening to publish the "H-Bomb secret" to protest the attempt at censorship.[16] Morland's article appeared, exactly as originally prepared for publication, in the November 1979 issue of *The Progressive*.[17] To the presumable amazement of Judge Warren, the highest officials of the Carter Administration, and much of the nation's press, the world did not come to an end.

II. A SECRET TO KILL FOR?

Though the government eventually dropped its censorship attempt and the *Progressive* case is therefore, as the lawyers say, "without precedential value," it is dealt with in a number of books,[18] magazines,[19] and law review articles.[20] Still, some aspects of the case are not yet fully understood, even by legal scholars.

(1979); 13 ENCYCLOPEDIA BRITANNICA 324 (1975).

[14] *See, e.g.*, E.J. BURDA, SANDIA CORP., EVALUATION REPORT—ELECTRICAL ORDNANCE DEVELOPMENT FOR THE MK 5 AND MK 7 WEAPONS 5-22 (Feb. 12, 1951).

[15] United States v. Progressive, Inc., 610 F.2d 819 (7th Cir. 1979).

[16] John Junkerman, *Papers Challenge Feds*, MADISON PRESS CONNECTION, Sept. 17, 1979, at 1.

[17] *See* Morland, *supra* note 1.

[18] *See, e.g.*, ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 37-54 (1991); A. DEVOLPI ET AL., BORN SECRET: THE H-BOMB, THE *PROGRESSIVE* CASE, AND NATIONAL SECURITY (1981); HOWARD MORLAND, THE SECRET THAT EXPLODED (1981).

[19] *See, e.g.*, Ben H. Bagdikian, *A Most Insidious Case*, QUILL, June 1979, at 21-32; Cynthia Bolbach, *"Born Classified": The Lessons of the "Progressive" Case*, CHRISTIAN CENTURY, Oct. 24, 1979, at 1033-38; Robert Friedman, *The United States v. The Progressive*, COLUMBIA JOURNALISM REVIEW, July/Aug. 1979, at 27-35; Michael Macdonald Mooney, *"Right Conduct" for a "Free Press,"* HARPER'S, Mar. 1980, at 35-44.

[20] *See, e.g.*, Michael A. Ferruggia, *Balancing the Interests of National Security and Free Speech: A Proposed Modification of the English Approach Suitable for Adoption in the U.S.*, 4 TOURO J. TRANSNAT'L L. 217, 235-39 (1993); Erwin Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161 (1981); L.A. Powe, *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990); John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 421-25 (1993).

There are, for example, the peculiar constraints that apply when the government attempts to impose secrecy on grounds of "national security." For the sake of credibility and consistency, if for no other reason, the government must insist on maintaining the same sort of secrecy in court that it is trying to enforce in print. The results can be both ludicrous and ominous. Under a protective order sought by the government and granted by Judge Warren, the government was able to pre-censor all court filings, determining which documents would be submitted only in camera and which would be part of the public record of the case.[21]

In order to participate in our defense, all of our attorneys had to be subjected to security clearance by the government. The named defendants, myself included, chose not to submit to such clearance because we objected to the process in principle and did not wish to be burdened with any more "secrets" that we could not publish. We thus were unable to participate effectively in our own defense and were denied access to substantial portions of the court record, including "classified" sections of briefs filed by our own lawyers on our behalf.

Similarly, exhibits and briefs filed by our attorneys were ordered by the court to be held in camera.[22] The contents of these materials and, in some instances, their very existence, were not made known to us until long after the government had abandoned its attempt at prior restraint. When we asked Judge Warren to vacate his preliminary injunction against publication, he rejected our motion in a secret opinion which we, the defendants bound by it, were unable to see for many months.[23] Our expert witnesses also had to submit to security clearances so that they could familiarize themselves with court documents, or at least with the contested article. In some instances, potential witnesses refused on principle to submit to clearance. In other instances, the clearance process took so long that we were, in effect, denied permission to avail ourselves of these experts' testimony or assistance. Some requests for clearances were still pending when the government dropped its case.

When the court went into closed session, we, as defendants, as well as the public and the press, were excluded. Our attorneys were cautioned not to discuss, even with us, what had transpired in camera, a stricture which they scrupulously observed. Fortunately, the court of appeals decisively rejected a government motion that our appeal be argued in camera[24]—though in this venue, too, we were unable to read in full the briefs submitted by our own

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[21] United States v. Progressive, Inc., No. 79-98 (W.D. Wis. Mar. 14, 1979) (protective order).

[22] *See id.* ¶ 1.

[23] United States v. Progressive, Inc., 486 F. Supp. 5 (W.D. Wis. 1979) (refusing to vacate preliminary injunction).

[24] United States v. Progressive, Inc., No. 79-98 (7th Cir. Sept. 9, 1979) (denying in camera hearing).

attorneys. Because of questions posed in open court by members of the three-judge appellate panel, we learned for the first time that our attorneys had found, on the open shelves of a library in Stockholm, a Soviet publication containing the "secret" we were barred from publishing.[25]

Since we were enjoined not only from publishing the specific article but also from "otherwise communicating or disclosing" its contents "in any manner,"[26] we found ourselves severely inhibited in what we could say about the government's assault on our First Amendment rights. The most frustrating example was a *Milwaukee Sentinel* reporter's article, based on research in the Milwaukee and Waukegan public libraries, which bore out our contention that the so-called "secret" of the hydrogen bomb was readily available to the public.[27] When our attorneys submitted the newspaper article, the court ordered it held in camera. That meant we could not discuss it, under the terms of Judge Warren's protective order, without risking a contempt citation and possible prosecution under the Atomic Energy Act.[28]

Finally, there was the question of personal safety for Howard Morland and for those of us who were familiar with the contents of his proscribed article. The government alleged, and the court agreed, that we possessed a "secret" which, if disclosed, might create catastrophic consequences for the United States and, indeed, for the entire world.[29] The government implied, in sworn affidavits and testimony, that some foreign powers or other interests would be eager to possess that "secret" which could be conveyed in a few sentences consisting entirely of nontechnical words.[30]

If the government really believed all that, it had an obligation to take every conceivable step to protect the "secret" and prevent its disclosure. At *The Progressive* and its printing contractors, there were perhaps a dozen persons—editors, typists, typesetters, and proofreaders—who had read Howard Morland's article and were, therefore, in a position to divulge the "secret."

If the government was serious about the consequences of disclosure, surely its responsibility did not end with the imposition of a court-ordered prior restraint on publication. What was to prevent any one of us from whis-

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[25] A.M. Prokhorov et al., *Laser Thermonuclear Fusion*, 19 USPEKHI FIZICHESKIKH NAUK [ADVANCES IN PHYSICAL SCIENCES] 547 (American Institute of Physics trans., July 1976).

[26] United States v. Progressive, Inc., 467 F. Supp. 990, 991 (1979), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

[27] Joe Manning, *H-Bomb Material Readily Accessible*, MILWAUKEE SENTINEL, May 1, 1979, at 1.

[28] 42 U.S.C. § 2274(b) (1976).

[29] *Progressive*, 467 F. Supp. at 996.

[30] Affidavit of Duane C. Sewell ¶ 7, United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (No. 79-98); Affidavit of Thomas R. Pickering ¶ 8, *Progressive* (No. 79-98).

pering the "secret" to a foreign agent over a beer in a neighborhood saloon, or from sealing it in a letter and dropping it in a mailbox, or from blurting it out over the telephone? Should we not assume, then, that forevermore—or for as long as our "secret" was, in the government's view, a secret—we would be followed, kept under constant surveillance, have our mail read and our telephone tapped, our every human contact closely monitored? Should we not assume, in fact, that the only way the government could be sure of protecting its "secret" was to keep us isolated in solitary confinement or to have us put to death?

These possibilities occurred to us, but we never dwelled on them because we never believed for a moment that the government was actually convinced of its own "secrecy" claims. But the logic was there and will continue to apply whenever the government attempts to impose prior restraint on publication on grounds of "national security."

III. THE "NARROW EXCEPTION" IN *NEAR*

Friends of free speech and freedom of the press quite properly celebrate the Supreme Court decision in *Near v. Minnesota*[31] as a great victory for the First Amendment. More than sixty years ago, it affirmed the principle that a free society cannot countenance a prior restraint on even the most offensive speech or publication.[32] Near was the publisher of a repulsive hate sheet that the State of Minnesota tried to shut down.[33] The Supreme Court declared in ringing terms that the First Amendment's protection extended even to *Near*.[34]

But few people realize that the *Near* decision also contains a booby trap—a few words inserted almost casually into the opinion by Chief Justice Charles Evans Hughes.[35] Those few words, sometimes referred to as the "narrow exception" in *Near*, can serve—and served in *United States v. Progressive, Inc.*[36]—as the basis for a broad assault on First Amendment rights.

In time of war, Chief Justice Hughes wrote, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[37] In 1979, that passage was cited by the government as a basis for restraining *The Progressive* from publishing "The H-

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[31] 283 U.S. 697 (1931).

[32] *See id.* at 714.

[33] *Id.* at 703.

[34] *See id.* at 717-19.

[35] *Id.* at 716.

[36] 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

[37] *Near*, 283 U.S. at 716.

Bomb Secret."[38] Judge Warren agreed and referred to *Near* in his order:

> Times have changed significantly since 1931 when *Near* was decided. Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced. In light of these factors, this Court concludes that publication of the technical information on the hydrogen bomb contained in [*The Progressive*'s] article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.[39]

What Judge Warren concluded, in other words, was that the "extremely narrow exception" in *Near*, which Chief Justice Hughes had explicitly reserved for time of war, now applied in time of peace because of the exigencies of the nuclear age. It must, in fact, apply at all times. In its appellate briefs to the Seventh Circuit, the government went even further, insisting that nuclear scientific information, like obscenity, was not covered by the First Amendment's free speech and free press provisions.[40]

The legal struggle against the government's censorship attempt cost *The Progressive* about a quarter of a million dollars—a burden that almost put the magazine out of business. It was only after the government had been embarrassed repeatedly by the foolishness of its secrecy claims that it dropped the case. "The H-Bomb Secret" was eventually published in the November 1979 issue of *The Progressive*,[41] and none of the catastrophic consequences predicted by the government—and by Judge Warren—came to pass.

IV. GOVERNMENT PERSISTENCE SWAYS THE MEDIA AGAINST US

We were appalled by the reaction of most of the mass media to the government's censorship attempt. As soon as Judge Warren had issued his temporary restraining order, Secretary of Energy James Schlesinger, who, we later learned, was the prime mover in the government's campaign to block publication of "The H-Bomb Secret," took to the telephone to warn editors of leading newspapers that they should not rise to the defense of the

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[38] *Progressive*, 467 F. Supp. at 996.

[39] *Id.*

[40] *See* Appellant's Brief at 9, United States v. Progressive, Inc., 610 F.2d 819 (7th Cir. 1979) (No. 79-1428).

[41] *See* Morland, *supra* note 1.

First Amendment in *The Progressive*'s case. Secretary of Defense Harold Brown delivered the same message in person. There probably was no need for them to go to all that trouble. Many of the media, though not all, proved themselves pathetically eager to support the government's case. They argued that the First Amendment stopped where "national security" began.

The *Washington Post*, which had heroically defended its First Amendment right to publish in the Pentagon Papers case,[42] urged us to delete "voluntarily" those portions of Morland's article that the government wanted to suppress.[43] It called ours "John Mitchell's dream case—the one the Nixon Administration was never lucky enough to get: a real First Amendment loser."[44] Fred Graham, then the Justice Department correspondent for CBS News, asserted categorically that the government would win the case. They did not lack for company in expressing those views.

If we were surprised by the reaction of the news media, we were astonished by the legal costs we incurred, a staggering sum for a small publication like ours; one that easily could have put us out of business. Had we not received assistance from the American Civil Liberties Union, the costs would have been even higher. To the government, of course, cost was no object. Dozens of lawyers contributed to the government's briefs, and there were certainly others who helped prepare the briefs and affidavits. When a copy of the article appeared in Australia, the government immediately sent lawyers to the other side of the globe to check out the situation.[45] Of course, since government lawyers do not keep track of their billable hours, the government's total expenditures were impossible to pin down.

U.S. Attorneys for the Eastern and Western Districts of Wisconsin[46] declined from the beginning to be involved in the case, questioning the constitutionality of the government's censorship attempt. In Washington, all of the Justice Department attorneys who worked on the H-Bomb case eventually petitioned Attorney General Griffin Bell to drop the matter,[47] but he refused.[48] The Department, he said, was obliged to press the case for its "client," Energy Secretary Schlesinger.

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[42] United States v. New York Times Co., 403 U.S. 713 (1970).

[43] *The Progressive and the Bomb*, WASH. POST, Mar. 28, 1979, at A22.

[44] *John Mitchell's Dream Case*, WASH. POST, Mar. 11, 1979, at C6.

[45] Charles R. Babcock, *The H-Bomb Article Surfaces in Australia*, WASH. POST, Apr. 1, 1979, at A2.

[46] *The Progressive* is published in Madison, in the Western District of Wisconsin, but the case was filed in Milwaukee, in the Eastern District, after Western District Judge James Doyle recused himself.

[47] *See, e.g.*, *U.S. Lawyers Urge End to Bomb Suit*, WASH. POST, June 8, 1979, at 1.

[48] *See id.*

V. WE SHOULD HAVE DEFIED THE COURT

With the benefit of fifteen years' hindsight, I have only one serious regret about the case called *United States v. Progressive, Inc.*:[49] I'm sorry that we followed the advice of our attorneys and obeyed Judge Warren's injunction. If such circumstances were to arise again, I would publish and be damned.

I have no criticism of the lawyers; they did what they were supposed to do. Their obligation was to keep us—and *The Progressive*—out of trouble. Under the secrecy provision of the Atomic Energy Act, we faced up to twenty years imprisonment,[50] as well as whatever contempt penalties Judge Warren might have imposed for defiance of the court order. The lawyers often reminded us of the punishment we might face. They also hoped for a significant legal victory—even a finding striking down the draconian secrecy provision of the Atomic Energy Act on constitutional grounds—if the case made its way through the appeals process. Neither the lawyers nor the defendants understood that if the government found itself facing an adverse appellate ruling, it could simply drop the case and render it moot.

The lawyers did their job, but we didn't do ours. They met their responsibility of protecting us. We failed to do our job of publishing. For more than half a year, we allowed our First Amendment rights to be suspended. When anonymous telephone callers told us—as several did—that they had bootleg copies of Howard Morland's article or knew "the H-Bomb secret" and could arrange for its publication, we implored them not to do so. We said we wanted to win a clean victory in the courts.

We were wrong. We should have met our obligation under the First Amendment by publishing the article, or by arranging to have it published elsewhere. If necessary, we should have passed out photocopies on street corners. I will never again surrender my First Amendment rights—whether under duress of a court order or on the well-intentioned advice of counsel.

VI. YEARS LATER: FBI MEMO ILLUSTRATES GOVERNMENT'S HYPOCRISY

In the mid-1980s, long after the government had dropped the case and *The Progressive* had published Howard Morland's article, I invoked the Freedom of Information Act[51] and asked the FBI for its files on *United States v. Progressive, Inc.* Eventually, I received hundreds of pages of documents, some of them heavily censored in black ink, but nonetheless contain-

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[49] 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

[50] 42 U.S.C. § 2274(b) (1976).

[51] 5 U.S.C. § 552 (1982 & Supp. III 1985).

ing enough information to impress me, once again, with the extraordinary lengths to which the government had gone in pursuit of its foolish censorship attempt.

But the most fascinating document was an internal FBI memo[52] I found near the end of the file. It dealt with routine disposition of the government's files on "The H-Bomb Secret," and it said:

> As the Bureau is aware, captioned investigation was instituted to determine if a violation of the Atomic Energy Act (AEA) occurred. Extensive investigation was conducted by numerous divisions with Boston being designated Office of Origin.
>
> This case file has been maintained in a secure safe at Boston and access was limited to SAC [special agent in charge] and case Agent SA [deleted] per instructions from FBIHQ on 5/31/79.
>
> This case was placed in closed status per FBIHQ airtel, 1/13/81.
>
> Referenced telephone call noted that DOE [Department of Energy] has not satisfied certain requirements for the Department of Justice, Internal Security Section, Criminal Division, to demonstrate that classified information had been actually compromised, severely damaging national security. Therefore, *prosecution was not warranted.*[53]

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[52] FBI Memorandum BS 117-160, at 2 (author and date deleted by FBI) (on file at *The Progressive*).

[53] *Id.* (emphasis added).