CHAPTER 18

Trying to Protect Freedom of the Press from the H-Bomb

In 1979 The Progressive ***magazine seeks to print "The H-Bomb Secret: How We Got It—Why We're Telling It," and the government seeks to suppress its publication. No such prior restraint order had yet been upheld in the history of the United States—the Supreme Court having vacated temporary restraining orders in the Pentagon Papers case, the only other such federal case. Fearing that either the secret of the H-bomb might be revealed and/or the freedom of the press inhibited, the author sends an amicus brief to a federal judge describing a supralegal process of resolving the dispute. In a dramatic moment the judge accepts the idea and warns the parties that he will issue an historic preliminary injunction if the parties do not accept it over the lunch hour.*** The Progressive ***refuses to accept the judge's warning and, for the first time in American history, a federal court issues a preliminary injunction providing for prior restraint of the press.***[329]

Not long after a Princeton student named Phillips had garnered considerable publicity by showing that he could design an atomic bomb, a researcher, Howard Morland, came to FAS asking for quiet assistance on an article on the hydrogen bomb. I asked him whether he was seeking to become the "Phillips" of the hydrogen bomb. And when he said yes, I said we would not cooperate because we saw no useful purpose in this project. The Federation of American Scientists had been built around the effort to prevent the proliferation of weapons of mass destruction—not to encourage it.

An MIT student, Ronald Siegel, received a draft of Morland's article, "The H-Bomb Secret," slated for publication in *The Progressive* magazine. Nervous about what was happening, Siegel gave it to his professor, George Rathjens, to examine. Rathjens, who had resigned as FAS chairman a few months earlier to function as an adviser to the ACDA director, Gerard Smith, promptly called *The Progressive*'s editor, Erwin Knoll, to try to talk him out of publication. Failing at that, he called the Department of Energy and suggested the article needed a classification review.

At this stage, of course, I had not read the Morland article, nor did I have then, or now, any expertise in H-bomb construction. Indeed, when offered the chance by the defendants to have myself cleared to read the article, I declined on the grounds that it would make it impossible for me to comment on the case. But had I read the article, I would have been alarmed by the belief of its author that it might well help other countries build their hydrogen bombs. Morland wrote:

> The physical pressure and heat generated by x- and gamma radiation, moving outward from the trigger at the speed of light, bounces against the weapon's inner wall and is reflected with enormous force into the sides of a carrot-shaped "pencil" which contains the fusion fuel.
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> That, within the limits of a single sentence, is the essence of a concept that initially eluded the physicists of the United States, the Soviet Union, Britain, France, and China; that they discovered independently and kept tenaciously to themselves, *and that may not yet have occurred to the weapon makers of a dozen other nations bent on building the hydrogen bomb.* (emphasis added)
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> Why am I telling you? . . . [Not] because I want India, or Israel, or Pakistan, or South Africa to get the H-bomb sooner than they otherwise would, *even though it is conceivable that the information will be helpful to them*. (emphasis added)

Morland's rationale was overdrawn and insufficient:

> I am telling the secret to make a basic point as forcefully as I can: Secrecy itself, especially the power of a few designated "experts" to declare some topics off limits, contributes to a political climate in which the nuclear establishment can conduct business as usual, protecting and perpetuating the production of these horror weapons.

After reading a Walter Pincus article in *The Washington Post* on this subject and consulting with FAS officials, I sent a cable to *The Progressive* urging consideration of the damage that the article could cause both to nonproliferation and to the first amendment.

The first amendment guarantees, of course, a free press. Federal prior restraint on publication—as opposed to government complaints after publication—would have been a first in America. Even the publication of the Pentagon Papers by *The New York Times* had not, in the end, been permanently restrained by the U.S. Supreme Court. Thus a permanent "prior restraint" order would have been a very serious new precedent against the freedom of the press. Subsequently, the AAAS Committee on Scientific Freedom and Responsibility sent a comparable telegram urging, in cases of this kind, "voluntary editorial changes by the publisher after discussion with the Government if necessary."[330]

I had a brainstorm. Securing the assent of the FAS Council to my idea, I mailed an amicus brief to the court giving gratuitous advice as amicus briefs do. The brief stated the following:

> We would suggest that one or two senior weapons scientists be joined by one or two senior representatives of the U.S. media, and the two- to four-person mediating committee be chaired by some respected lawyer or retired judge or justice. The resulting committee of three to five would then work together with the two parties and report to the judge on their progress, or lack of it, in dealing with the specific deletions at issue. At least this could facilitate subsequent litigation by narrowing the issues. The members could be chosen to be acceptable to the two sides.

After the government moved to suppress the article, a scientific consultant, Dr. Theodore M. Postol, gave *The Progressive* an affidavit saying that the Morland article could be easily derived from the *Encyclopedia Americana* article by Dr. Edward Teller. The government disagreed. And the FAS's (and America's) senior scientific consultant on this subject, the Nobel laureate Hans Bethe, had provided an affidavit stating, "Based upon my experience on the Bethe panel, whose task it was to analyze the nuclear capabilities of foreign nations, it is my judgment that public dissemination of the Morland manuscript would substantially hasten the development of thermonuclear weapons capabilities by nations not now having such capabilities." Affidavits went back and forth.

I flew to Milwaukee to be on hand for the March 26, 1979, decision. As I entered the court, I asked the judge's secretary if he had, indeed, received the amicus brief. To my surprise, she said, "Oh, the judge would like to speak to you," and ushered me into his chambers. He then asked whether the brief was endorsed by FAS or was a personal idea. I assured them that it had been endorsed by the FAS Executive Committee (a fact recorded in the amicus brief itself) and could be taken, under our rules, as the opinion of the organization. He said, "Fine." The secretary led me to an excellent seat to watch the morning proceedings.

It was very interesting. The judge summarized the case at some length and took note of an article that explained how the French had missed elementary ideas in the 1930s and had inexplicably lost a year's time. He thought the article could "provide a ticket to bypass blind alleys." Morland, in his deposition, had stated that "if the information in my article were not in the public domain, it should be put there so that ordinary citizens may have informed opinions about nuclear weapons." But the court said it could "find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue." The court concluded that the information was "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."

The article was not just an embarrassment to the government as were the Pentagon Papers. Those documents, the court argued, simply contained "historical data relating to events that occurred some three to twenty years previously" with no "cogent reasons" advanced by the government as to why the article affected national security. In this case there was a specific statute, Section 2274 of the Atomic Energy Act, that prohibited communicating restricted data to any person "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation."

Accordingly, Judge Warren said, if necessary, he would issue a preliminary injunction against *The Progressive.* But he said "bad cases make bad law." At this point my jaw dropped as the judge began to talk about the amicus brief "submitted by the Federation of American Scientists through its director, Dr. Jeremy J. Stone"; the judge pronounced himself "greatly impressed with it" and agreed with us that a "non-legal resolution" would be in everyone's interest and would set a desirable precedent.

He said, "Now, therefore, acting on this suggestion, the court herewith poses to the parties a final choice." He declared a two-hour recess to see if the parties would agree to mediation, in which case each would be asked to submit to the court two senior weapons scientists and two representatives of the media. The court would choose two people from each category and would then itself approach a respected lawyer or retired jurist to chair the group. The panel would meet with the participants and would report back in ten days on its progress in dealing with the specific deletions at issue. At that time the court would either dismiss the case by stipulation of the parties or, in the absence of an agreement, would issue a preliminary injunction. If the parties did not accept this plan by the end of the recess, the court would "regretfully issue the preliminary injunction."

I walked around the town on air, wondering if it could be possi-

ble that this cosmic matter could be resolved by our suggestion. It wasn't. But it was close. The government agreed. I was advised that *The Progressive*'s board had also agreed. But its editor, Erwin Knoll, said he would resign as editor if the FAS proposal were accepted. And the board backed down. The judge issued his restraining order.[331]

The case continued. Some people may have tried to force the secret out, and it was reported that the relevant diagrams were being printed on T-shirts and worn on Australian beaches—where an antinuclear activist was said to have taken them. (Why antinuclear activists thought it so important to "get out" the H-bomb secret was always unclear to me.) On September 17, 1979, the Justice Department asked the court for permission to withdraw its civil suit. The authors of *Born Secret*, a book about the case, think there were "other suspected reasons" for the withdrawal: "A court decision that the untested Atomic Energy Act was unconstitutional could wreak havoc with the system for protecting nuclear data. And continuation of the litigation might have led to more disclosures of information that either should be protected or would embarrass the government."[332]

By November 1979 the article was published. In his editorial explaining his decision to publish, *The Progressive*'s editor dealt with the FAS proposal, stating that he had "patiently explained to our friends that the Founders, in their wisdom, had not written a 'mediation' process into the Bill of Rights." His editorial made no reference whatsoever to the problem of the proliferation of H-bombs—before or after he had learned the secret was adjudged to be in the public domain—but simply viewed the matter as a case of attempted censorship.

There are two ways to look at the *Progressive* case. In the first, which the insurgents have adopted, one can look at the case in retrospect. Here there *was no secret* at all. The government was foolish to try to restrain the magazine because, in fact, the article was oversold, revealing a secret that was no secret.

In the second way of looking at this, in prospect, *The Progressive*, and Howard Morland, were actively trying to discover and print something that they did not know was public knowledge. Morland's article concedes he might be revealing something that would help other countries build H-bombs, while editor Knoll never used as justification for his publication that the secret was already out. Meanwhile, the most senior atomic scientist in the country, Hans Bethe, who had chaired a panel on just this question, was giving depositions urging restraint.

Although national-security justifications for secrecy were abused over and over again during the Cold War (and still are today), and although the H-bomb secret may have been much nearer the unclassified surface than many had believed, I do think there are legitimate reasons for the government's keeping some matters concealed from public view. If, for example, the same problem turns up in the realm of biological warfare, I do hope that everyone will not be quite so eager to prove that the deadly secret can easily be derived from the public literature and that some future Howard Morland does not insist that it be placed on the Internet to prevent the government from "suppressing" his article.