

FEF amicus brief explodes Schlesinger's H-bomb hoax

Energy Secretary James Schlesinger's scenario to use the *Progressive* magazine "H-bomb" case as a ploy to grab sweeping powers over nuclear fusion research and scientific publication has potentially been derailed by the Fusion Energy Foundation (FEF). The foundation has filed an *amicus curiae* brief in the case of the **United States v. The Progressive et al.**, which should effectively prevent Schlesinger from obtaining a precedent in the *Progressive* case to allow the government to censor the publication of basic scientific information.

The FEF filed its brief with the U.S. Court of Appeals for the Seventh Circuit in Chicago, where the *Progressive* magazine and author Howard Morland are appealing the government's injunction preventing the magazine from publishing Morland's "How to Make an H-Bomb" article.

Last March, the *Progressive* magazine intentionally provoked Schlesinger's Department of Energy into seeking an injunction to prevent the publication. The American Civil Liberties Union and other groups rushed into make this a full-blown First Amendment freedom-of-the press issue. Schlesinger, Cyrus Vance, Defense Secretary Harold Brown, and other government officials offered equally foreboding warnings of the immediate dangers of nuclear proliferation if Morland's article were published.

This controlled environment was only broken when the FEF brief raised the issues of classification of scientific research for the first time in this case, warning that this case must not be used to provide Schlesinger's Energy Department with the legal authority to continue its present practices of classifying scientific information in violation of both the letter and the spirit of the Atomic Energy Act.

While Schlesinger's suppression of information concerning fusion energy research is well known, and is detailed in the FEF brief, the brief also points out that the *Progressive* and many of its allies are also opposed to unlimited dissemination of scientific research. The *Progressive*, for example, had advocated stricter controls on the nuclear fuel tritium—as part of its campaign against both nuclear fission and fusion—and an *amicus*

brief of the Federation of American Scientists asked the court to reserve the power to suppress the results of frontier research such as that involving recombinant DNA.

Not without good reason, the *Progressive* case has been described as a conflict between the two principal factions among "New Dark Ages" advocates—the "pacifist" Russellites who want to ban all scientific progress and technological development, and the Well-sians who want to preserve a narrow arena of science and technology for military and social-control applications.

Legal methodology

Into this contrived legal battle the FEF has intervened, using the same methodology which the FEF and the U.S. Labor Party used in their influential joint *amicus curiae* brief to the U.S. Supreme Court in 1977-78 in the Consumers Power (Midland) case. In both cases, a controversy and the statutes in question are analyzed from the standpoint of the United States Constitution's fundamental commitment to scientific and technological progress. From this standpoint, the significance of the Atomic Energy Act and the criteria for resolving the issues of classification and declassification become absolutely clear and obvious.

For example, the *Progressive* defendants and their *amici* are arguing that the Atomic Energy Act—under whose provisions the government obtained its injunction—is unconstitutionally overbroad. But none of the parties to the case have bothered to discuss the actual context of the 1954 Act and its radical departure from wartime secrecy provisions of the 1946 Atomic Energy Act.

The FEF brief therefore bases its argument on the premise that "the fundamental purpose of the Atomic Energy Act of 1954 was to improve procedures for the control and dissemination of atomic energy information so as to encourage broadened participation in the development of peaceful applications of atomic energy."

Following his historic "Atoms for Peace" proposal

to the United Nations in December 1953, President Eisenhower proposed major revisions of the Atomic Energy Act to Congress in February 1954. Eisenhower's Message to Congress, cited in the FEF brief, declared that the "great progress in nuclear science and technology" that had occurred since 1946 meant that many of the restrictions of 1946 were no longer appropriate. "... these restrictions impede the proper exploitation of nuclear energy for the benefit of the American people and of our friends throughout the free world."

These purposes in accord with "the deepest intent of the Constitution," included among its policy guidelines for the Atomic Energy Commission:

The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

As the FEF brief argues, "the classification policies of the United States government has in effect reversed these priorities as established by Congress in 1954." As an example, the brief uses as a case study the government's present policies regarding inertial confinement fusion research, showing how the results of scientific research regarding laser fusion and other aspects of inertial confinement fusion have been published in other countries but are classified in the United States. In one area, the brief notes, "both atomic (the USSR) and non-atomic nations (Spain) and all those who read the literature of these nations, have access to this material. Only scientists in the United States are deprived. The march of proliferation has not been halted thereby, only that of American progress."

Also discussed in the brief is the case of the Soviet scientist Leonid Rudakov, whose work was classified in the United States after being declassified by the Soviet Union.

Finally, the FEF brief refutes the simple-minded, militaristic notions of "national security" which are being bandied about by both sides in this case. It is clear from the legislative history of the Atomic Energy Act that national security was understood to encompass scientific progress and economic strength as well as strictly military considerations. The entire 1954 Act, with its emphasis on the encouragement of scientific progress, was a dramatic refutation of the "scientific secrecy" school of Schlesinger. "The position of the Act on the larger question of the place that nuclear technologies have in the nation's strategic assessment is clear," concludes the FEF brief. "Peaceful uses of nuclear energy—both fission and fusion—must be encouraged as part of our nation's security."

Argument in the Progressive case has been set for

September 10 by the Court of Appeals. On July 3 the U.S. Supreme Court rejected a motion by the ACLU to speed up the schedule of the case, stating that the ACLU had waited too long to seek expedition. Whether the Court of Appeals upholds or overrules the lower court's injunction against the Morland article, all observers expect that the full case will eventually be decided by the Supreme Court.

—Edward Spannaus

The FEF brief

Introduction

The central question on which everything else in this case hinges is the question of what really constitutes our national security. Both sides in this case seem to take an extremely narrow view of national security, regarding it as a matter pertaining solely to military weapons and secrecy regarding their manufacture. President Eisenhower, who proposed the Atomic Energy Act of 1954, and the Congress which passed it, took no such narrow view. National security was understood by them, and must be understood by us today, as embodying the full scientific and industrial strength of our nation. This is why the 1954 Act placed such a high priority on improving procedures for the dissemination of atomic energy information for the purposes of encouraging "scientific and industrial progress."

Any nation which stifles and impedes basic scientific research will soon relegate itself to the position of a second or third-rate power. It would be disastrous if the outcome of this case were to encourage such a development. Yet such are the direct implications of the present case. The editors of *The Progressive* seem to have gone out of their way to provoke government censorship. Perhaps this was for the purpose of proving some point they wished to make concerning government secrecy. Nonetheless, it seems clear that neither the defendants nor the government share the view that national security depends upon encouraging scientific research and technological progress, particularly with respect to thermonuclear fusion. The present Administration's policy has been to downgrade the importance of nuclear energy in general and it has made drastic cuts in research allocations for fusion energy. And on the other side, a recent issue of *The Progressive* featured an article calling for stricter controls on research involving the fusion fuel tritium.

The issue of prior restraint on publication as presented in this case is therefore inseparable from the issue of national security in its broadest sense. If in fact everything that the government claims in its arguments and supporting affidavits is true, then the Morland

article may well fall within the narrow range of exceptions to the general rule against prior restraint. We would not dispute the right of the government to seek an injunction under the Atomic Energy Act to enjoin the publication of purely military "blueprint" technical information, as opposed to data concerning basic scientific research or civilian applications.

The court below recognized this distinction to some extent when it stated:

The Court is convinced that the government has a right to classify certain sensitive documents to protect its national security. The problem is with the scope of the classification system.

Memorandum and Order at 4. Yet, that Court also believed itself obligated to suppress:

Certain concepts never heretofore disclosed in conjunction with one another ... concepts ... not ... in the public realm.

The problem is exactly that of the *scope* of the classification system. If this court were to issue a blanket rule which explicitly or implicitly gave the government the

scientific *concepts*, on the grounds that such concepts may have a military application, then our nation's true security interests will have been harmed rather than protected.

To be more specific, the critical distinction which should guide this Court's deliberations is the distinction between basic scientific concepts involving thermonuclear processes, and specific *applications* of such concepts as they affect weapons design and operation. Can the government classify basic scientific research—which has wide ranging civilian *and* military applications—on the grounds that its *potential* military applications require that all discussion of the concepts themselves be prohibited? This is exactly what has happened in the case of aspects of laser fusion, as we shall discuss below. Whatever the outcome of this case, it will bear directly upon the ability of scientists to obtain access to the results of basic scientific research now being conducted in both the United States and the Soviet Union with respect to laser fusion and inertial confinement. Any upholding of prior restraint which does not include a precise distinction of the type we are urging herein will contribute heavily to closing off one of the most promising avenues now open to the human race, that of the

A limited number of copies of the FEF amicus curiae brief and the appendix containing the Eisenhower Message and excerpts from Freedom of Information Act releases on the Rudakov case are available from FEF at a cost of \$10. Send check or money order to FEF, 304 West 58th Street, N.Y., N.Y. 10019.

development of commercial fusion energy as the solution to the global energy and food crises now facing our planet. That this is no hypothetical danger is revealed in the decision below. An amicus, the Federation of American Scientists, asked the court to reserve the power to suppress discussion of *any* frontier research, on grounds that verge on the superstitious. Yet, had the specific technology adduced by that amicus as an example, recombinant DNA research, (see page 13, Memorandum) been suppressed, the soon-to-be-realized cure for diabetes, and nitrogen fixing modifications drastically increasing food crops, would have been lost to humanity. This danger is foreshadowed in the opinion below, where the Court fails to distinguish between *concepts*, and blueprints in his example of neutron-driven fission.

Argument

Section 2014(y) of the Atomic Energy Act (42 U.S.C. 2001 et seq.) has been attacked by the defendants/appellants and their supporting *amici* as unconstitutionally overbroad. This section reads:

(y) the term "Restricted Data" means all data concerning (1) design, manufacture, or production of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

Section 2162 provides the procedures for declassification of Restricted Data, and is immediately preceded by Section 2161, which mandates the policy of the government with respect to dissemination and declassification:

2161. Policy of Commission

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

(a) Until effective and enforceable international safeguards against the use of atomic energy for destructive purposes have been established by an international arrangement, there shall be no exchange of Restricted Data with other nations except as authorized by section 2164 of this title; and

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and

public understanding and to enlarge the fund of technical information.

In the deepest sense, this statute expresses the deepest intent of the Constitution far more directly than many another law in the statute books. Our Founding Fathers fought a Revolution to free themselves and their posterity from the chains of darkness and backwardness by which the British monarchy was shackling the development of the American colonies. Their most fundamental commitment was to the creation of a sovereign republic based upon natural law, in which the nation and its individual citizens would have the freedom and the power to pursue a course of rapid agricultural and industrial development.

The Revolution was not completed until the fragmentation and decentralization of the Confederation was overcome by the establishment of a constitutional federal republic, whose central purposes were to "provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity...."

It is from this standpoint that we are obligated to interpret the Atomic Energy Act of 1954. There is no better place to start than with one of the most remarkable documents of our time, President Eisenhower's Message to Congress concerning the Atomic Energy Act of 1954.

President Eisenhower presented his historic "Atoms for Peace" proposal to the United Nations in December, 1953. He followed this proposal with a Message to Congress on February 17, 1954 proposing a revised Atomic Energy Act of 1954 (hereinafter, "Message") for "the purpose of strengthening the defense and economy of the United States and the free world" through the following means:

First, widened cooperation with our allies in certain atomic energy matters;

Second, improved procedures for the control and dissemination of atomic energy information; and

Third, encouragement of broadened participation in the development of peacetime uses of atomic energy in the United States.

The President described the conditions of 1946, when the first Atomic Energy Act was written:

... A new and elemental source of tremendous energy had been unlocked by the United States the year before. To harness its power in peaceful and productive service was even then our hope and goal, but its awesome destructiveness overshadowed its potential for good.

Under conditions of the monopoly held on military applications of atomic power by the United States, this monopoly had to "be protected and prolonged by the

most stringent security safeguards." (*Id.*, p. 2) But, President Eisenhower noted:

Since 1946, however, there has been great progress in nuclear science and technology. Generations of normal scientific development have been compressed into less than a decade....

Many statutory restrictions, based on such actual facts as the American monopoly of atomic weapons and limited application of atomic energy in civilian and military fields, are inconsistent with the nuclear realities of 1954. *Furthermore, these restrictions impede the proper exploitation of nuclear energy for the benefit of the American people and of our friends throughout the free world.* (emphasis added)

The principal changes made by the 1954 amendments (which became known as the Atomic Energy Act of 1954) were provisions for the transmittal and exchange of information with other nations, for the encouragement of commercial development of nuclear power. (As a result of the Act, the first commercial nuclear reactor was completed in 1959.) The President explained the reasons for these policies, and the relationship between military and civilian applications:

... In respect to defense considerations, our atomic effectiveness will be increased if certain limited information on the use of atomic weapons can be imparted more readily to nations allied with us in common defense. In respect to peaceful applications of atomic energy, these can be developed more rapidly and their benefits more widely realized through broadened cooperation with friendly nations and through greater participation by American industry. By enhancing our military effectiveness, we strengthen our efforts to deter aggression; *by enlarging opportunities for peacetime development, we accelerate our own progress and strengthen the free world.* (emphasis added).

President Eisenhower's objectives were totally incorporated into the 1954 legislation as it was drafted and adopted by Congress. The Report of the Joint Committee Report (Senate Report 83-1699), acknowledging the "extraordinary scientific and technical achievements in atomic energy" since 1946, stated:

Technological developments—some promising longer and more richer lives for all privileged to share in the peacetime benefits of the atom, and others posing grave threats to the very existence of civilization—have proceeded much more rapidly than was expected in 1946. As a result, atomic-energy legislation which was once fully responsive to assuring the common defense and promoting the national welfare must now be revised to take account of existing realities....

Congress never lost sight of the fact that the common defense and security was the paramount objective of atomic energy programs, but the concept of national security was clearly intended to encompass "strengthening the defense *and economy* of the United States and the free world" (emphasis added).

This report has already summarized the considerations underlying the stringent provisions of the Atomic Energy Act of 1946 against private participation in atomic energy. It has also made clear that changing conditions now not only permit but require a relaxation of these prohibitions if atomic energy is to contribute in the fullest possible measure to our national security and progress.

To this end, the government was to encourage research and development programs:

We believe, rather, that teamwork between government and industry—teamwork of the type encouraged by these amendments—is the key to optimum progress, efficiency, and economy in this area of atomic endeavor. In other words, our legislative proposals aim at encouraging flourishing research and development programs under both Government and private auspices.

As we shall see in the next section, the government's current classification policies are in direct contradiction to the worthy aims described above. The government's current practices are in no way authorized by the relevant statutory provisions. Nor can they be justified on the grounds that fusion is a different technology and that the 1954 Act was intended only to deal with nuclear fission. This is absolutely clear in the Joint Committee Report:

Sectin 11c: "Atomic energy" is defined to mean "all forms of energy released in the course of nuclear fission or nuclear transformation." This definition includes both fission and fusion reactions.

And also:

Section 51 provides that any material capable of releasing substantial quantities of atomic energy may be found by the Commission to be special nuclear material ... (this) permits the inclusion in this category for the first time materials essential to fusion processes as well as those essential to fission processes.

Current classification practices are harmful to both scientific research and national security

It is almost a truism to say that every area of advanced scientific endeavor will have (usually unforeseen) appli-

cations both in industry and in military areas. This intimate connection among scientific research, industrial technology, and military application is especially clear in areas of high energy density, most notably the two areas of purview of the Atomic Energy Act itself, nuclear fusion and fission.

But, as President Eisenhower's speech and the legislative history of the Act amplify, this connection is extremely beneficial to the national defense: to ensure national security, it is essential to further not just military applications of this scientific research, but equally, the research itself and its implementation in industry. The Atomic Energy act recognizes this and mandates with equal emphasis the *restriction* of military applications and the *dissemination* of information necessary for scientific research and industrial development. Indeed, the Act itself puts two legislative requirements on the administration of the Act; protection by classification of military information *and, of equal importance for the maintenance of national security*, of "dissemination of scientific and technical information relating to atomic energy ... so as to provide that free exchange of ideas and criticism which is so essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information (42 USC 2161).

The conclusion to be drawn from the Act is that any classification or restriction of information which functioned so as to abort scientific or industrial progress would, in fact, hinder the maintenance of national security.

The paradigmatic case in which the distinction called for in the Atomic Energy Act between "blueprint" military applications and basic scientific research has *not* been made is that of inertial confinement nuclear fusion research. Inertial confinement (IC) fusion research, because it began as a militarily inspired project to replicate in the laboratory the conditions of matter inside the hydrogen bomb has continued to be classified in large part, even though the over-riding application of the research is now in the area of civilian electrical energy production....

In the strict sense of the words, the Atomic Energy Act legislated a national policy which is very *pro*-proliferation by establishing the central role that atomic energy must play in the economic and industrial health of the country. Certainly, the Act is careful to distinguish between military proliferation and civilian proliferation of nuclear energy; unfortunately, this distinction has not been clearly made or enforced in the current application of the Act. The position of the Act on the larger question of the place that nuclear technology have in the nation's strategic assessment is clear: peaceful uses of nuclear energy—both fission and fusion—must be encouraged as part of our nation's security.