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National Security: The Ultimate Threat to the First Amendment

Erwin Knoll*

I. INTRODUCTION

"Depend upon it, Sir," Samuel Johnson observed, "when any man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."¹ Being subjected to a prior restraint on utterance and publication has much the same effect. Fortunately, very few Americans have had the experience. As one of those few, I can assure you that I never gave the first amendment such close attention, or such deep devotion, as during the six months and nineteen days when I was deprived of its full protection by court order.²

Obviously, most of us respect the first amendment, or at least pay lip service to it, as a cornerstone of our freedom. Journalists, in particular, are swift to sing its praises and invoke its protection. I suspect, however, that few of us can appreciate the constitutional guarantee of freedom of speech and of the press as fully as one who has been directed by a court, on penalty of fine and imprisonment, to refrain from "publishing or otherwise communicating or disclosing in any manner" certain words, sentences, paragraphs, facts, or ideas.³

This paper discusses those aspects of *United States v. Progressive, Inc.*⁴ which have a direct bearing on my thesis that governmental claims of national security constitute the ulti-

* Editor of *The Progressive*.

1. 6 J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 309 (W. Croker ed. 1846) (1st ed. London 1791).

2. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *dismissed mem.* 610 F.2d 819 (7th Cir. 1979). The temporary restraining order was issued on March 9, 1979, the preliminary injunction on March 26, 1979, and the secret order on June 15, 1979. The case was commenced on March 8, 1979, and was dismissed on September 23, 1979. In addition to court records, a full file is maintained by The Progressive Foundation, 315 W. Gorham St., Madison, Wisconsin 53703.

3. *United States v. Progressive, Inc.*, No. 79-C-98 (W.D. Wis. March 9, 1979) (order granting temporary restraining order).

4. 467 F. Supp. 990 (W.D. Wis.), *dismissed mem.* 610 F.2d 819 (7th Cir. 1979).

mate threat to the first amendment. As it happens, certain aspects of that case directly relate to the historic case this symposium is commemorating, for I believe it is important to recognize that the United States Supreme Court's decision in *Near v. Minnesota*,⁵ which we quite properly celebrate as a great victory for the first amendment, helped lay the groundwork for potentially the most injurious assaults on freedom of speech and of the press.

I am referring, of course, to the narrow exception stipulated by Chief Justice Hughes in *Near*, when he observed that in time of war, "no one would question 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."⁶ That passage was cited by the United States Government in 1979 as a basis for restraining *The Progressive*,⁷ a monthly magazine, from publishing certain technical information concerning the manufacture of nuclear weapons. In the words of Federal District Court Judge Robert W. Warren:

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 analagous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraints.⁸

What Judge Warren concluded, in other words, was that the "extremely narrow exception" in *Near*, which Chief Justice Hughes explicitly had reserved for time of war, must also apply in time of peace because of the exigencies of the nuclear age. It must, in fact, apply at all times.

According to the Federal Atomic Energy Act of 1954,⁹ this narrow exception also applies to all nuclear data. The statute states: "The term 'Restricted Data' means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy . . ."¹⁰

5. 283 U.S. 697 (1931).

6. *Id.* at 716.

7. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 992 (W.D. Wis.), *dismissed mem.* 610 F.2d 819 (7th Cir. 1979).

8. *Id.* at 996.

9. Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2242 (1976).

10. *Id.* at § 2014(y).

Such information is "restricted" whether it originates within the government or within the mind of a private citizen.¹¹ Unless the information specifically has been "declassified or removed from the Restricted Data category,"¹² such data may not be published.¹³ These are powers of censorship far more sweeping than those embodied in the "official secrets" laws of some nations¹⁴ that make no pretense of observing freedom of the press.

In arguing its case before the United States Court of Appeals for the Seventh Circuit,¹⁵ the Government carried this narrow exception still further, contending that the publication of "technical information," presumably including but not confined to nuclear information, is not covered by the first amendment at all, but is, like obscenity,¹⁶ a form of unprotected speech.¹⁷ The potential consequences of such a doctrine in our highly technological society are mind-boggling.

I do not mean to hold the *Near* decision, and its narrow exception, responsible for all of these unforeseen and unfortunate consequences. I do suggest that even the narrowest of exceptions have a way of attaining horrendous breadth, and that an exception based on considerations of national security can create truly pernicious results. My experience suggests four especially serious considerations. First, the invocation of national security against publishing certain information makes it extraordinarily difficult, and perhaps impossible, to apply first amendment principles. Second, in attempting to impose censorship on national security grounds, the Government is able to wield sweeping powers of selective prosecution which exert a severe chilling effect. Third, when prior restraint is sought to protect national security, the judicial process itself becomes a mockery. Fourth, once prior restraint is imposed for reasons of

11. See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 993 (W.D. Wis.), *dismissed mem.* 610 F.2d 819 (7th Cir. 1979).

12. Atomic Energy Act of 1954, 42 U.S.C. § 2014(y) (1976).

13. See *id.* §§ 2274, 2280.

14. See, e.g., Official Secrets Acts, 1911, 2 & 3 Geo. 5, c. 28, 10 & 11 Geo. 5, c. 75, 2 & 3 Geo. 6, c. 121; Atomic Energy Authority Act, 1954, 3 Eliz. 2, c. 32, § 6, sched. 3.

15. Unfortunately, the Seventh Circuit never was given an opportunity to rule on the merits. In September, 1979 the Justice Department announced that the publication of similar material had rendered moot its attempt to block publication of *The Progressive's* article. See note 32 *infra* and accompanying text.

16. See *Paris Adult Theatre v. Slaton*, 413 U.S. 54 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

17. Brief for Appellee, *United States v. Progressive, Inc.*, 610 F.2d 819 (7th Cir. 1979).

national security, the infringement of other freedoms is a logical and inescapable consequence.

II. APPLICATION OF FIRST AMENDMENT PRINCIPLES

The invocation of national security makes it extraordinarily difficult, and perhaps impossible, to apply first amendment principles. Chief Justice Hughes exaggerated only slightly when he assumed in *Near* that "no one would question" infringement of the first amendment to protect military secrets in time of war.¹⁸ Few would have questioned such censorship a half century ago, and I suspect even fewer would do so today. In fact, most of us seem to have accepted the narrow exception of *Near* as an unwritten addendum to the first amendment. Even in legal and journalistic circles, the narrow exception tends to be taken for granted. Anyone who challenges it is likely to be dismissed as an "absolutist"—that is, as one who naively believes the first amendment actually means what it plainly says.¹⁹

Whenever anyone finds it necessary or expedient to weigh freedom in the balance against any other consideration, freedom is likely to be found wanting. That certainly is the case when freedom of speech and press is balanced against considerations of national security. The logic is irresistible: who would not gladly permit a trivial and temporary incursion against the Bill of Rights when the alternative might be military defeat or even a nuclear holocaust? That was precisely the logic Judge Warren articulated in the *Progressive* case when he stated, "you can't speak freely when you're dead."²⁰

In the nuclear age, striking a balance between freedom and national security becomes a task charged with emotion that approaches, and sometimes attains, hysterical proportions. Judge Warren said, "I want to think a long, hard time before I'd give a hydrogen bomb to Idi Amin,"²¹ and the statement made headlines everywhere.²² When he later acknowledged that there was no way *The Progressive's* suppressed article could "give a

18. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

19. See generally Mooney, "Right Conduct" for a "Free Press", HARPER'S, March 1980, at 35-44.

20. *United States v. Progressive, Inc.*, No. 79-C-98 (W.D. Wis. March 9, 1979) (comment from the bench).

21. *Id.*

22. See N.Y. Times, March 10, 1979, at 1, col. 2; N.Y. Times, March 11, 1979, § 4, at 20, col. 1; Wash. Star, March 10, 1979, at 1, col. 1; Chi. Tribune, March 10, 1979, § 1, at 1, col. 2. Some reporters actually asked me whether we had any subscribers in Uganda.

hydrogen bomb to Idi Amin,"²³ hardly anyone paid attention.

Confronted with Government allegations that national security was at stake, much of the press abandoned not only its principles, but also its minimal standards of accuracy.²⁴ A headline in the *Lansing State Journal* blared, "You, Too, Can Build H-Bomb,"²⁵ and an editorial in *The San Francisco Chronicle* described our article as "a handy guide to building your own H-bomb."²⁶ *The Washington Post* editorialized that it was "John Mitchell's dream case—the one the Nixon administration was never lucky enough to get: a real First Amendment loser."²⁷

In the atmosphere created by such reporting and commentary, against the background of fully justifiable public apprehension about nuclear dangers, predictions of a "judicial climate" hostile to the first amendment are almost certain to become self-fulfilling prophecies.²⁸ Any case that pits the first amendment against official assertions of national security is likely to turn out "a real First Amendment loser."

III. SELECTIVE PROSECUTION AND ITS CHILLING EFFECT

In attempting to impose censorship on grounds of national security, the government is able to wield sweeping powers of selective prosecution which can exert a severe chilling effect. An example that has become all too familiar in recent years is the Central Intelligence Agency's punitive litigation against dissident former employees who have attempted to publish books about the Agency.²⁹ No such action has been taken, of course, against former high government officials who have drawn freely on classified materials for their published works.

Where nuclear "secrets" or other scientific or technical

23. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 993 (W.D. Wis.), *dismissed mem.* 610 F.2d 819 (7th Cir. 1979) (comment from the bench).

24. *See generally* Bagdikian, *A Most Insidious Case*, *QUILL*, June 1979, at 21-26.

25. *Lansing State J.*, March 9, 1979, at 1.

26. *S.F. Chronicle*, March 20, 1979, at 38, col. 1.

27. *Wash. Post*, March 11, 1979, § C, at 6, col. 1.

28. *See* note 23 *supra* and accompanying text. In ruling on the preliminary injunction, Judge Warren made a point of noting that "even the press" wasn't supporting a continuation of *The Progressive* case. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis.), *dismissed mem.* 610 F.2d 819 (7th Cir. 1979).

29. *See* *Haig v. Agee*, 101 S. Ct. 2766 (1981); *Snepp v. United States*, 444 U.S. 507 (1980); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

matter is concerned, the potential for abuse is even greater; the "restricted" knowledge is widespread within the scientific community, and even outside of it. Dr. Edward Teller, often described as "the father of the H-Bomb," has said of his offspring, "in science there are very few real secrets. I assume the French and the British probably know many of our secrets. The Russians, I venture to guess, know most of our secrets including quite a few that we haven't even discovered as yet."³⁰ When some are allowed to disseminate the secret, while others may be subjected to prior restraint or prosecution, the potential for intimidation is enormous.

In the course of the *Progressive* case, our attorneys submitted to the courts more than two dozen publications or broadcast transcripts that contained some or all of the allegedly "secret" material that we had been enjoined from publishing.³¹ A *Milwaukee Sentinel* reporter, after a week of research in the public libraries of Milwaukee, Wisconsin and Waukegan, Illinois, came up with the "secret" of the H-Bomb and published it in his newspaper.³² Dr. Teller himself gave the "secret" away years ago in an article for the *Encyclopedia Americana*.³³ Yet *The Progressive* alone was singled out for prior restraint.

When the government invokes national security to protect technical or scientific "secrets" from dissemination, its claims should be viewed with extreme skepticism; there are few secrets in science that last for more than a few months. The notion of "atomic secrecy," however, is so deeply imbedded in the public consciousness that the government's national security claims are likely to be believed. Even if the government's secrecy rationale eventually can be refuted as it was in the *Progressive* case, the costs can be so formidable that they constitute a chilling effect against publication. Before the Government dropped its case, *The Progressive* had incurred almost \$250,000 in legal costs—a huge sum for a small, financially unstable political journal. *The Progressive* is still a long way from paying off its indebtedness. The pressures on *The Progressive's* small staff and budget came close to forcing it out of

30. N.Y. Times, May 27, 1973, opinion page.

31. See, e.g., Taylor, *Nuclear Safeguards*, ANNUAL REVIEW OF NUCLEAR SCIENCE 407 (1975). One of these publications was a Soviet journal that we obtained from a Swedish library. See Prokhorov, SOVIET PHYSICS USPEKHI, 547 (1976).

32. Milwaukee Sentinel, April 30, 1979, at 1, col. 1.

33. E. Teller, *Hydrogen Bomb*, 14 ENCYCLOPEDIA AMERICANA 654-56 (1979).

business and might easily dissuade another publication from pursuing its first amendment rights.

IV. PRIOR RESTRAINT AND THE JUDICIAL PROCESS

When prior restraint is sought to protect national security, the judicial process itself becomes a mockery. For the sake of 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. For example, under a protective order sought by the Government and granted by the court,³⁴ the Government was able to precensor all court filings, determining which documents would be submitted only *in camera* and which would be part of the public record of the case.

Additionally, in order to participate in our defense, all of our attorneys had to submit to security clearance by the Government.³⁵ The actual defendants in the case chose not to submit to this clearance, because we objected to the process in principle and did not want to be burdened with any more "secrets" that we could not publish. We were thus 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 in our behalf. Similarly, exhibits and affidavits filed by our attorneys were ordered by the Government to be held *in camera*, and the contents of these materials, and, in some cases, 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 opinion³⁶ which we, the defendants bound by it, were unable to see for many months.³⁷ Our expert witnesses, too, 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

34. *United States v. Progressive, Inc.*, No. 79-C-98 (W.D. Wis. March 14, 1979) (protective order).

35. See generally Mooney, *supra* note 19, at 35.

36. *United States v. Progressive, Inc.*, No. 79-C-98 (W.D. Wis. June 15, 1979) (secret order).

37. Even today, some portions of the court record remain sealed—not because they contain "secrets," but because the government regards them as "sensitive."

were, in fact, denied permission to avail ourselves of these experts' testimony or assistance.

When the court went into closed session, the defendants, as well as the public and the press, were excluded. The defendants' attorneys were cautioned not to discuss, even with their clients, 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*.

Since we were enjoined not only from publishing the specific article, but also from "otherwise communicating or disclosing" its contents "in any manner," 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 the aforementioned *Milwaukee Sentinel* article based on research in the Milwaukee and Waukegan public libraries.³⁸ When our attorneys submitted it to the court, the Government ordered it held *in camera*. That meant we could not discuss it, under the terms of the court's protective order, without risking a contempt citation and possible prosecution under the Atomic Energy Act.

All of these severe distortions of the judicial process help to illustrate why prior restraint has always been held in particular contempt by those who value freedom. Prior restraint is, perhaps, the most obnoxious form of governmental abuse because it puts the government's own conduct beyond public scrutiny. In the absence of censorship, any other offense against liberty is, at least, visible to the people; prior restraint provides its own blanket of concealment. The government needs to offer no public justification for imposing secrecy; the justification itself is secret.

V. INFRINGEMENT OF OTHER FREEDOMS

Once a prior restraint is imposed for reasons of national security, the infringement of other freedoms is a logical and inescapable consequence. In this respect, censorship on grounds of national security carries implications that are unique and extremely disturbing, especially for those who are being censored. It was only gradually, during the half-year we were under court-ordered restraint, that we became fully aware of those implications.

38. See note 32 *supra* and accompanying text.

The United States 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. The Government implied that some foreign powers or other interests would be eager to possess that "secret." The "secret" could be conveyed in a few sentences consisting entirely of nontechnical words.

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, "The H-Bomb Secret,"³⁹ and were, therefore, in a position to divulge the "secret." There were also other people to whom we or the author had shown the manuscript at various points in its preparation in order to obtain guidance or verification. They, too, were 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 whispering the "secret" to a foreign agent over a beer in a neighborhood saloon, 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 surveillance, have our mail read, our telephone tapped, or our every conversation monitored? We never dwelled on such possibilities because we never believed for a moment that the Government actually was convinced of its own "secrecy" claims. The logic, however, was there, and will apply if the Government again attempts to impose prior restraint on grounds of national security. Censorship raises the possibility of far more sinister assaults on liberty than the imposition of a prior restraint.

VI. CONCLUSION

I have said nothing here about the impact of censorship on public policymaking in a supposedly democratic society. This is not an oversight. "The people's right to know" is a critically important doctrine, but one that is separate from first amend-

39. *The Progressive* did eventually publish the article. See Morland, *The H-Bomb Secret—How We Got It, Why We're Telling It*, *THE PROGRESSIVE*, November 1979, at 14.

ment concerns. The first amendment deals with the people's right to speak, to publish, and to disseminate. "The people's right to know" justifies serious, important, responsible speech and writing. The virtue of the first amendment is that it protects utterances which the state and the courts, as well as the respectable pillars of society, may regard as wholly irresponsible.

It would be particularly inappropriate, I believe, to inject "the people's right to know" into a discussion devoted to a celebration of *Near v. Minnesota*. There was nothing edifying about Jay M. Near or the scurrilous sheet he published—nothing that contributed to the people's right to know. The Supreme Court of Minnesota correctly described it as "devoted largely to malicious, scandalous, and defamatory matter."⁴⁰ It was the admirable, remarkable achievement of the Supreme Court majority that it unequivocally upheld the first amendment in the case of a shabby character like Near and a sorry rag like his *Saturday Press*.

Well, the holding was almost without equivocation. There was that "extremely narrow exception" for time of war—the exception "no one would question." I came to question it intensively during that half a year when my mind was wonderfully concentrated on the first amendment. I came to believe that when it comes to matters of fundamental freedom, and the first amendment is our most fundamental freedom, even the narrowest of exceptions is too broad. And when that narrow exception is based on claims of national security, the likelihood of abuse is so great that it becomes unavoidable.

There is a reason, I suspect, why the first amendment was written without exceptions of any kind, even those "no one would question." There is a reason for it to have been written so simply, so clearly, and so absolutely.

40. *State ex rel. Olson v. Guilford*, 179 Minn. 40, 41, 228 N.W. 326, 328 (1929), *rev'd on other grounds sub nom. Near v. Minnesota*, 283 U.S. 697 (1931).