# guest comment

## "Born secret" disclosure law

*Paul N. McCloskey, Jr.*

For the first time in my experience, honorable and distinguished scientists are falling under the shadow of possible dishonor at the hands of that very agency of government which, perhaps more than any other, bears responsibility for the peace of the world and relies on scientists to meet that responsibility.

I speak of the Department of Energy, and its responsibilities for nuclear fission and fusion. The honorable and distinguished scientists I speak of are men like Edward Teller, Ted Taylor, George Rathjens, Ray Kidder, Hugh DeWitt, Ted Postol, George Stanford, Gerold Marsh and Alexander DeVolpi.

The problem is that of the "born secret" concept contained in the Atomic Energy Act of 1954. It has three elements: (1) the classification procedures and policies of the Department of Energy, (2) the ambiguity of the present law as it is being interpreted by the Energy and Justice Departments, and (3) the increasing public dispersion of scientific data bearing on construction and use of weapons that can destroy mankind.

These factors have led to a situation whereby the Government is now depending on the threat of criminal prosecution to cow scientists, both government and private, into restraint in the communication of ideas, while conceding that if criminal prosecution were attempted, it would probably fail.

At stake is the ability of scientists, both inside and outside government, to communicate with each other and thus advance scientific knowledge. Balanced against this goal, which has historically been considered as a highly laudable one, looms our growing uneasiness, if not conviction, that uncontrolled advancement of science in the fields of nuclear weaponry, biological warfare and perhaps other areas such as genetics can destroy the world.

Clearly, a *balance* is required between advancing science and protecting the public against a *too-easy* cre-


ation or possession by terrorists of hydrogen bombs, nerve gas and so on.

The balance struck in the 1954 Atomic Energy Act, however, seems no longer adequate, but if the law is to be changed by legislative action, the changes should be fully considered and advanced by scientists as well as lawyers and politicians.

I can assure you that *without* serious participation and action by scientists neither the Department of Energy nor the Congress will have the courage, ability and will to attack the problem; and it will continue to cause concern and sleepless nights for able people in your profession.

The situation created by *The Progressive Magazine* case decision last year is this:

Whenever an individual, public employee or private citizen, generates a new concept of nuclear weaponry, that concept is "born secret" and, under the law, *must* be classified as soon as it is placed on paper.

But only the *government* can classify.

And, I might add, only the government apparently can declassify under current law.

The relevant section of the Atomic Energy Act is Section 2014 (11) (y), which defines restricted data—that which is prohibited from publication—as:

> "*all* data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of specific 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." [*Emphasis added.*]

That last phase is crucial. Restricted data does not include data that the government had declassified, that is, allowed to be published in the public domain.

A great deal has been published in the public domain in recent years, most of it by distinguished government scientists—men like Teller, Taylor and Rathjens.

From that mass of published information and following questioning of several government scientists, an astute but untrained newspaper reporter, Howard Morland, prepared an article for publication in *The Progressive Magazine*. Morland contends that he had described nothing more than information which had lawfully been "removed from the 'Restricted Data' category" through information released into the public domain. The Court felt otherwise, finding that the article contained "*concepts*" not previously published.

The Court's language focused on a stark reality:

> "Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression."

In effect, the court found that the threat to life represented by unrestricted publication of H-bomb justified prior restraint of that publication.

During the court proceedings, a constituent of mine, Chuck Hansen, an amateur nuclear-weapons enthusiast of Mountain View, California, called my attention to his belief that the Department of Energy was managing

Congressman Paul N. McCloskey, Jr. is a Republican representing the twelfth Congressional District in California.

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its classification program improperly. It was Hansen's contention that DOE had permitted leading government scientists in years past to publish the basic concepts of nuclear weaponry, but was now applying a different standard to private citizens such as Howard Morland.

Hansen felt that any "concepts" presented by Morland were easily deducible from already published data.

Hansen had sent an 18-page letter to three Members of Congress and several newspapers containing his views. When the government learned of the letter, the Justice Department sought to prohibit the *Daily Californian* from publishing it. However, the *Madison Press Connection*, on 16 September 1979, published Hansen's letter in its entirety, rendering moot the *Progressive* controversy and causing the Justice Department to drop its lawsuit.

To my knowledge, Hansen had done nothing more than any private citizen might have done in reading public journals and studying data available to the public.

At least seven other people during the past several years have sent communications relating to nuclear-weaponry concepts which they believed, in good faith, to contain information that had been properly declassified, only to have it promptly classified by DOE.

For example, in May 1978 Dmitri Rotow, a Harvard student, found in the Los Alamos Public Library a document called "Final Design Status of the TX-7" and proceeded to write a paper on its content. Subsequently his paper was classified by DOE. A year later, Rotow returned to the Library to research the public availability of information on nuclear weapons for the American Civil Liberties Union. He then discovered document number UCRL 4725 and made copies of it. A librarian observing his work discovered that the document had been wrongly declassified.

Postol, Marsh, Stanford and DeVolpi at the Argonne National Laboratory have also maintained that DOE is manipulating the classification procedures for political purposes.

On 25 April 1979, during the *Progressive* case, they wrote a letter to Senator John Glenn concerning alleged misuse of DOE's classification procedures. DOE then classified *their* letter. Significantly, DOE did not *remove* such classification until one day before our Government Operations Subcommittee held public hearings on the question last month.

Two scientists at the Lawrence Livermore National Laboratory, Hugh DeWitt and Ray Kidder, sent a memo to the Regents of the University of California concerning the declassification of the Inertial Confinement Fusion Program. DOE immediately classified their memo.

Note now that *nine* reputable individuals, six government employees and three private citizens, have therefore been able to generate communications in *good faith*, believing them to contain already published information which the government subsequently chose to classify.

The six government employees all believe that DOE has used its classification procedures for political purposes rather than in checking bona-fide attempts to protect nuclear secrecy.

DOE contends it *must* classify all previously unpublished new concepts *under the law*.

In any event, it seems clear that the cat is out of the bag.

If, indeed, a Harvard student, a newspaper reporter and an untrained nuclear amateur can generate articles gathered from publicly available sources, which the government feels must be kept secret because those articles threaten the peace of the world, *the law is no longer adequate to protect the national security*.

Yet DOE contends that no *change* in the law is necessary. To date both Armed Services Committee chairman Mel Price and Ranking Republican Member Bob Wilson agree that no change is necessary.

It is of course possible that the cure would be worse than the malady. Most of the lawyers and scientists who have written on the subject argue that no law can be written to prevent the *private* citizen, at least, from publishing new concepts in this area, even though what that private citizen conceives and publishes may be used to permit some nation or terrorist group to build and detonate their own hydrogen bombs.

None of the nine individuals who have published information subsequently classified by DOE have been prosecuted.

It certainly must be considered an anomaly that the government can *prevent* publication of information, yet not prosecute the person who wishes to publish it.

In view of this anomaly, I prepared and introduced H.R. 6024 which would make it a crime for a private citizen, in the field of nuclear weaponry, to publish his concepts without first checking which government agency would have jurisdiction. I did this primarily to prompt the focusing of debate on the issue.

DOE responded that if every citizen who had a concept of nuclear weaponry was required to submit his plan to the government before publication, DOE could conceivably spend all of its time evaluating the concepts of the private citizens, with none left over to solve the

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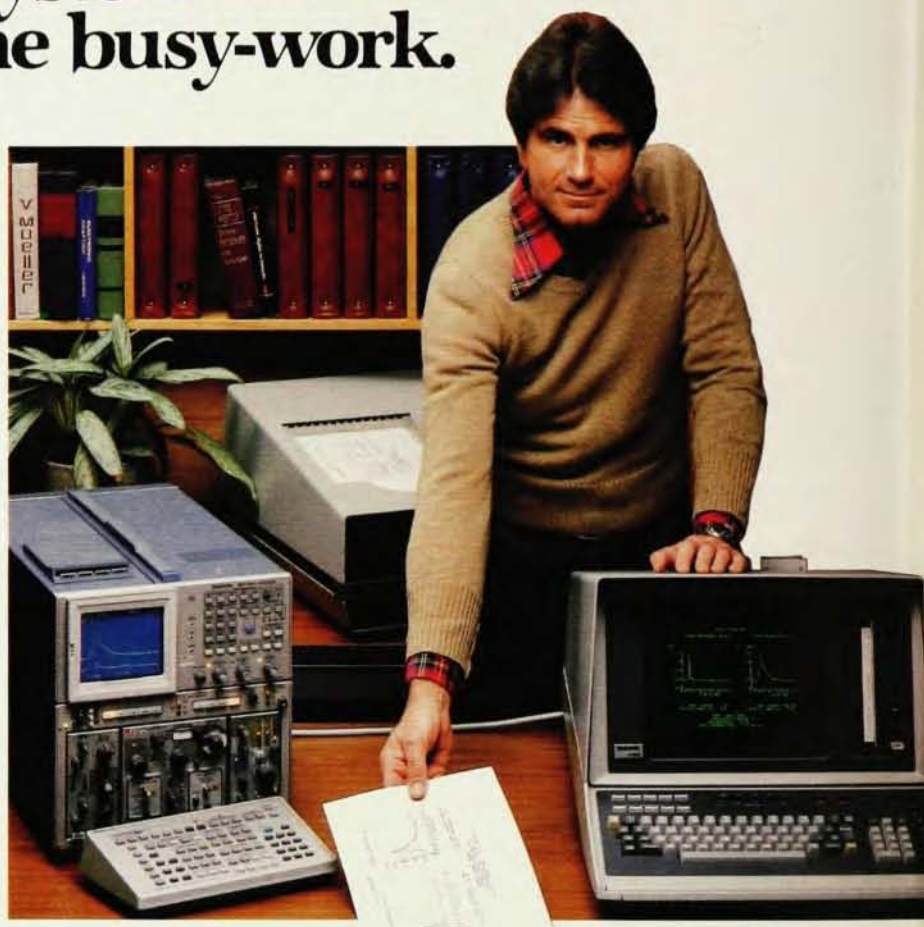


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nation's energy problems. DOE announced that it has now adopted a policy of "no comment" on such information, conceding that any comment seeking to prevent publication merely gives validity to the concepts involved, and that there is no real way to prevent publication anyway, save by waving the *threat* of criminal prosecution.

In a letter to an Oakland newspaper dated 17 October 1979, DOE's Assistant Secretary for Defense Programs, Duane Sewell, said:

> "It is the Department of Energy's policy not to comment on the accuracy (or similarly, the classification) of published information concerning nuclear weapon designs . . ."

We thus appear to be back on dead center. Any citizen who conceives a nuclear concept in the future is free to print it without concern as long as he believes he is using whatever the government has allowed to be published in the past. The government is, however, entitled to try, under the *Progressive* rule, that the proposed publication would include new concepts but, as in the *Progressive* case, the resulting furor will probably result in their being published anyway. Duane Sewell's position indicates they will merely make "no comment" in the future.

The prevailing congressional sentiment is expressed in a letter from Bob Wilson:

> "Notwithstanding the adequacy of existing laws, to prevent or deter the spread of Restricted Data, there has been a reluctance by the FBI and the Department of Justice to agressively investigate and prosecute alleged violations. Without enforcement no amendment to the law would make any difference."

Congressman Wilson's view is shared by top DOE officials who claim the FBI and Department of Justice have been remiss in meeting their responsibilities under the 1954 Act. DOE apparently feels that Morland, Hansen and Rotow, at least, could not have derived their new concepts had not someone at DOE "leaked" information. Both the Department of Justice and the FBI, at the congressional hearings last month, however, indicated that they held little hope of successfully prosecuting private citizens under the 1954 Act, since to be guilty of any offense the private citizen has to be proven guilty beyond a reasonable doubt, in the unanimous view of twelve fellow citizens, that he published his ideas "with intent to injure the United States . . .or with reason to believe such data will be utilized to injure the United States." (42 U.S.C. §2274).

As a former prosecutor and defense attorney, I agree completely.

The chilling effect on *government* scientists is far more deadly, however. A *government* scientist can be prosecuted if he "knowingly communicates, or whoever conspires to communicate or to receive, any Restricted Data, to any person not authorized to receive Restricted Data . . .upon conviction thereof, be punishable by a fine not more than $2,500." (42 U.S.C. §2277).

Under these circumstances, we have the unusual circumstance of DOE threatening its own scientists with the black cloud of dishonor and criminal prosecution, not because the law is clear, but because it is *not* clear.

This is, in effect, the rule of men, not of law. Respect for the law has never been more necessary, but that respect has traditionally been based on the premise that the law is clear and unambiguous and everyone is presumed to understand it. The law should not be a tool whereby an embarassed bureaucrat can threaten an honorable employee in order to cover his own political hindquarters.

As a legislator, I am offended both by DOE's position and by Justice's position, since it would seem to me that their head-in-the-sand attitude will encourage great scientists to remain in private life rather than serve the government. It also seems to me they owe a duty to come forward with recommendations for a change in the law. I have little confidence that they will, however.

What is needed is a full debate on the scientific community as to a new law setting out a new balance between the communication of scientific concepts and the protection against every American being able to add a nuclear weapon to his handgun collection. What that balance should be is clearly beyond the will or desire of the lawyers of DOE, the Justice Department and Congress, at least thus far.

Whatever that balance should be, however, should be clearly set forth *in the law*. As one legislator, I should like to help draft the new law in a way which scientists find to be a fair compromise between the two basic principles.

I hope scientists will therefore understand my plea for help. I know of no group more affected, no group who have more to lose, and no group who can more capably further this debate towards an ultimate resolution, by legislative action, if possible, but if not, by a conscious and informed judgment that the issue is one, like religious beliefs, which is not susceptible of legislative solution.

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*This guest comment is based on an invited paper presented at the 1980 Spring Meeting of The American Physical Society in Washington, D.C.* □