Nuclear Energy: Do States Lack Power to Block Proliferation of Reactors?

A legal study sponsored by the Atomic Industrial Forum, the nuclear industry's trade association, contends that most of the state legislative and ballot initiatives aimed at halting the spread of nuclear reactors are "clearly invalid." In view of its sponsorship by a special interest group, the study must be read more as an advocacy brief than as a definitive judgment of the issues. But it has nevertheless raised some interesting legal questions; it appears to be the opening gun in a possible protracted legal struggle should various state-level efforts to pass laws curbing nuclear power prove successful.

At its most fundamental level, the legal argument has to do with whether a state has the right to reject or restrict nuclear reactors on its own authority, or whether such powers have largely been preempted by the federal government. The pronuclear forces contend that Congress has established a national policy to develop nuclear energy, that it has assigned responsibility for regulating most aspects of the nuclear program to the federal government, and that no state has the right to subvert this national plan by banning reactors.

Some antinuclear critics retort that Congress never intended to compel a state to accept a technology it does not want, and that the citizens and legislature of a state are thus free to reject nuclear reactors even if those reactors, once built, would ordinarily be regulated by the federal government. Other critics contend that the states have powers—such as the authority to regulate land use—that can be used to control the proliferation of nuclear plants even if other aspects of nuclear regulation have been preempted by the federal government.

Intertwined with these arguments are myriad arcane disputes over the meaning of previous judicial decisions, existing federal laws, and legislation and ballot initiatives now pending in a score of states. How it will all come out is anybody's guess. "It's an open question," says David Pesonen, head of the antinuclear initiative campaign in California. "It will have to be litigated and we expect it to be litigated."

One noted authority on nuclear law—Harold P. Green, professor of law at George Washington University law school—told *Science* the validity of the various state-level initiatives is "a hard question to answer." Green said the issue is "not nearly as cut and dried" as the industry's brief indicates. He added that there is "very little meaningful law on preemption" and that "it's hard to find a constant thread" in the precedents that exist. Still, if he had to guess, Green adds, "more probably than not, if it goes to the Supreme Court, it will be decided along the lines suggested" by the industry's brief.

The argument goes to the core of the efforts now under way in some 22 states to restrict the spread of nuclear power. Two states—Oregon and Vermont—have already adopted laws which the pronuclear forces fear will restrict or prohibit nuclear development, although neither statute explicitly imposes a moratorium. In at least eight states, initiative measures that would curb nuclear power are being, or have recently been, circulated. Antinuclear groups in California and Oregon have already collected enough signatures to ensure that their propositions will be on the ballot in this year's elections, while groups in Colorado and perhaps one or two other states are given a good chance of collecting enough signatures. A Massachusetts initiative, on the other hand, failed to qualify. In addition to these initiative efforts, which constitute direct voting on legislation by the populace, at least 20 state legislatures had bills before them in 1975 that would restrict or prohibit the development of nuclear power.

The brief that attacks these legislative and initiative efforts was prepared for the Atomic Industrial Forum by Arthur W. Murphy, professor of law, and D. Bruce La Pierre, associate in law, both at the Columbia University Law School. Murphy has long been active in nuclear issues as a consultant to the Atomic Energy Commission and a member of the Atomic Safety and Licensing Board Panel. He also prepared a report for the Forum in the 1950's that was a precursor to the federal insurance law governing nuclear reactors, known as the Price-Anderson Act. The two lawyers were paid $7000 for their latest brief, which is being distributed as a 100-page booklet by the Forum under the title *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption.*

The gist of their argument is that "almost without exception" the various state bills, laws, and initiatives "are based on a concern about the radiological safety of nuclear power plants," an issue reserved for federal regulation.

As they see it: "There can be little doubt about the objective of most of the bills introduced in the state legislatures. The supporters do not like nuclear power and seek to stop (indeed roll back) its development. . . . The opposition is based on fear, real or expressed, of the hazards of a nuclear power program—principally the possibility of a catastrophic reactor accident, the long-term hazards of storing 'wastes' produced in the fission process, and the possibility of diversion of nuclear materials, especially plutonium, by terrorist groups." Thus the bills would impose conditions on nuclear reactors, which could not operate unless they met these conditions.

Yet these areas of concern, according to Murphy and La Pierre, are all "radiological" matters in which control and regulation is expressly reserved for the federal government by the Atomic Energy Act and related federal laws. The key court precedent they cite was a case in which Minnesota tried to impose more stringent requirements on radioactive discharges from a nuclear plant operated by Northern States Power Company than were required by federal regulations. A federal district court found that the Atomic Energy Act expressly preempted such regulatory power for the federal government, while an appeals court, by a split decision, found in 1971 that there was an implied preemption. The Supreme Court did not rule on the merits of the case.

These and other considerations lead Murphy and La Pierre to conclude that most of the pending legislation "seems clearly invalid as an intrusion into an area specifically preempted by the federal government. . . . If enacted, the bills almost certainly would ultimately be declared invalid."

No detailed counterbrief has been made public by the antinuclear forces, nor is one apt to be unless the issue reaches litigation. But interviews with several lawyers active in nuclear matters indicate that the issue is murky. Pesonen, who played a key role in preparing the California initiative, said Murphy and La Pierre "have got a good argument. They're doing what all lawyers do—serving as vigorous advocates for their client. They're being paid well. But there are good arguments on the other side, too." In particular, he noted that the California initiative is cast as a land-use regulation, not primarily as an effort to

regulate "radiological" issues. (Murphy and La Pierre contend its "underlying premise" nevertheless is concern about "radiological safety.")

Pesonen added that lawyers involved in the California initiative have prepared a confidential memorandum for use in possible court suits. A summary of this memorandum was made available to California officials who raised questions about including the initiative on the ballot. "We persuaded them to leave it alone," Pesonen said. He also suggested that if the Forum's legal position were really strong, then the nuclear industry would presumably go to court in advance to block the balloting. (A Forum spokesman said that possibility had been "much discussed" but "most lawyers shied away" from challenging the laws before they go into effect.)

Other lawyers in the antinuclear movement suggested that the California initiative might be valid because it leaves it to the subjective judgment of the legislature to determine the adequacy of safety systems and radioactive waste disposal plans before reactors can be built. Thus, there is, in a sense, no regulatory standard being imposed. "The heart of the matter is whether the state can flat out say 'No' to this technology," one lawyer said. "If the technology is accepted by the states, then regulation is mostly in the hands of the [federal] Nuclear Regulatory Commission. But was this technology mandated upon the states?"

Green, the law professor who suspects the Supreme Court might well find in favor of industry, nevertheless believes it would be possible to cast state laws in such a way that state regulation of nuclear energy would be valid. One way, he says, might be to make the laws applicable to all forms of power, not just nuclear.

Vermont, meanwhile, has successfully imposed regulations on a nuclear power plant with the utility's acquiescence. A few years ago the Vermont Yankee Nuclear Power Corporation signed an agreement with the state and several conservation groups whereby it agreed voluntarily, among other things, to submit to regulation by various state boards. Murphy and La Pierre suggest that Vermont Yankee took this action to facilitate state approval of a bond issue it needed. "Since a company which proposes to operate a nuclear power plant is exposed to many areas of state regulation unrelated to radiation protection, there are many points at which pressure can be applied and the company's need for a good business environment may provide a ready backdoor to state regulation of nuclear power plants," they warn.

Neither side expects the legal issues to have much effect on the balloting in various states. As to what difference it will make if any states adopt laws that are later found invalid, Murphy and La Pierre warn that there could be "a great deal of confusion and delay." They add that some utilities, leery of "even the small risk" that the antinuclear laws will be upheld, may choose fossil fuel plants rather than nuclear. They also suggest that, if states try to regulate nuclear power through various "borderline" approaches, Congress may have to "impose federal regulation of all aspects of the power field." On the other hand, if enough states want to clamp down on nuclear plants, the resulting political pressures might well lead Congress to change its own stance toward nuclear energy.—PHILIP M. BOFFEY

Ruckelshaus: What Happened to Mr. Clean?

William D. Ruckelshaus, the first and highly respected chief of the Environmental Protection Agency (EPA) and later a hero of Nixon's "Saturday Night Massacre," has recently come in for a fair amount of criticism for doing what many former government officials do: settling down to a lucrative law practice in Washington and offering his services to the type of clients whose activities he formerly regulated.

Although the Ruckelshaus move was not unusual, it has bothered a number of environmental activists and public interest lawyers who had hoped for "better" from him. Some environmentalists see him as "working the other side of the street" because that's where the money is; others are simply uncomfortable that he has seen fit to represent some clients—most particularly, the makers of cancer-causing vinyl chloride, whose interests, they believe, run directly counter to those of the public.

Science visited Ruckelshaus at his Farragut Square office* to see what he thought about all this. Ruckelshaus is characterized as a super-smoothie by those who distrust him, and certainly it would be difficult to throw him on the defensive. At 43, he has waxed plumpish but is by no means complacent, either about the questions that have been raised about his present job, the state of American society, or the state of the world. He is restless. He wishes he had eight lives in order to do all the things he wants to do. During the interview he repeatedly leapt from his couch to stride about the room before sitting down again. From time to time he emitted rays of frustration. But his frustration is balanced by an easy and rather good sense of humor.

He brought up the conflict of interest topic right away, saying that the role of former government officials representing clients before their old agencies was a legitimate issue and one to which he had given much thought. He is satisfied that he is not violating any ethical standards, including his own.

Others are not entirely satisfied. Mark Green, a Ralph Nader lawyer, believes questions are raised by the fact that his name automatically gives Ruckelshaus preferential access to and enhances his credibility at EPA and on Capitol Hill. (Ruckelshaus doesn't think so.) William Butler, of the Environmental Defense Fund (EDF), is dissatisfied not so much with the man as with the system: "It's sad that there is no way a man like that can earn money and remain in the spotlight and still be on our side of the fence," he says.

Money, undoubtedly, has something to do with it; but Ruckelshaus believes that, if he worked on the public interest side, he would be in far greater danger of running into conflict of interest problems vis-à-vis his old agency, since public interest groups frequently engage in legal action against EPA. More to the point, though, he really isn't the activist type. Ruckelshaus is a lawyer from a long line of lawyers. His personal view of what constitutes the pub-

*Ruckelshaus last June formed the firm of Ruckelshaus, Beveridge, Fairbanks, and Diamond. Richard M. Fairbanks was the environment man on Nixon's Domestic Council; Henry L. Diamond was New York governor Nelson Rockefeller's commissioner for environmental protection.