

A Court of Appeals Decision on Prior Restraint

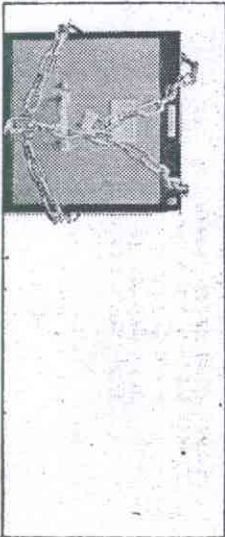
And a Threat to That Freedom

NYT 2/11/75
By ANTHONY LEWIS

A court decision that has not yet had much attention is regarded by some lawyers as among the most significant ever made in the First Amendment area. The decision was handed down nine days ago, in Richmond, Va., by the United States Court of Appeals for the Fourth Circuit. Unless the Supreme Court rules otherwise, the effect will be to give the United States something approaching the much criticized British Official Secrets Act.

The decision amounts to this: A Government employee who has access to classified information can be forever enjoined from disclosing or discussing it after he resigns. If he denies that something he wants to talk about was in fact classified, judges must give the Government claim the presumption of truth. It does not matter if the disputed material has leaked out; the former employee is still barred from discussing it.

The case is that of Victor Marchetti and John Marks, authors of the best-selling book, "The C.I.A. and the Cult of Intelligence." Mr. Marchetti is a former official of the Central Intelligence Agency; Mr. Marks, of the State Department. When the C.I.A. got wind of the book, it sought an injunction against any use of secrets. On April 18, 1972, a judge issued a restraining order. The following September the Court of Appeals upheld the order, on a novel legal theory. It was that Mr. Marchetti had signed a "contract" when he joined the C.I.A., as do most Government employes



in security areas, promising not to disclose classified information. By signing, Chief Judge Clement Haynsworth said, "he effectively relinquished his First Amendment rights."

The C.I.A. demanded 339 deletions from the manuscript. When the authors protested that many of these items were common knowledge—such as the fact that Air America, in Indochina, was a C.I.A. outfit—the agency gradually withdrew a number of its demands. It held to 168; the publisher and authors sued to challenge the remaining deletions. The only question open, under the Fourth Circuit's ruling, was whether those items had in fact been classified.

The trial judge, Albert V. Bryan Jr., is a conservative man who seemed inclined toward the Government at first. But his skepticism grew as he heard the testimony and read the evidence. In the end he found that only 26 items had actually been classified while Mr. Marchetti was in

the agency. Others, he said, had been declared classified on an ad hoc basis by officials when they read his manuscript, or they were simply nonsecret matters that had been included in documents stamped classified as a whole—something as voluminous as, say, one of the 47 volumes of the Pentagon Papers.

On appeal, Judge Haynsworth swept aside the skepticism. "There is a presumption of regularity," he wrote, "in the performance by a public official of his public duty." To censor a particular item, he said, the Government need not prove that an official had focused on it in classifying an entire document. Nor did it matter if an item had leaked, Judge Haynsworth said, because there still might be danger in letting a really informed person confirm it.

Finally, the court brushed aside new amendments to the Freedom of Information Act authorizing courts to decide for themselves whether information has been properly classified. Courts are not equipped to make such judgments, Judge Haynsworth indicated. Any complaints should be taken to the appropriate Government committee.

After recent disclosures, Congress and the public have both obviously lost a good deal of their old awe for the C.I.A. But in the Fourth Circuit's view, the courts must remain deferential—even to the extent of overriding constitutional presumptions.

The other striking aspect of the Marchetti decision is how utterly different it is from the decision that Judge Haynsworth does not mention—the Supreme Court's 1971 decision on the Pentagon Papers. That emphasized the need for speed when there are challenges to free expression, and said that any attempt at prior restraint came to court "bearing a heavy presumption against its constitutional validity."

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