

Marchetti v. United States

By Kenneth McCormick

The ray of hope of reassertion and protection of our rights of free speech and press—which many had when the Supreme Court ruled against restraining publication of the Pentagon Papers—has faded.

While many civil libertarians have pointed out the dangers of sanctioning even temporary prior restraints, as was done by some of the Justices in the Pentagon Papers opinions, a subsequent case, in which the Supreme Court has just denied review, raises to a far greater degree—*Marchetti v. United States*.

In April 1972, the Government instituted legal proceedings against Victor L. Marchetti, a former C.I.A. agent, by obtaining a temporary restraining order from the United States

District Court for the Eastern District of Virginia. The temporary order, which later became a preliminary and permanent injunction, requires Marchetti to submit to the C.I.A., thirty days in advance of release, all writings, even fictional, which relate or purport to relate to intelligence, intelligence activities, or intelligence sources and methods. The C.I.A. may forbid disclosure of any information which it has classified and which has not been placed in the public domain by prior disclosure. The basis of this broad injunction was a secrecy agreement signed by Marchetti in 1955 when he began working for the C.I.A.

The decision of the District Court was affirmed, with slight modification, by the Court of Appeals for the Fourth Circuit. It is that opinion which now stands by reason of the Supreme Court's denial of certiorari.

Although the Circuit Court of Appeals' opinion does allude to the im-

portance of the First Amendment, it allows the C.I.A. full discretion to prevent the publication of any material which is "classified" and not in the public domain. The ruling means that once material has been stamped "classified," no court may look behind that stamp to determine whether or not it is reasonable—let alone necessary.

In effect, it purports to allow the executive branch unfettered discretion in determining what information can be withheld from the public. It imposes no requirement that some need for secrecy exists.

While a traditional view of the First Amendment would impose a firm mandate against any prior restraint by the Government, it cannot be denied that some judicial inroads have been made on this doctrine. A recent example is, of course, the Pentagon Papers case where there was a temporary period of restraint to enable the judiciary, at various levels including the Supreme

Court, to determine whether or not dissemination of the publications would be harmful to the nation. In the *Marchetti* case, however, the decision of the Circuit Court of Appeals allows prior restraint by the executive branch without meaningful judicial review.

Moreover, by holding that the courts may not look behind the government label of "classified," the Fourth Circuit would abrogate the important role of the judiciary to protect the First Amendment rights of the people. To allow the executive branch such unilateral determination not only undermines the very purpose of the First Amendment but it serves to weaken the whole concept of responsible government so vital in a democracy.

While it is difficult to attribute any concrete reason to the denial of review by the Supreme Court, one can hope that the determining factor was that no attempt to restrain publication

of specific material had been made.

In its brief to the Supreme Court, the Government argued that the issue of prior restraint as posed by the *Marchetti* situation was now only "academic." It emphasized that Marchetti had not yet submitted any proposed publication to the C.I.A. and that the C.I.A. had not denied approval for publication of any material. To that extent, the *Marchetti* case can be distinguished factually from the government's action to restrain publication of the Pentagon Papers.

Should Marchetti proceed with his writing and should the C.I.A. order the deletion of certain materials prior to publication, the Supreme Court justices could still determine that judicial review of the appropriateness of such deletions is required.

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