NYTimes MAY 22 1975 CIA

Security and Freedom

By Anthony Lewis

BOSTON, May 21—Even before the Revolution of 1776, Americans rejected the British system of licensing for publications—the requirement of official approval before any manuscript could be printed. The First Amendment wrote that disapproval into fundamental law. The Supreme Court has often said that the amendment, at its core, bars the licensing of expression.

But today two Americans are subject to just such a licensing system. They are Victor Marchetti and John D. Marks, co-authors of the book "The C.I.A. and the Cult of Intelligence." They cannot write anything in a vaguely defined area of national security without the prior approval of the C.I.A. They cannot discuss facts or even write fiction. Not now or ever.

It is an extraordinary legal situation, unlike any in our history. The press has paid relatively little attention to it, perhaps because the media themselves are not involved. But some legal scholars feel that the case raises dangers more profound than those the press saw in the attempt to stop publication of the Pentagon Papers.

Mr. Marchetti was a C.I.A. official for years. When he joined the agency, he signed a standard agreement not to disclose classified material. After resigning in 1969 he began to write critically about some C.I.A. activities. The agency went to court and, on the basis of the agreement, got an injunction forbidding him to disclose any classified information learned when he was an employe.

With Marks, Marchetti wrote the book. The injunction required him to submit the manuscript to the C.I.A., which demanded deletion of hundreds of passages. Some were so far-fetched—mispronunciations by U.S. officials, for example—that the agency withdrew in time. But it held to 168 items, and the book was published with blanks where they had been.

What are the legal issues? There is of course a First Amendment issue. But I think other compelling questions come first: questions about the separation of powers under the Constitution, and about fair procedure. Ordinarily, under our system of law, the Executive has to have legislative authority from Congress before it can take some legal action. That was why the Supreme Court held President Truman's steel seizure of 1952 unlawful—because it had no basis in any statute.

In this case there is no statute authorizing the executive branch to enforce secrecy agreements with former employes by injunction. Congress might want to grant such authority. But it might also want to consider how long any ban should last, and what sort of subjects it should cover—anything labeled "security" or narrowly defined secrets such as codes. In short, Congress would weigh the policy, as it is meant to do under the Constitution.

The strange thing is that C.I.A. Director William E. Colby said during this case that there was "no existing statutory authority for injunctive relief" in the circumstances. Yet the Court of Appeals for the Fourth Circuit approved a sweeping injunction.

The burden is on Marchetti and Marks, under the court order, to prove they should be allowed to publish something. It is a very heavy burden.

The judge who tried the case—Albert V. Bryan Jr. of Virginia—at first was sympathetic to the Government. But after hearing the C.I.A. witnesses he found that 142 of the 168 passages the agency sought to delete from the book did not in fact contain any material classified while Marchetti was an employe. Then, without even looking at all the evidence, the Fourth Circuit set aside his findings. And it said these remarkable things:

Anything "useful if not vital to national security" is classifiable. Courts must presume that anything classifiable was in fact classified. When a document, even a large book, is stamped secret, every single sentence in it, however innocuous, must be regarded legally as classified. If secret matters become public in other ways, Marchetti and Marks still cannot talk about them—unless the C.I.A. approves.

Mr. Marchetti has been in the courts for three years now, trying to overcome that overwhelming burden of proof. And if the Government can decide what he may say without meaningful judicial review, then of course it can and will do so with other former employes.

In our society today many of the crucial areas of Government decision-making are shrouded in secrecy. If blunders or crimes occur, the only hope of correcting them is through a Government employe speaking out. That right is a democratic safety valve—not to be closed lightly, without legislative sanction. It is so important that even the secrecy-conscious British exempt from their Official Secrets Act critical speeches by ministers who resign in protest.

The Supreme Court has been asked to review the Marchetti case. Outside comment does not and should not move the Court on such matters. But one may hope that the justices remember John Milton's brave words against the licensing system, and Wordsworth's cry at another time of danger to freedom: "Milton! Thou should'st be living at this hour."

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