How the CIA Tried to Cover Up

Alfred A. Knopf has just published a book called The CIA and the Cult of Intelligence *by Victor L. Marchetti and John D. Marks. The book's introduction, excerpted below, tells how its pages came to be filled with boldface type and (deleted) space.*

By Melvin L. Wulf

On April 18, 1972, Victor Marchetti became the first American writer to be served with an official censorship order issued by a court of the United States. The order prohibited him from "disclosing in any manner (1) any information relating to intelligence activities, (2) any information concerning intelligence sources and methods, or (3) any intelligence information."

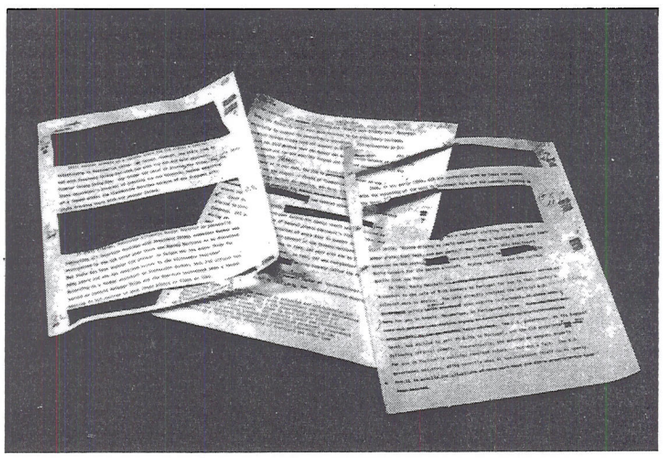
To secure the order, government lawyers had appeared in the chambers of Judge Albert V. Bryan, Jr., of the United States District Court for the Eastern District of Virginia, in Alexandria, on the morning of April 18, without having notified Marchetti. The government's papers recited that Marchetti had worked at the CIA from 1955 to 1969, that he had signed several "secrecy agreements" in which he had agreed not to reveal any information learned during his employment, that after he left the CIA he had revealed forbidden information, that he was planning to write a nonfiction book about the agency, and that publication of the book would "result in grave and irreparable injury to the interests of the United States."

Among other papers presented to the judge was an affidavit (classified "Secret") from Thomas H. Karamessines, Deputy Director of the Central Intelligence Agency, the head of the CIA's covert-activities branch. The affidavit said that a magazine article and an outline of a proposed book, both written by Marchetti, had been turned over to the CIA and that they contained information about CIA's secret activities. The affidavit related several of the items and described how their disclosure would, in the CIA's opinion, be harmful to the United States.

On the basis of that affidavit and others, including one by CIA Director Richard Helms, Judge Bryan signed a temporary restraining order forbidding Marchetti to disclose any information about the CIA and requiring him to submit any "manuscript, article or essay, or other writing, factual or otherwise," to the CIA before "releasing it to any person or corporation." It was that order which United States marshals served upon Marchetti; the next month was consumed by a hectic and unsuccessful effort to have the order set aside.

Marchetti asked the ACLU for assistance the day after receiving the order, and was in New York the following day to meet his lawyers and prepare his defense. At the first court appearance, on Friday, April 21, we unsuccessfully urged Judge Bryan to dissolve the temporary restraining order. He also refused to order the government to allow Marchetti's lawyers to read the "secret" affidavit, because none of us had security clearance. The following Monday we were in Baltimore to arrange an appeal to the United States Court of Appeals to argue there that the temporary restraining order should be dissolved.

During the Baltimore meeting the government lawyers announced that they had conferred security clearance upon me and that I would be able to read the affidavit but could not have a copy of it. They said they would clear the other defense lawyers during the next few days. We were also told that any witnesses we intended to present at trial, to be held that Friday, would also require security clearance before we could discuss the secret affidavit with them. That was a hell of a way to prepare for a trial; we couldn't even talk to prospective witnesses unless they were approved by the government. No doubt the government would like to have that advantage in every trial.



This is how the pages of *The CIA and the Cult of Intelligence* arrived at the publisher's office. In the published book, passages which the CIA reluctantly reinstated are printed in boldface type. Passages which are still tied up in litigation are indicated by blank spaces and the word (DELETED). **[Photo: Martha Kaplan]**

We argued the appeal before the Court of Appeals on Wednesday, but that too was unsuccessful, and the temporary restraining order remained in effect. Our only satisfaction was an order by the court prohibiting both the CIA and the Department of Justice from trying to influence our witnesses in any way.

On Friday we appeared before Judge Bryan and reluctantly asked for a two-week postponement because it had been impossible for us to secure witnesses who could testify that day. The need for security clearance had made it impossible for us to discuss the case with those witnesses who had at least tentatively agreed to testify for the defense. But, more depressing, we had had great difficulty finding people willing to testify at all.

The trial started and ended on May 15. Essentially, the trial consisted of Karamessines repeating the contents of his secret affidavit. As interesting as it would be to describe the day in detail, I am forbidden to, for the public was excluded and the testimony of the government witnesses is classified. The result, however, is public. It was a clean sweep for the CIA, and Judge Bryan issued a permanent injunction against Marchetti.

The results on appeal were not much better. The validity of the injunction was broadly affirmed. The only limitation imposed by the Court of Appeals was that only *classified* information could be deleted from the book by the CIA. The litigation finally came to an end in December 1972 when the Supreme Court refused to hear the case. It was a great defeat for Marchetti, for his lawyers—and for the First Amendment.

American law has always recognized that injunctions against publication—"prior restraints," in legal jargon—threaten the root and branch of democratic society. Until 1971, when the *New York Times* was enjoined from printing the Pentagon Papers, the federal government had never attempted to impose a prior restraint on publication, and the handful of such efforts by the states were uniformly denounced by the Supreme Court. As we learned from the Pentagon Papers Case, however, the Nixon administration failed in their specific goal of suppressing publication of a newspaper—but for fifteen days, a newspaper actually was restrained from publishing, the first such restraint in American history.

The *Times*' resumption of publication of the Pentagon Papers immediately after the Supreme Court decision would seem to mean that the case had ended victoriously. Although it was a victory, it was not a sound victory, for only Justices Black and Douglas said that injunctions against publication were constitutionally forbidden under *any* circumstances. The other members of the court made it perfectly clear that they could imagine circumstances where such injunctions would be enforced, notwithstanding the First Amendment's guarantee of a free press. Nixon-administration lawyers could read the opinions as well as ACLU lawyers, and they too saw that the decision in the Pentagon Papers Case was not a knockout punch. So only ten months after being beaten off by the *New York Times*, they were back in court trying the same thing again with Victor Marchetti.

Nine opinions were written in the Pentagon Papers Case. Out of all those opinions one standard emerges under which a majority of the justices would have allowed information to be suppressed prior to publication: proof by the government that disclosure would "surely result in direct, immediate and irreparable injury to the Nation or its people." We were comfortable with that standard because we were confident that nothing Marchetti had disclosed or would disclose in the future would have that effect. But we were not permitted to put the government to its proof through the testimony of our four witnesses because Judge Bryan agreed with the government that Marchetti's case was different from the Pentagon Papers Case.

"We are not enjoining the press in this case," the government lawyers said. "We are merely enforcing a contract between Marchetti and the CIA. This is not a First Amendment case, it's just a contract action." The contract to which they were referring was, of course, Marchetti's secrecy agreement.

All employees of the CIA are required to sign an agreement in which they promise not to reveal any information learned during their employment which relates to "intelligence sources or methods" without first securing authorization from the agency.

The CIA fell upon the contract theory as a device for trying to suppress the book before it was printed. The theory struck an harmonious note with the federal judges who heard the case, and proved more successful than the government probably ever dared to hope and certainly more than we had ever expected. But it cheapens the First Amendment to say that an agreement by an employee of the United States not to reveal some government activity is the same as an agreement to deliver a hundred bales of cotton. It ignores the compelling democratic principle that the public has a right to be well informed about its government's actions.

Of course, some will be heard to say, "But these are secrets," and indeed much of the information you will read in this book has been considered to be secret. But "secrets" have been revealed before—there were literally thousands of them in the Pentagon Papers. Every high government official who writes his memoirs after leaving office reveals "secrets" he learned while in government service, and most of *them* signed secrecy agreements, too. "Secrets" are regularly leaked to the press by government officers, sometimes to serve official policy, sometimes only to serve a man's own ambitions. In fact, disclosure of so-called secrets—even CIA secrets—has a long and honorable history in our country, and the practice has proved to be valuable because it provides the public with important information that it must have in order to pass judgment on its elected officials.

Furthermore, disclosure of "secret" information is rarely harmful because the decision inside government to classify information is notoriously frivolous. Experts have estimated that up to 99 percent of the millions of documents currently classified ought not be classified at all. But not only is disclosure of "secret" information generally harmless, it is a tonic that improves our nation's health. Government officers cried that disclosure of the Pentagon Papers would put the nation's security in immediate jeopardy. When they were finally published in their entirety, the only damage was to the reputation of officials in the Kennedy and Johnson administrations who were shown to have deceived the nation about the war in Vietnam.

When you read this book, you will notice that, unlike any other book previously published in the United States, this one contains blanks. That is the remarkable effect of the government's success. You will also notice that the book has two authors, Victor Marchetti and John Marks. That is another remarkable effect of the government's success. After being enjoined, defeated in his attempts to win relief in the appellate courts, virtually ignored by the press, shunned by his former colleagues at the CIA, unable even to discuss the progress of his work with his editor at Knopf (because the very purpose of the injunction was to forbid the publisher to see the manuscript before the CIA had had the opportunity to censor it), there was serious question whether Marchetti would be able to write the book at all. His discouragement was profound and his bitterness sharp. If he had not written the book, the government's success would have been complete, for that was its real objective. Luckily, Marchetti and Marks came together, and with a shared perspective on the evils of clandestine activities, they were able to do together what the government hoped would not be done at all.

(continued on next page)

While We're on the Subject

The second issue of the *Civil Liberties Review*, just published, includes these two articles:

"Further Adventures of a Tappee" by Morton H. Halperin, a former National Security Council staff member who, with the ACLU, is suing Kissinger, Mitchell, the Chesapeake & Potomac Telephone Company and others for illegally tapping his phone.

"Secret Government and What To Do About It" by Stephen Gillers, who writes, "In Washington there are people who don't know the difference between war and politics."

The *Review*'s next issue, to be published this summer, will feature an "Rx for Surveillance" section, including articles on cameras, informers and files, by Frank Donner; wiretapping and bugging, by Herman Schwartz; army surveillance of civilian politics, by Chris Pyle; the need for privacy legislation, by Barry Goldwater, Jr.; and the FBI's record-keeping apparatus, by Aryeh Neier.

The quarterly's subscription rate for ACLU members who become charter subscribers is $10 for one year. Address subscription inquiries to John Wiley & Sons, Inc., 605 Third Avenue, New York, N.Y. 10016.

When the manuscript was completed at the end of August 1973, it was delivered to the CIA. Thirty days later, the time allowed by the injunction, we received a letter from the CIA which designated 339 portions of the book which were to be deleted. Some of the deletions were single words, some were several lines, some were portions of organizational charts, and many were whole pages. In all, 15 to 20 percent of the manuscript was ordered deleted. I won't soon forget that September evening when Marchetti, Marks and I sat in the ACLU office for several hours literally cutting out the deleted parts of the manuscript so that we could deliver the remains to Knopf. It was the Devil's work we did that day.

We filed suit in October, together with Knopf, challenging the CIA's censorship. By the time we went to trial on February 28th, the agency had reduced their number of deletions from 339 to 168. Withdrawal of half their original objections should not be taken as a sign of the CIA's generosity. On the contrary, it was the result of our insistent demands over a period of four months, and the agency's recognition that we would go to the mat over the very last censored word. The authors gave up nothing, and rejected invitations to rewrite parts of the book so that it would be satisfactory to the CIA.

There were three issues to be decided at the trial: did the censored portions of the book consist of classified information? was that information learned by the authors during their government employment? and was any of it in the public domain?

After a two and a half day trial, including testimony by the five highest ranking officials of the CIA, Judge Bryan decided the case on March 29th. It was a major victory for the authors and the publisher. Bryan held that the agency had failed, with a few exceptions, to prove that the deleted information was classified.

The decision was probably surprising to the CIA. Accustomed as they had become to having their way, it is unlikely to have occurred to them that a mere judge of the United States would contradict their declarations about classified information, for it was the government's theory throughout the case that material was classified if high ranking officials *said* it was classified.

Our view, presented through the expert testimony of Morton Halperin, was that concrete proof of classification was required. In the absence of documents declaring specific information to be classified, or testimony by the employee who had in fact classified specific information, Judge Bryan flatly rejected mere assertions by ranking CIA officers that such information was classified.

Of the 168 disputed items, he found only 27 which he could say were classified. On the other hand, he found that only seven of the 168 had been learned by Marchetti and Marks outside their government employment, and that none of the information was in the public domain.

The decision is obviously important. It allows virtually the entire book to be published (though the present edition still lacks the deleted sections cleared by Judge Bryan, since he postponed enforcement of his decision to allow the government its right to appeal); it desanctifies the CIA; and it discards the magical authority that has always accompanied government incantations of "national security." Hopefully, the higher courts will agree.

There will necessarily be differences of opinion on the subject of the disclosure of secret information. The reader of this book can decide whether the release of information it contains serves the public's interest or injures the nation's security. For myself, I have no doubts. Both individual citizens and the nation as a whole will be far better off for the book having been published. The only injury inflicted in the course of the struggle to publish the book is the damage sustained by the First Amendment.

Melvin L. Wulf is legal director of the American Civil Liberties Union.

Where to Prod a Sluggish Congress

Washington Report
By Arlie Schardt

As the Nixon-appointed Supreme Court continues to demonstrate its insensitivity to a wide range of civil liberties issues, the wisdom of the ACLU's decision to expand its citizen lobbying program in Congress becomes more apparent.

If we cannot look to the courts to assure the safeguards intended by the Bill of Rights and the Constitution, we must turn to the source of the laws the courts interpret—namely, the Congress.

Every member of the ACLU should understand there is an important role for him or her to play. Too many ACLU members (and our ranks have now grown to some 275,000 persons) are still under the impression that the work of the ACLU is work for lawyers only, and that the rest of us can only contribute our money and our best wishes.

Nothing could be further from the truth, nor more damaging to the effort to move strong civil liberties legislation through the state and national legislatures.

Looking back . . .

The ACLU has of course lobbied for years at all levels of government. But until recently we have not had the membership, nor the staff, to make our voices heard with the potency that is now both necessary and possible.

The impeachment campaign has been the best example so far of how effective the ACLU can be. When we began our nationwide campaign last September, the view of most observers was that it's a swell idea, and have fun tilting at windmills. The idea of impeachment was regarded as preposterous. Most people did not even know what the word meant.

Nine months later most people do know what it means. Impeachment is a household word. Today not a day goes by without some national TV commentator, columnist, magazine or local editorial using phrases and information in the exact form in which they were printed last fall in ACLU publications widely distributed to the media.

It would of course be absurd to say that the ACLU or any other individual or group, was alone responsible for bringing about the impeachment hearings now in Congress. But it would be equally inaccurate to underestimate the impact of the thousands of ACLU members who took active roles in raising the issue in their communities.

No one will ever know how many thousands of letters to Congress were generated by ACLU members, or how many people phoned, wired or met with their Representatives to inform them that they too are accountable in this crisis. Grassroots impeachment committees, set up in dozens of congressional districts, drew many people into the political process for the first time in their lives. Many of them joined the ACLU. Many of them plan to translate their experiences into action on future issues.

ACLU action in the legislative arena raises public awareness of the civil liberties dimensions of lawmaking in a way that nothing else can. It also raises public awareness of what the ACLU is all about, because legislative activities are heavily covered by the media.

This means more people join the ACLU which in turn increases our legislative impact, since one of the things politicians seem able to do best is count.

In today's climate, it is not only naive, it is a dereliction of duty to think we can merely state our positions on issues and then count on the goodness and wisdom of Congress to protect civil liberties. There are at least 20 major subjects now before Congress which merit as much pressure as concerned citizens can apply.

Impeachment, of course, is still paramount. Until this issue is resolved, our federal government is literally crippled, and the political process is hostage to Mr. Nixon's efforts to save himself in a Senate trial. It is imperative that ACLU members do everything possible to move Congress to impeach Mr. Nixon as soon as possible. Summer may be a time for relaxing, but failure to prod a lethargic Congress is a sure way to see the impeachment process drag out interminably, at critical cost to the nation.

A brief look at some of the many other civil liberties concerns now before Congress should be enough to cause any citizen to contact the nearest ACLU office and start lobbying.

Abortion. The Supreme Court's 1973 decisions affirming every woman's right to choose for herself whether or not to have an abortion is under fierce attack by groups aiming for nothing less than compulsory pregnancy. Several laws have been passed to narrow the availability of abortion services, and others are in the hopper. The ACLU is challenging these laws in the courts (and winning), but litigation can never keep pace with every new piece of regressive legislation. It is imperative that Congress hear from thousands of citizens who insist on their right to free choice. Letters should be sent as often as possible to every member of your state's delegation in Congress. Be assured that letters *do* make a difference.

School Prayer. There are persistent efforts to bring a school prayer constitutional amendment to the floor. Senator Birch Bayh, chairman of the Senate Judiciary Committee's subcommittee on constitutional amendments, should be advised that separation of church and state is still very much a part of the Constitution.

Privacy. There is a whole host of legislation relating to the protection of privacy. Besides an ACLU effort to draft an omnibus privacy bill, there are already bills now before Congress on criminal justice information, wiretapping, bank customer privacy, fair credit reporting, army surveillance activities, human experimentation, data banks, and telephone toll records.

The closest any of the wiretapping bills comes to the ACLU policy opposing all wiretapping is a bill sponsored by Senator Charles McC. Mathias of Maryland, prohibiting any wiretapping without a warrant showing probable cause.

Both House and Senate banking committees are stalling on the issue of bank customer privacy. Senator William Proxmire's comprehensive Fair Credit Reporting Bill has been tabled (sidetracked) by the Senate Banking Committee. Numerous bills on data banks are at the hearings stage.

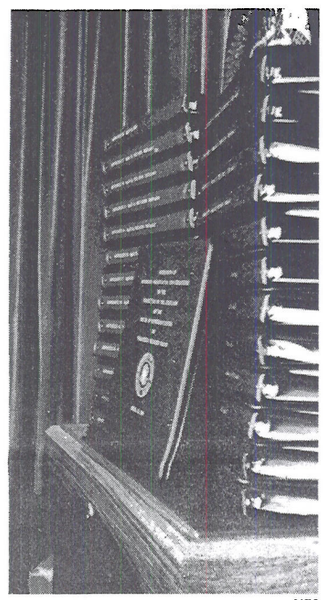
Senator Sam J. Ervin, Jr. held hearings in April on army surveillance, but the House has not yet moved.

Government Information Policies. Nev Freedom of Information Acts have bee passed by both houses, and are awaitin resolution by a conference committee Bills on executive privilege were before House-Senate conference in June Hearings on bills relating to securit classification of information have begun

Federal Criminal Code. A bill to revis the entire federal criminal code has bee in Senate hearings. It contain monumental dangers in many areas notably freedom of speech, press, dissen and political activity. The ACLU presented massive testimony last montl in opposition to these dangerous features

Amnesty. This will undoubtedl emerge as one of the nation's most con troversial issues after impeachment House hearings have been held. Congres needs to hear from pro-amnesty citizens

Legal Services. A bill to create an in dependent Legal Services Corporatio has passed the House and June passag was imminent in the Senate—but Mr Nixon was threatening to veto the bill as an appeal to Senate reactionaries to save him in an impeachment trial.



UPI

. . . to see what's gaining.

Reporter's Privilege. A bill to enable newsmen to maintain the confidentiality of their sources in most, but not all, cases was drafted by the House Judiciary Committee, but there has been no Senate action since last year's hearings.

School Desegregation. A conference committee met in June to reconcile an unconstitutional House busing ban with a milder Senate version. Mr. Nixon was demanding passage of the House version.

Death Penalty. A general bill passed the Senate. No hearings have been held in the House.

Bills concerning campaign reform, no-knock, search and seizure, broadcast license renewal, grand jury reform, health insurance and rules of evidence are among others affecting civil liberties and civil rights.

As can be seen, there is a need, and more than one issue, for everyone. There is no reason why the ACLU should not be the most effective public interest lobby in Washington. All it requires is the full participation of a growing ACLU membership. Contact your affiliate. Tell them you are are ready to begin your nonpartisan political work in defense of the Bill of Rights.

Washington Report is a regular feature in Civil Liberties. *Its purpose is to provide information on congressional actions you can influence through communication with your congresspersons, the press and other groups. Arlie Schardt is associate director of the ACLU's Washington Office.*