CIA

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# The C.I.A. And Free Speech

By Tom Wicker

Victor Marchetti and John D. Marks have asked the Supreme Court to overturn an Appeals Court ruling that permitted stringent Government censorship of their book, "The C.I.A. and the Cult of Intelligence." If the Court refuses to intervene, or sustains the Appeals Court, one of the most extraordinary prior restraints in history will have been allowed to stand, and the ability of the Government to classify and withhold information from the public will have been greatly enhanced.

The case arose when Mr. Marchetti left the employ of the Central Intelligence Agency in 1969—after 14 years—and began to write a book about it. C.I.A. officials learned of his plans and went into court, citing an employment contract he had signed pledging himself to secrecy about what he learned while working for the C.I.A. A temporary injunction against Mr. Marchetti was confirmed by the Fourth Circuit Court of Appeals on grounds that he planned an unauthorized disclosure of classified information. The Government's "need for secrecy in this area," the Appeals Court said, justified this prior restraint on publication.

The result was that Mr. Marchetti and his co-author, Mr. Marks, had to submit their manuscripts for clearance to the C.I.A., which deleted 339 portions of it. Subsequent negotiations reduced this number to 168 deletions, but the authors nevertheless filed suit to have the injunction—hence the deletions—set aside.

In hearings before Federal District Judge Albert V. Bryan Jr. in Alexandria, Va., the C.I.A. failed to sustain its deletions, despite testimony by four deputy directors, except in 26 instances and parts of two others. Meanwhile, however, the book had appeared with all 168 deletions represented by blank spaces. Then, on Feb. 7, the Fourth Circuit overruled Judge Bryan and upheld the Government's right to make the 168 deletions. That

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decision is the one now being appealed to the Supreme Court.

If upheld, it would vastly expand the Government's power to classify information. Appeals Court Judge Clement F. Haynsworth Jr., for example, based the majority's decision on what he called "a presumption of regularity in the performance by a public official of his public duty." Thus, he was able to rule that material subject to classification, for all intents and purposes, had in fact been classified, whether or not it had been specifically stamped with a classification. This effectively overrode Judge Bryan's finding that in numerous instances C.I.A. officials had officially classified information only when they found it in the Marchetti-Marks manuscript, not before; and it meant that certain general assertions—something like "the C.I.A. was active in Greece"—would be considered classified information, even though not specifically contained in any classified documents.

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In several other instances, moreover, Judge Bryan had accepted Mr. Marchetti's testimony that he had obtained certain information only after he left the C.I.A.'s employ. But the Appeals Court ruled that if the C.I.A. had possessed and classified this information while Mr. Marchetti worked for the agency, whether or not he was then in possession of it, he still was barred from disclosing it when he learned of it later on.

The Appeals Court ruling apparently did not reach the question whether the press may publish or broadcast classified information. Rather, it upheld an injunction against unauthorized disclosure of such information, maintaining that the Government's need for secrecy and the contract Mr. Marchetti had signed overrode his First Amendment rights. In effect, the court held that there was a lifetime restraint on his ability to disclose material that fell under the court's exceptionally broad definition of classified information. If that applies across the board to all the numerous Federal agencies that require such contracts of their employes—or those that may in the future—it will prove to be a major new restraint on the flow of Government information to the public.

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Yet it remains a singular fact that the practice of classifying information rests on no statutory authorization whatever—only upon a series of executive orders. Moreover, when the C.I.A. was obliged to prove its case for secrecy before Judge Bryan, its best witnesses were in most instances unable to do so, just as when the Government was obliged to prove to Federal District Judge Murray Gurfein, in 1971, that publication of the Pentagon Papers would damage the national security, impressive official witnesses were unable to do that either.

In both cases, an appeals court, hearing no witnesses at all, nevertheless overruled the lower court and opted for Government secrecy and prior restraint. Once again, therefore, the Supreme Court will have to decide whether the First Amendment may be so cavalierly overridden.