# THE MARCHETTI CASE: NEW CASE LAW

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The Marchetti case is truly a landmark case in the annals of the law—and it has far-reaching implications for the Central Intelligence Agency, the intelligence community, and the federal government as a whole, as will be demonstrated.

Actually, the legal story consists of two separate but related legal actions:

(1) The first case was initiated at the request of CIA by the United States of America, represented by the Department of Justice. CIA sought an injunction which would prevent a former employee, Victor Marchetti, from publishing a proposed magazine article by enforcing the secrecy agreement he signed upon entering into employment with CIA. After hearings, appeals, trials, and further appeals, a permanent injunction was issued. The decision of the United States District Court for the Eastern District of Virginia in Alexandria, Va., was appealed to the U.S. Court of Appeals for the Fourth Circuit. There the original decision was affirmed, and a petition for a writ of *certiorari*** was filed with the U.S. Supreme Court. That court declined to review the decision of the Circuit Court, which is cited as *U.S. v. Marchetti*, 466F 2d 1309(1972).

(2) The second case was initiated by Alfred A. Knopf, a publisher, and Marchetti and John D. Marks, co-authors of a proposed book, *The CIA and The Cult of Intelligence*, submitted to CIA on 27 August 1973 pursuant to the terms of the injunction issued in the first case. This latter case, against the United States, was filed in the U.S. District Court for the Southern District of New York. On motion of Department of Justice lawyers, and after hearing arguments, that court ordered the case removed to the Alexandria District Court which had heard the first case and had issued the injunction. The basic issue in this second case concerned the appropriateness of the deletions CIA had made from the Marchetti-Marks manuscript. After trial, the Alexandria District Court made a decision which was extremely adverse to the government's position. Upon appeal, the Fourth Circuit Court of Appeals reversed the District Court, fully approving the government's position—i.e., agreeing with all the deletions requested by CIA. This case too was appealed to the Supreme Court, but *certiorari* was denied. This case is cited as *Knopf v. Colby*, 509F 2d 1362(1975).

Perhaps this is the place for some background on the central figure, Victor Leo Marchetti. Marchetti served for two years, 1951-1953, in France and Germany as a corporal in Army Intelligence, including six months of Russian Area study at the EUCOM Intelligence School in Oberammergau. Returning to the United States to complete his college studies, he graduated from Penn State in June 1955 with a bachelor's degree in History (Russian Area Studies), worked three months as an analyst at the National Security Agency, and entered on duty with CIA as a GS-7 on 3

*The author wishes to acknowledge the assistance of Lawrence R. Houston and John K. Greaney in the preparation of this article.

**A writ of *certiorari* certifies that the Supreme Court agrees to hear the case in question; when such a writ is denied, it means the Supreme Court sees no reason for taking the case to the Supreme Court.

October 1955 at the age of 25. He rose relatively rapidly, primarily through the Office of Research and Reports, but also with tours in the Directorate of Operations and the Office of National Estimates. From ONE, as a GS-14, he went to the Office of Plans, Programs, and Budget in January, 1966, and served there for two and a half years. In July, 1968, having reached the GS-15 level, he became Executive Assistant to the Deputy Director of Central Intelligence for a period of nine months. He was then assigned to the Planning, Programming, and Budget Staff at the National Photographic Interpretation Center, and five months later resigned for "personal reasons" in September, 1969.

In his assignments with the CIA PPB office, where he handled the papers for the "303 Committee" (later the "40 Committee") which passed on Covert Action proposals, and particularly with the DDCI, Marchetti got an overall view of the Agency and access to sensitive information afforded to extremely few Agency employees. There was no evidence of serious disillusion or disenchantment with the Agency before he left.

After his departure from the Agency, Marchetti began writing, first a novel, *The Rope-Dancer*, and then non-fiction articles concerning Agency activities. In March 1972, the Agency received a draft of an article Marchetti had written for *Esquire* magazine, together with the outline of a proposed book on CIA. The source expressed the opinion that the Agency might be concerned with the content, because many aspects seemed classified and sensitive. Indeed, the Agency was concerned. Very serious classified matters were discussed. Included were names of agents, relations with named governments, and identifying details of ongoing operations. There were items which might have led to the rupture of diplomatic relations between the United States and other countries. Disclosure would cause grave harm to intelligence activities of the U.S. Government and to CIA.

William E. Colby, then Executive Director, telephoned me in my capacity of Deputy General Counsel at the time, asking what legal action could be taken. The answer was that no criminal action would be successful once the material were published, but this might be the proper situation for seeking an injunction. Colby asked whether we were certain of our legal position as to an injunction. We noted that extensive legal research within the Agency and consultation with the Department of Justice had taken place five or six years before. Colby asked for some documents on this as quickly as possible, and had them within 30 minutes.

It is useful to digress to look at this novel legal approach. For years the Agency had recognized the practical impossibility, under existing law, of applying criminal sanctions to employees and former employees who disclosed classified information to unauthorized persons. In the mid-Sixties, however, under threat of a revealing book by a disgruntled former employee, the lawyers looked into the possibility of civil sanctions—namely, an injunction to enforce his contract based on the secrecy agreement each employee signs at the beginning of his employment. It was known, of course, that various industry agreements had been enforced in the courts—agreements that protected industrial processes and other proprietary rights from disclosure by employees, both during and after employment. Why shouldn't the U.S. Government also be protected on the simple basis of a valid contract? The conclusion was reached that a court action had a good chance of success. The Department of Justice was consulted, and after thorough review agreed. The pending threat went away, but the papers were preserved against later need.

What did Colby do with the documents when we produced them? He discussed them with the then-Director, Richard Helms, who took the matter up personally with

the President. The President said he would turn this over to John Ehrlichman, then his Counsel. Helms asked CIA General Counsel Lawrence R. Houston and me to go to the White House to see Ehrlichman and discuss possible action on the proposed article and book by Marchetti. In late March 1972 we were shown into Ehrlichman's office in the White House. In a few minutes Ehrlichman appeared, accompanied by an assistant, David R. Young. They had done their homework, knew the factual situation, had studied the pertinent criminal law, and had the proper law books in their hands. After thorough discussion, it was agreed that the criminal statutes would provide no remedy for the problem facing us. Talk then turned to the injunction possibility. We presented our view in favor of a try in the courts for an injunction, conceding that there was no precedent involving the U.S. Government in the case law.

Finally it was mutually agreed to have a try at an injunction. Talk then turned to the means of preparing the case. Houston and I urged care with respect to which Deparment of Justice attorney would handle the case, on the grounds that dealing with classified intelligence information would require considerable understanding to prepare a complaint, briefs, and oral argument while at the same time protecting the sensitive aspects; this, after all, was what the case was all about. He then suggested Daniel J. McAuliffe, an attorney in the Internal Security Division of the Department of Justice, who was on detail to the White House. Ehrlichman described McAuliffe as very able and discreet. Within a day or so, McAuliffe came to the Headquarters Building to begin his study of the case and to start his education into the intricacies of classification and intelligence. There were to be many hours of joint study and consultation. McAuliffe was indeed a thoroughly competent professional who performed the research and prepared the documentation which was the basis for the subsequent court action. When it came time to go to court, the matter was turned over to Irwin Goldbloom, another thoroughly expert and capable lawyer in the Civil Division of the Department of Justice.

One of the first problems came with the realization that if Marchetti published the information about which we were concerned, then the injunction proceeding would be useless. Normally, in seeking an injunction, the person against whom it is sought is served with appropriate papers and given an opportunity to be represented before the judge. We were afraid, however, that Marchetti, if served, might immediately get in touch with the media and broadcast the very items about which we were concerned. Accordingly, we took the backup documentation, together with the proposed temporary restraining order, to Judge Albert V. Bryan Jr., of the U.S. District Court for Eastern Virginia, sitting in Alexandria. We met Judge Bryan in his chambers, showed him quotations from Marchetti's manuscript which, to us, appeared most damaging if made public, and explained our theory of an injunction based on the secrecy agreement. We also stated that Marchetti had not been served and explained why we came in with an *ex parte* proceeding under these circumstances.

Judge Bryan agreed with the argument put forward by Goldbloom and signed the temporary restraining order without hesitation on 18 April 1972. He then called in one of the marshals and ordered him to serve Marchetti immediately with the executed order.

This set in motion the proceedings leading to the first court hearing before Judge Bryan, at which Marchetti was represented by counsel for the American Civil Liberties Union. The defense counsel appealed on technical grounds on an urgent basis, and the appeal was heard within a few days by the U.S. Fourth Circuit Court of Appeals sitting in Alexandria. While the appellate court refused to stop the

proceedings, they did raise some troublesome questions, particularly about clearance of witnesses for the defense who would have access to the classified material. They warned that nothing could be done which could be construed as intimidating or warning off witnesses.

Some details of the actual trial are appropriate here because of their relevance to the second case. Judge Bryan permitted the government to file classified briefs and classified exhibits. Much testimony of witnesses was *in camera*—court closed to the public. The judge issued appropriate protective orders, binding on all parties and their attorneys, and at the close of the trial ordered all classified records sealed. This sealed record, of course, was made available to the Fourth Circuit Court of Appeals. There were affidavits and oral testimony by Agency personnel as to which matters in the proposed *Esquire* article and the book outline were considered classified. Judge Bryan had some difficulty in accepting simple testimony that a matter was classified. The issue was not whether a matter had been properly classified, but rather whether it was in fact classified at all, in instances where the defendant argued that it was not. For example, in a situation involving the true name of an agent, the judge was satisfied when shown an acknowledgment of an assigned pseudonym on a card showing the agent's true name and stamped "Secret." Similar types of documents for other situations were exhibited to support the testimony of Agency employees, and the judge appeared satisfied as did the defendant's lawyers. Judge Bryan issued a permanent injunction on 19 May and an appeal was taken.

Now, what were the basic legal issues reviewed by the Circuit Court? From the beginning, Marchetti's lawyers (from the American Civil Liberties Union) urged that an injunction was a prior restraint in violation of the First Amendment providing that "Congress shall make no law. . . . abridging the freedom . . . of the press." By case law the amendment has been applied to the Executive Branch and to the courts. The Circuit Court reviewed the constitutional basis for secrecy within the Executive Branch and its right and duty to maintain secrecy. The Court went on to say that First Amendment rights and freedom of speech are not absolute rights, and that the secrecy agreement was a reasonable and constitutional means for the Director of Central Intelligence to implement his statutory charge to protect intelligence sources and methods from unauthorized disclosure. In other areas, the Court said that the Agency must review any submission within 30 days, and that Marchetti, if dissatisfied with the Agency action, could seek judicial review. This burden, the Court added, should not be on CIA. The Court went on to say:

> Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement.

The Court also held that:

> The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure [by the Government], it had come into the public domain.

Inasmuch as the Court held that "the process of classification is part of the Executive function beyond the scope of judicial review," CIA would have no obligation to establish the *propriety* of classification, but would be required to establish only the *fact* of classification.

The three judges, Clement F. Haynesworth, Harrison L. Winter, and the late J. Braxton Craven, Jr., agreed on the basic opinion except that Craven would not

subscribe to a flat rule that there should not be any judicial review of classification. As he put it,

> I would not object to a presumption of reasonableness [on the part of the Government], and a requirement that the assailant demonstrate by clear and convincing evidence that a classification is arbitrary and capricious before it may be invalidated.

The opinion of the Circuit Court remanded the case to the District Court to limit the injunction to classified information so that on 15 March 1973 it finally read as follows:

> ORDERED:
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> That the operative provisions of the permanent injunction entered by this Court on May 24, 1972 be and they hereby are revised and that the "Ordered" provisions of said permanent injunction shall now provide:
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> That the defendent, Victor L. Marchetti, his agents, servants, employees and attorneys, and all other persons in active concert or participation with him, and each of them, be, and they hereby are permanently enjoined from further breaching the terms and conditions of the defendant's secrecy agreement, dated 3 March 1955, with the Central Intelligence Agency by disclosing in any manner (1) any classified information relating to intelligence activities, (2) any classified information concerning intelligence sources and methods; *Provided*, however, that this Injunction shall not apply to any such information, the release of which has been authorized in accordance with the terms and conditions of the aforesaid contract, and *Provided*, further, that this Injunction shall apply only with respect to classified information obtained by said defendent during the course of his employment under the aforesaid secrecy agreement and which has not been placed in the public domain by prior disclosure by the United States; and it is
>
> FURTHER ORDERED:
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> that the defendant shall submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods, for the purpose of avoiding inadvertent disclosure of classified information contrary to the provisions and conditions of the aforesaid secrecy agreement, and such manuscript, article, essay or other writing shall not be released without prior authorization from the Director of Central Intelligence or his designated representative.

CIA had fashioned a workable tool in a court of law, based on a simple contract theory. This tool could prevent serious damage to the interests of the United States or threats to the personal safety of individuals, by acting *in advance* of the threatened disclosure. Even if the government were able to take criminal action on a disclosure, the damage would already have been done. Other agencies in the Intelligence Community were urged to establish secrecy agreement procedures. In the face of increasing concern over publication of classified information, CIA had taken the initiative in the courts and won a significant victory in a landmark legal case.

*II*

The second case starts with a letter from Marchetti's lawyer dated 27 August 1973 which transmitted a proposed manuscript of 517 pages pursuant to the terms of the permanent injunction issued in the first case. CIA had 30 days to respond. A task force was organized with representatives from the four directorates, and at the same time each of the four Deputy Directors was charged with reading the entire manuscript within a matter of days. At a meeting of the four deputies and the task force, it was agreed that the manuscript was in fact "Top Secret—Sensitive," and should be so marked. There were other difficulties: the manuscript included compartmented information and sensitive need-to-know projects, and not all of the task force members or Agency lawyers had the requisite clearances (which were quickly granted). Also, some items were of prime interest to other agencies, including State, NSA, and Navy. Excerpts were sent to other agencies as appropriate. The task force was informed that for each item adjudged as classified, the judgment would have to be backed up with documentation. The process also began of sorting out which items would be assigned to which Deputy Director for final judgment.

Colby—by now DCI—was of course kept fully informed of precisely how this mammoth judgmental and mechanical task was being planned and pushed forward. There was careful consideration of which items, although classified, were so widely known that no serious harm would result from publication. Colby made the decision that we should proceed to list all classified items consistent with the language of the injunction, with the view that at a later date, possibly at trial, CIA could withdraw on the softer items. I debated this with Colby—probably insufficiently and not vociferously enough—on the grounds that the authors and their lawyers would publicize the items withdrawn with the simple theme that CIA had listed them as classified and then changed its mind. The inference drawn would be that CIA thereby confirmed the validity of each item previously deleted but subsequently cleared. When the book was published, this was precisely what happened—all of the items which CIA first deleted and then cleared were printed in boldface type so that any reader knew what CIA regarded as classified as of the submission of the manuscript.

It is impossible to overemphasize the massive job of reviewing these 517 pages of manuscript. Some reviewers had a tendency to delete three or four pages at a time so as to drop an entire subject, when in fact deletion of a few sentences, names, or places would have done the job. This happened particularly with the other agencies involved, but inasmuch as the Agency was responding on behalf of all (no volunteers here to go on the record or to provide witnesses in court), there had to be consistency. Finally the job was done, and a letter dated 26 September 1973 was sent forward attaching a listing of 339 deletions, referring, for example, to words three through eight on line 17 of page 276. This was done to avoid putting the classified words in the letter, so that the letter itself could remain unclassified for use in the open court record. In the letter, an offer was made for a conference to ascertain if by modest word changes some of the listed deletions could be made acceptable to CIA.

Such a conference was held on 4 October 1973 with Marchetti, his ACLU lawyer Melvin Wulf, myself as CIA General Counsel, and John K. Greaney as Assistant General Counsel. It was an all-day session which got nowhere. They presented a quantity of newspaper clippings which contained information similar to items in the manuscript and urged that such information in the clippings in effect made the items in the manuscript unclassified. We countered that this was not so, and that if Marchetti would simply attribute the information in the manuscript to the media sources, CIA would have no problem. But no, they wanted whatever authenticity could be gained from asserting the information as Marchetti's knowledge. Other

suggestions were made, such as deletion of names of people, substitution of a general geographical area for a specific capital or country, or deletion of certain details of operational projects. These too were rejected, and by the end of the day it became clear that they were not going to make any changes. One can wonder whether they came to negotiate, or simply to make a record that such a conference had been held. The Agency in the next few days considered its position on the full 339 items, and made the decision that it would withdraw its objections to the "soft" items, which totalled 114. Later, after a thorough review of the remaining deletions, and more careful study by the four deputies and the lawyers as to what they would face as witnesses in the actual trial, CIA withdraw on another 57 items, leaving 168 deletions on which CIA stood fast.

Marchetti, in submitting the manuscript, had included John D. Marks as co-author. Marks was a former State Department employee, who had worked in intelligence and had signed a secrecy agreement. It also developed that Marchetti had signed a contract for the publication of the book with Alfred A. Knopf, Inc.

The court aspect of this second case now began with the filing of a legal action in the U.S. District Court for the Sourthern District of New York. The plaintiffs were Knopf, Marchetti, and Marks, seeking an order which would permit publication of the remaining 168 deleted items. One can only speculate about the motives behind their choice of a court: sheer legal tactics, easier jurisdiction in terms of the subject matter, or physical convenience for plaintiffs' lawyers, who were all based in New York City. The case law and court rules clearly favored jurisdiction where the injunction had been issued on 15 March 1973. Upon motion and after oral argument, the action was transferred to the Eastern District of Virginia (Alexandria) where the first case had been tried and where it would come before Judge Bryan, who had tried the first case. So much for tactics or whatever.

Now came the depositions preparatory for trial: sworn testimony with lawyers from both sides present for cross-examination. Among the witnesses were the four deputies, the DCI, Marchetti, and Marks. Marks had been granting interviews to journalists and had appeared on radio and television discussing information similar to that contained in the manuscript. Again, as earlier, it was argued that because the information was in the media it was no longer classified. This was a bootstrap operation: leak information in the manuscript, and then claim it is thereby declassified by publication. Marks, however, was put in a dilemma when asked whether he had given specific items to the press. If he admitted it, he could be subject to a citation of contempt under the original injunction inasmuch as he now was a co-author; if he denied it, he would be risking perjury charges. He resorted to pleading the Fifth Amendment on five occasions. Later, at the trial, the judge took note of this, saying, in effect, you can't have it both ways.

It is worthwhile to digress here for a moment to comment on the degradation and dilution of security that characterized this entire matter. Obviously Marks, Marchetti's lawyers, and Knopf's lawyers had access to a mass of sensitive information. It should be noted that Knopf's lawyer, Floyd Abrams, voluntarily undertook not to expose the manuscript to his client. In court, not only the judge but his clerk, the bailiff, the stenographer, and others were exposed to sensitive classified information. Papers and documents in the court and in the lawyers' offices were not stored under the rigidly controlled conditions prevailing at CIA. Nor were most of these people trained, by experience or otherwise, in how to deal with highly classified information and documents. The crowning blow came when CIA asked the District Court for access to the record of the first trial. Back came the answer: "We can't find it." And they never have!

Now came the trial. It was clear from the briefs filed that the plaintiffs wished to re-litigate the First Amendment issue. It was also clear that the judge would have none of this, but the issue was in the record for the inevitable appeal. The four Deputy Directors were witnesses and collectively covered all the 168 deletion items. They testified that the information was classified, and had been since the inception of the program or from the witness's first contact with it, and was still classified. Then excerpts of classified documents were submitted as exhibits, heavily censored so as not to furnish new sensitive information. The witnesses than tied each of the deletion items to information in the various exhibits, which was the procedure Judge Bryan found acceptable at the first trial. This time, however, Judge Bryan was having even greater difficulty in understanding the basic concept of classification and the procedure followed. He appeared to think that the government should be able to punch a computer button that would result in a showing that a deletion had been classified by a proper official on a specific date in the past. He accepted a few documents which specifically stated that certain types of information should be classified at certain levels. One such document, for example, was a DCI Directive specifying that locations of communications intelligence collection facilities would be classified "Secret." One such deletion item was thus accepted by the judge, together with an additional 25. In a decision stunning to the government, however, Judge Bryan found that the fact of classification of the remaining 142 items had not been proved.

To CIA, it seemed self-evident that matters such as names of agents and details of ongoing clandestine collection operations were classified. In his opinion, Judge Bryan stated that it seemed to him that the four Deputy Directors were making *ad hoc* classifications of material after having read the manuscript, although he recognized that the Deputy Directors had denied this. No evidence or even assertions contradicted the four deputies. Could the judge have thought that they were lying? It was clear that the judge simply had not comprehended the classification system. Further he had abandoned the method of proving classification which had been acceptable to him and to the defendants at the first trial, and had also been acceptable to the Circuit Court of Appeals. In the second trial, however, he neglected to advise the government that he had so abandoned the procedure for proof, nor did he state what would be acceptable.

Preparations accordingly were made for the appeal. The Department of Justice lawyers who had handled the trial, Irwin Goldbloom—by now Deputy Assistant Attorney General, Civil Division—and his assistant, David J. Anderson, started writing appeal briefs. There was the continuing close working relationship between them and, for the Agency, John Greaney and me. Greaney and I, working with the information supplied by the four Directorates, wrote the classified briefs; The Department of Justice lawyers wrote their unclassified briefs; then we exchanged them for comment. We all wanted to make certain that we made clear to the Circuit Court what classification in the intelligence arena was all about. The briefs and other documents constituting the record were duly filed, consisting of several thousand pages. In any event it was an enormous record for the Circuit Court to review. Oral argument was heard on 3 June 1974 before the same three judges who had heard the first case, Haynesworth, Winter and Craven. At the close of questioning Judge Winter made an observation to the effect that "When this matter was before us previously, none of us then realized how enormously complicated this matter of classification really is." This observation clearly foreshadowed parts of the opinion, such as, in speaking of their opinion in the first case,

> . . . . we did not foresee the problems as they developed in the District Court. We had not envisioned any problem of identifying classified information embodied in a document produced from the files of such an agency as the CIA. . . . We perhaps misled the District Judge into the

imposition upon the United States of an unreasonable and improper burden of proof of classification.

Finally, after an almost unprecedented length of time—more than nine months—the Circuit Court on 7 February 1975 handed down its opinion: total and complete victory for CIA and the U.S. Government on the fundamental issues. The plaintiffs of course petitioned the U.S. Supreme Court for a writ of *certiorari*, but this was denied. What were the basic issues decided?

1) The court declined to modify its "previous holding that the First Amendment is no bar against an injunction forbidding the disclosure of" classified information acquired by an employee of the U.S. Government in the course of such employment, and "its disclosure would violate a solemn agreement made by the employee at the commencement of his employment." The Court held "he effectively relinquished his First Amendment rights."

2) The District Judge properly held that classified information obtained by the CIA or the State Department was not in the public domain unless there had been official disclosure of it. . . . It is one thing for a reporter or author to speculate or guess that a thing may be so, or even . . . to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.

3) The Court referred to:

. . . the fact that Marks, on Fifth Amendment grounds, on five different occasions declined to answer whether he was the undisclosed source of information contained in five magazine articles offered by the plaintiffs to show that the information was in the public domain. A public official in a confidential relationship surely may not leak information in violation of the confidence reposed in him and use the resulting publication as legitimating his own subsequent open and public disclosure of this same information.

4) . . . the individuals bound by the secrecy agreements may not disclose information, still classified, learned by them during their employments regardless of what they may learn or might learn thereafter.

Also

Information later received as a consequence of the indiscretion of overly trusting former associates is in the same category.

5) The Court dwelt at some length on the well-established doctrine of presumption of regularity by a public official in his public duty:

. . . in the absence of clear evidence to the contrary, courts presume that they [public officials] have properly discharged their official duties. . . . That presumption leaves no room for speculation that information which the district court can recognize as proper for Top Secret classification was not classified at all by the official who placed the "Top Secret" legend on the document.

The Court summarized by saying,

In short, the government was required to show no more than that each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp.

> classified in any degree and which was contained in a document bearing a classification stamp.

This summary not only is reasonable, but also reflects exactly the standard and procedure accepted by Judge Bryan in the first trial! How or why he rejected this standard in the second trial, one can only wonder.

6) While it is not one of the primary issues, it is still important to note what the Court said about the deletions of additional and irrelevant information in the documents submitted as exhibits by the government:

> Nor was it necessary for the government to disclose to lawyers, judges, court reporters, expert witnesses and others, perhaps, sensitive but irrelevant information in a classified document in order to prove that a particular item of information within it had been classified. It is not to slight judges, lawyers or any one else to suggest that such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill-equipped to provide the kind of security highly sensitive information should have.

7) The action of the Fourth Circuit Court of Appeals is embodied in the following:

> For such reasons, we conclude that the burden of proof imposed upon the defendants to establish classification was far too stringent and that it is appropriate to vacate the judgment and remand for reconsideration and fresh findings imposing a burden of proof consistent with this opinion. . . .

Thus was written the penultimate chapter of the Marchetti case. The final chapter was the drafting* of proposed findings of the District Court, which act, it was hoped, would close the case. Those readers who are lawyers can imagine the task. In any event, the detailed findings of fact for court approval, involving some 142 specific fact situations, were filed. On 22 October 1975 a final order was issued. No appeals were filed, and the order became final. It was reported in the press that in answer to a question about contesting the "findings of fact" and the order entered by the District Court, Knopf's lawyer answered that more than $150,000 in legal fees had been spent and that it did not seem appropriate to contest the matter further. The basic constitutional issues were settled, and further legal action would only be nitpicking on factual issues. The ACLU also had no stomach for further legal battling. The book, meanwhile, had been published with gaps for the deletions and boldface type for the original deletions subsequently withdrawn by the CIA.

### *Conclusion*

What had all this accomplished and what were the implications for the future? For the first time CIA had taken the initiative in the courts to prevent the unauthorized disclosure of intelligence sources and methods. The courts had affirmed in the particular circumstances the most fundamental of legal principles—the sanctity of a contract. The courts had affirmed the right—and the duty—of the government to seek enforcement of that contract to protect its secrets, i.e., sensitive classified information. As previously mentioned, there was a degradation and dilution of security, and we have the acknowledgment by the Circuit Court itself that ". . . . we are ill-equipped to provide the kind of security highly sensitive information should have." While it was not perfect, a highly useful tool had been fashioned.

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*Originally by Walter L. Pforzheimer as a consultant to General Counsel.

When the Rockefeller Commission (Commission on CIA Activities Within the United States) was established by the President on 4 January 1975, there were immediate discussions concerning procedures to be followed by the Commission in protecting CIA sensitive classification information. The Commission and its professional staff were cooperative. CIA asked that all staff members sign secrecy agreements. Bowing to the inexorable logic of the question posed by CIA of what law or legal tool could be used to protect classified information *except* the secrecy agreement, the Commission directed its staff members to sign such agreements. Next came the Senate Select Committee to Study Intelligence Activities, and the House Select Committee on Intelligence. At the request of CIA, the chairmen of the two committees directed all staff members to sign secrecy agreements. During this same period the Department of Justice was conducting an investigation of possible crimes by employees or former employees of CIA. The Special Prosecutor investigating Watergate was also investigating possible crimes by Agency personnel. At the request of the CIA, the Attorney General and the Special Prosecutor directed all their employees having access to CIA information to sign secrecy agreements. While there may have been some leaks, no books or published articles not submitted to proper authority have appeared attributed to any of the above sources. But for the Marchetti case, it is not likely that secrecy agreements would have been obtained in all of the above situations, and one can only speculate about possible publications.

In the meantime, CIA had been working closely with the Department of Justice on proposed legislation to provide criminal sanctions for the unauthorized disclosure of intelligence sources and methods. As a part of that legislative package there was a provision for CIA to apply for an injunction when there were threatened violations of the proposed law. Justice for two years would not concur in this provision, arguing that the Marchetti case established the principle of an injunction. CIA argued strongly the well-established fact that the other ten judicial circuits were not bound to follow the precedent established by just one circuit, the Fourth. CIA wanted a firm statutory basis for an injunction in whatever jurisdiction a new case might arise. Justice finally relented, and the President sent the legislative package forward to Congress with the injunction provision. This was done in February 1976 with a recommendation for Congressional approval. No action was taken in 1976, but it is hoped there will be some action in 1977.

As a result of the various investigations of intelligence activities, the President on 19 February 1976 issued Executive Order 11905, entitled "United States Foreign Intelligence Activities." The order was to clarify the authority and responsibilities of intelligence activities—in other words, a listing of do's and don'ts. Section 7(a) is pertinent here:

> (a) In order to improve the protection of sources and methods of intelligence, all members of the Executive Branch and its contractors given access to information containing sources and methods of intelligence shall, as a condition of obtaining access, sign an agreement that they will not disclose that information to persons not authorized to receive it.

Section 7(c) provides that when there is a threatened unauthorized disclosure of intelligence sources and methods by a person who has signed a secrecy agreement, the matter will be referred "to the Attorney General for appropriate legal action, including the seeking of a judicial order to prevent such disclosure."

Section 7(a) directs all intelligence agencies to do what CIA had done since it was established on 18 September 1947. Section 7(c) directs all agencies to do what CIA

had taken the initiative to do nearly four years ago—i.e., take a prospective violator of the secrecy agreement like Marchetti to court to prevent disclosure.

I feel that the above paragraphs under the heading of "Conclusion" show vividly and graphically the impact of the Marchetti case, not only as a legal precedent but also as a guideline for the conduct of intelligence on a day-to-day basis. No one will claim that the Marchetti case offers a panacea to prevent disclosure of classified intelligence information. The United States needs criminal sanctions, as discussed earlier, for unauthorized disclosure of intelligence sources and methods where the injunctive remedy cannot or has not been applied. (This is clearly demonstrated by the recent Department of Justice announcement that Philip Agee will not be prosecuted, should he return to the United States, for publication abroad of a book replete with details of Agency operations.) If an author publishes a book or article prior to submission to CIA for review as to classified information, obviously injunctive relief is valueless. Current laws provide no usable criminal sanctions; thus the need for the "sources and methods" legislative package.

Nevertheless, the Marchetti case has provided an extremely valuable legal tool, helping the Agency in working with would-be authors and also helping to improve security in Agency relationships with other government entities and agencies, the Congress, and the Judiciary.