



3-1-1973

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## Recommended Citation

Kenneth L. Eagle, *Constitutional Law -- Prior Restraint Enforced Against Publication of Classified Material by CIA Employee*, 51 N.C. L. REV. 865 (1973).

Available at: <http://scholarship.law.unc.edu/nclr/vol51/iss4/10>

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## NOTES

### Constitutional Law—Prior Restraint Enforced Against Publication of Classified Material by CIA Employee

The “right to know” is in a period of gestation. . . . [P]eople will increasingly insist upon knowing what their government is doing and . . . because this knowledge is vital to government by the people, the “right to know” will grow.<sup>1</sup>

The public’s “right to know” is dependent upon the free exercise of the first amendment freedoms of speech and press. This right seemingly received strong reaffirmance in *New York Times Co. v. United States*,<sup>2</sup> when the Supreme Court dissolved a preliminary injunction which had prohibited the *New York Times* and *Washington Post* from publishing excerpts from a classified Pentagon study of United States policy decisions in Vietnam. However, the scope of the Pentagon Papers case has recently been narrowed by the Court of Appeals for the Fourth Circuit in *United States v. Marchetti*,<sup>3</sup> in which the court affirmed the issuance of an injunction enforcing a secrecy agreement which had been exacted by the Central Intelligence Agency (CIA) from an employee as a condition of employment.<sup>4</sup>

Before Victor Marchetti began working for the CIA in 1955 he was required to sign a secrecy agreement in which he promised not to divulge any classified information, intelligence, or knowledge concerning the present and future security of the United States, except in the performance of his official duties, unless specifically authorized in writing by the CIA Director or his authorized representative.<sup>5</sup> After his resignation in 1969 Marchetti published a novel and a magazine article critical of some policies and practices of the CIA.<sup>6</sup> In March of 1972 he submitted to *Esquire* magazine and six other publishers an article in which he related some of his experiences as an agent.<sup>7</sup>

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<sup>1</sup>United States v. Marchetti, 466 F.2d 1309, 1318-19 (4th Cir.) (Craven, J., concurring), *cert. denied*, 93 S. Ct. 553 (1972).

<sup>2</sup>403 U.S. 713 (1971) (per curiam). This case is commonly known and will hereinafter be referred to as the Pentagon Papers case.

<sup>3</sup>466 F.2d 1309 (4th Cir. 1972).

<sup>4</sup>*Id.* at 1311-12.

<sup>5</sup>*Id.* at 1312.

<sup>6</sup>*Id.* at 1313.

<sup>7</sup>*Id.*

After learning of this, the United States, alleging that the article contained classified information concerning intelligence sources, methods, and operations, sought an injunction to enforce the secrecy agreement.<sup>8</sup> The district court granted the injunction and ordered Marchetti to submit all writings to the CIA Director for prior approval and not to release, without prior Agency approval, *any* writing relating to the Agency or to intelligence.<sup>9</sup> The Fourth Circuit upheld the substance of the district court decree but limited the requirement of prior approval to the release of *classified* material.<sup>10</sup> The decision further provided that the CIA must respond within thirty days after submission of material for approval and that Marchetti would be entitled to judicial review of any CIA denial of publication approval.<sup>11</sup> However, the burden of obtaining such review would be on Marchetti. The issues on review would be limited to whether or not the information were classified, and if so, whether or not it had previously been disclosed to the public.<sup>12</sup>

Any consideration of the doctrine of prior restraint<sup>13</sup> should begin with *Near v. Minnesota*,<sup>14</sup> the landmark case in this area. *Near* involved a statute which provided for the "abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.'"<sup>15</sup> Whenever such nuisance existed, an appropriate public official, or a citizen if such official took no action, could maintain an action to perpetually enjoin the persons committing the nuisance from further maintaining it.<sup>16</sup> In declaring the statute unconstitutional the Supreme Court held that the chief purpose of the first amendment guarantee is to prevent prior restraints upon publication, and that while such protection is not "absolutely unlimited," limitations have been recognized only in "exceptional cases."<sup>17</sup>

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<sup>8</sup>*Id.* at 1311, 1313.

<sup>9</sup>*Id.* at 1311.

<sup>10</sup>*Id.* at 1311, 1318.

<sup>11</sup>*Id.* at 1317.

<sup>12</sup>*Id.* at 1317-18. Judge Craven concurred in the court's decision, but disagreed that the scope of judicial review should be so limited, preferring not to foreclose inquiry into whether or not secrecy classifications are reasonable. *Id.* at 1318-19.

<sup>13</sup>The doctrine of prior restraint has been defined as holding that the first amendment prohibits governments from imposing any system of prior restraint, with certain limited exceptions, in any area of expression within the boundaries of the amendment. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

<sup>14</sup>283 U.S. 697 (1931).

<sup>15</sup>*Id.* at 701-02.

<sup>16</sup>*Id.* at 702-03.

<sup>17</sup>*Id.* at 713, 716. "Exceptional cases" mentioned by the Court included enforcements against

The Court in *Near* was highly suspicious of any restraint that would eliminate or decrease criticism of public officials.<sup>18</sup> This concern has broadened, and the doctrine of prior restraint has been applied to subsequent cases involving licensing statutes that have required the acquisition of a permit from a public official prior to the exercise of first amendment rights. Fearing arbitrary denials of licenses by officials who might base their decisions on the content of the intended expression, the Court has overturned statutes and ordinances which have not contained adequate guidelines for implementation.<sup>19</sup> On the other hand, the Court has upheld narrowly drawn statutes with explicit standards based upon the time, place, and manner of the intended expression.<sup>20</sup>

Similarly, prior restraints in the area of obscenity have been scrutinized in order to avoid suppression of expression protected by the first amendment.<sup>21</sup> In *Kingsley Books, Inc. v. Brown*<sup>22</sup> the Court upheld a statute which authorized a municipality to enjoin the sale and distribution of written and printed material that had been found at a trial to be obscene. This case was distinguished from *Near* because the statute was directed solely at obscenity and imposed no restraint upon materials not already published and found to be obscene.<sup>23</sup>

Censorship of motion pictures has presented its own unique problems. In *Times Film Corp. v. City of Chicago*<sup>24</sup> the Court refused to establish a general rule that movie censorship statutes are unconstitutional *per se*, and said: "It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech

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obscene publications, government actions to prevent actual obstruction to its recruiting services or the publication of the sailing dates of transports or the number and location of troops, and government actions to protect against incitements to acts of violence and the overthrow by force of orderly government. *Id.* at 716.

<sup>18</sup>*Id.* at 710, 713.

<sup>19</sup>*E.g.*, *Saia v. New York*, 334 U.S. 558 (1948) (use of sound amplification devices); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (distribution of religious literature).

<sup>20</sup>*E.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941) (parade permits).

<sup>21</sup>In light of the definition of the doctrine of prior restraint in note 13 *supra*, it may at first seem meaningless to discuss prior restraint in relation to obscenity, which is unprotected by the first amendment. *Roth v. United States*, 354 U.S. 476 (1957). However, because of the Fourth Circuit's reliance in *Marchetti* upon a movie censorship case in establishing safeguards, 466 F.2d at 1317, such discussion can be helpful. Besides, if one adheres to the "absolutist" first amendment philosophy, obscenity deserves as much protection as anything else. *Freedman v. Maryland*, 380 U.S. 51, 61-62 (1965) (Douglas, J., concurring).

<sup>22</sup>354 U.S. 436 (1957).

<sup>23</sup>*Id.* at 445.

<sup>24</sup>365 U.S. 43 (1961).

are invalid."<sup>25</sup> Subsequently, in *Freedman v. Maryland*,<sup>26</sup> however, particular features of a Maryland statute were challenged. There the Court found the prior restraint invalid because the absence of appropriate procedural safeguards produced a danger of undue suppression of protected as well as unprotected expression.<sup>27</sup>

The history of prior restraint consists primarily of statutory enactments that have infringed upon first amendment rights. Unprecedented, therefore, was the government's attempt in the Pentagon Papers case to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified study of United States policy decisions in Vietnam.<sup>28</sup> On the surface, at least, the decision in that case seemed to give the doctrine of prior restraint its greatest impetus in forty years. The Supreme Court, in denying the injunction, ruled that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" and that the United States had failed to carry its burden of showing justification for such restraint.<sup>29</sup> There were, however, six concurring and three dissenting opinions, and the exact legal principles of the decision are difficult to determine.<sup>30</sup>

Although the competing interests of governmental secrecy and first amendment freedoms were very similar in *Marchetti* and the Pentagon Papers case, the respective courts reached opposite conclusions. In the Pentagon Papers case there was no explicit statement as to why the government had failed to overcome the presumption against prior restraints, and the injunction was denied. In *Marchetti* no explicit statement can be found as to how the government met its heavy burden, yet the injunction was granted.

The Fourth Circuit relied upon three major factors in implicitly establishing that the presumption against prior restraint had been overcome. First, the court found that the Constitution,<sup>31</sup> Supreme Court

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<sup>25</sup>*Id.* at 47.

<sup>26</sup>380 U.S. 51 (1965).

<sup>27</sup>*Id.* at 60. The procedural safeguards required by the Court to accompany a system of prior submission to a censor included (1) placing the burden of proving the film is obscene on the censor, (2) assuring the right to a final judicial determination on the merits, and (3) prompt judicial review. *Id.* at 58-59.

<sup>28</sup>403 U.S. at 714.

<sup>29</sup>*Id.*

<sup>30</sup>Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971).

<sup>31</sup>U.S. CONST. art. II, § 2.

decisions,<sup>32</sup> and history<sup>33</sup> have clearly established the government's right to "internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest."<sup>34</sup> The court correctly noted that nothing in the Constitution requires the government to divulge information. The historical development of the use of "executive privilege" in refusing to disclose information to Congress can be justified on a separation-of-powers theory.<sup>35</sup> However, this theory collides with the view that sovereignty resides in the people, and that government may interfere with the people's "right to know" only when they consent, and that presidential power to withhold information from the public is truly a narrowly limited "privilege" and not a right.<sup>36</sup>

Secondly, the court considered the nature of the material Marchetti sought to disclose and determined that although "ordinary criminal sanctions *might* suffice to prevent unauthorized disclosure of such information . . . the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted."<sup>37</sup> In the Pentagon Papers case the government also argued that it had a right to secrecy and that disclosure of the information would be harmful.<sup>38</sup> Perhaps a distinction between the two cases can be found in the nature of the classified materials involved. In the Pentagon Papers case the information concerned a war which was a major national issue. The Supreme Court, therefore, may have felt especially compelled to allow such information to flow freely to the public. The Fourth Circuit may not have felt this same

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<sup>32</sup>*E.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936). There the Court recognized the paramount role of the President in foreign affairs and the need for secrecy in regard to information gathered by the President's "confidential sources." But the Court also said that this executive power, like every other governmental power, "must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320.

<sup>33</sup>466 F.2d at 1316. In enacting the Freedom of Information Act Congress recognized the need for secrecy and provided that "[t]his section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy . . ." 5 U.S.C. § 552(b) (1970). Exec. Order No. 10,501, 3 C.F.R. 306 (1972), established the classification system that is currently in use.

<sup>34</sup>466 F.2d at 1315.

<sup>35</sup>*See* Kutner, *Freedom of Information: Due Process of the Right to Know*, 18 CATHOLIC LAW. 50, 52 (1972).

<sup>36</sup>*See* Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667, 668-70, 770 (1959).

<sup>37</sup>466 F.2d at 1317 (emphasis added).

<sup>38</sup>403 U.S. at 732 (White, J., concurring).

sense of urgency in regard to Marchetti's material. Also, the Pentagon study covered decisions only up to the year 1968, while the classified materials in *Marchetti*, if the secrecy agreement is taken literally, concerned the "present and future security of the United States."<sup>39</sup>

The chief distinction between the two cases, however, probably lies in the court's third factor, the "position of trust and confidence" in which the government placed Marchetti.<sup>40</sup> "Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably [have implied] a secrecy agreement had there been no formally expressed agreement . . . ."<sup>41</sup> In the Pentagon Papers case there was no confidential relationship between the government and the newspapers involved. Had there been no such relationship in *Marchetti*, there is language in the Fourth Circuit's opinion which indicates that the injunction would not have been affirmed: "Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by *employees* and *former employees* of classified information obtained *during the course of employment*."<sup>42</sup>

The combination of these three factors enabled the government to overcome the heavy presumption against the constitutionality of its system of prior restraint. In balancing the governmental interest against the first amendment rights involved, however, the court had to consider whether a sufficient nexus existed between the secrecy interest and the means by which the government sought to protect that interest. The court found that it is reasonable for government agencies to protect internal secrets through secrecy agreements with employes.<sup>43</sup> Some support and authority for this view can be found in Justice Stewart's concurring opinion in the Pentagon Papers case.<sup>44</sup> He felt that since the President has the power to conduct foreign affairs and to maintain the national defense, his responsibility is to insure that the confidentiality necessary to carry out his duties receives protection.

The Fourth Circuit, however, did not base its determination that this system of prior restraint is reasonable solely on the President's

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<sup>39</sup>466 F.2d at 1312 n.1.

<sup>40</sup>*Id.* at 1313.

<sup>41</sup>*Id.* at 1316.

<sup>42</sup>*Id.* at 1316-17 (emphasis added).

<sup>43</sup>*Id.* at 1316.

<sup>44</sup>403 U.S. at 729-30.

inherent powers to preserve vital secrecy. The court said that "Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods."<sup>45</sup> Secrecy agreements as a condition of employment are "entirely appropriate to a program in implementation of the congressional direction of secrecy."<sup>46</sup> According to Justice White's concurring opinion in the Pentagon Papers case, an express congressional mandate would seem to be necessary: "[T]he United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these."<sup>47</sup>

Apparently the Fourth Circuit was satisfied that congressional authorization plus inherent executive power had combined to enable the government reasonably to require a prospective CIA employee to waive his first amendment rights. This sanction given to the employment contract may be usefully compared to the old and generally discredited right-privilege distinction.<sup>48</sup> The old notion was that government employment or the conferral of a government benefit was a privilege which the government could take away without affording any procedural due process. It has since been established that the termination of government employment cannot be based upon an exercise of first amendment rights by the employee.<sup>49</sup> Therefore, it seems arguable that the initial grant of government employment cannot be based on the surrender of first amendment rights.

The court insisted, however, that Marchetti, in signing a secrecy agreement, did not surrender his first amendment right of free speech.<sup>50</sup> "The agreement is enforceable only because it is not a violation of those rights."<sup>51</sup> Taken out of context, this statement could be interpreted as meaning that there is no first amendment right to speak about material which the government has designated as classified. But in the context

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<sup>45</sup>466 F.2d at 1316. 50 U.S.C. § 403(d)(3) (1970) reads: "[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure . . . ."

<sup>46</sup>466 F.2d at 1316.

<sup>47</sup>403 U.S. at 731.

<sup>48</sup>For a good analysis of the distinction and its constitutional implications, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

<sup>49</sup>*E.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

<sup>50</sup>466 F.2d at 1317.

<sup>51</sup>*Id.*

of the entire decision and in light of Justice Brennan's analysis of the nature of the classified material in the Pentagon Papers case,<sup>52</sup> the court seems to have held that it is not a violation of a person's first amendment rights to require that person to waive such rights as a condition of government employment when disclosure of the information to which the employee is exposed "may reasonably be thought to be inconsistent with the national interest."<sup>53</sup>

In order to insure that the prohibition on expression is kept to a minimum the court provided several safeguards. Feeling that undue delay would impair the reasonableness of the restraint, the court set thirty days as the maximum period in which the CIA should respond after submission of material for approval.<sup>54</sup> The court further provided that Marchetti, on his own initiative, could obtain judicial review of any CIA action disapproving publication.<sup>55</sup> It is certainly arguable that these safeguards are inadequate. The CIA needs only to indicate whether or not material submitted by Marchetti is classified. A few days would be more than a reasonable amount of time in which to make such a determination. And though judicial review may be obtained, there are no set time limits within which a decision must be handed down.

These inadequacies, however, are insubstantial when compared to the limitations placed by the court upon the scope of judicial review. "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, it had come into the public domain."<sup>56</sup> By imposing this narrow restriction upon the scope of review, the court has foreclosed any determination of whether such restraints prohibit the free and robust discussion of public issues and personalities which is necessary to the proper exercise of the people's function in the democratic process.<sup>57</sup>

Since the court will look no further than the classified stamp on the cover, material which may be merely embarrassing to a public offi-

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<sup>52</sup>Justice Brennan said that unlike obscene material, there was no question that the Pentagon Papers material was within the first amendment's protection. 403 U.S. at 726.

<sup>53</sup>466 F.2d at 1315.

<sup>54</sup>*Id.* at 1317.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 1318.

<sup>57</sup>This was the Supreme Court's main concern in *Near*. See text accompanying note 17 *supra*. Similarly, in the licensing cases, the Court feared that a licensing official might arbitrarily deny the license due to the content of the intended expression. See text accompanying notes 18-19 *supra*. This concern broadened in the obscenity cases, where the Court moved to prevent suppression of protected expression. See text accompanying notes 20-26 *supra*.

cial rather than essential to the national security or the sensitive aspects of foreign affairs may remain undisclosed. The CIA has been relieved of any burden of proving the necessity of the classification and prior restraint. This conflicts with Justice Brennan's view<sup>58</sup> that the first amendment tolerates no prior restraints predicated upon conjecture that untoward consequences may result. Accordingly, he urged that only allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea can support the issuance of even an interim restraining order.

The Fourth Circuit, however, is not without support for its determination that the process of classification is an executive function beyond the scope of judicial review.<sup>59</sup> An effective argument can be advanced that it would be extremely difficult to recognize the importance of a particular secrecy classification without knowledge of many other related secrets. "What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."<sup>60</sup> Yet the term "classified" is very broad, and the court has perhaps swung the balance too far in the direction of the governmental interest. More appropriate might be a requirement that the government show that disclosure of the material will "surely result in direct, immediate, and irreparable damage to our Nation or its people."<sup>61</sup>

Judge Craven has suggested a possible compromise.<sup>62</sup> A presumption of reasonableness in favor of the government classification should be established. The person challenging a classification would be required to demonstrate that it is arbitrary and capricious before it could be invalidated. This approach has the advantage of allowing inquiry into the classification process. It has the serious disadvantage, however, of shifting the burden of overcoming the heavy presumption to the person desiring to exercise his first amendment freedom of speech.

In perspective the *Marchetti* decision is an unprecedented movement toward the restriction of first amendment rights. It leaves open the possibility that Marchetti's exercise of free speech will depend solely

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<sup>58</sup>403 U.S. at 725-27.

<sup>59</sup>*E.g.*, *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970).

<sup>60</sup>466 F.2d at 1318.

<sup>61</sup>403 U.S. at 730 (Stewart, J., concurring).

<sup>62</sup>466 F.2d at 1318.

upon the discretion of an executive official. In view of this danger the recent denial of certiorari by the Supreme Court<sup>63</sup> is disappointing. Hopefully, the determining factor in the denial was that no attempt to restrain publication of specific material has yet been made.<sup>64</sup> If so, the Court, upon actual submission of material and denial of authorization to publish, could still determine that judicial review of the classification system is necessary for the protection of our cherished freedoms of speech and press.

KENNETH L. EAGLE

### Consumer Protection—Disclosure of Cognovit Provisions as Security Interests Under the Truth in Lending Act

The Truth in Lending Act,<sup>1</sup> which became effective on July 1, 1969, provides: "[I]t is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."<sup>2</sup> Pursuant to authority granted by the Act,<sup>3</sup> the Board of Governors of the Federal Reserve System has published Federal Reserve Board Regulation Z<sup>4</sup> to implement the purposes of the Act. Prior to the passage of the Truth in Lending Act, it was impossible for most consumers to purchase credit in any rational or intelligent manner.<sup>5</sup> The problem was not simply an inability to understand complex finance charges, for consumers were (and still are) often intimidated by the legalistic language that is so lavishly employed in both the large and fine print of loan instruments.

Creditors often retain security interests<sup>6</sup> within the body of loan

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<sup>63</sup>93 S. Ct. 553 (1972).

<sup>64</sup>McCormick, *Marchetti v. United States*, N.Y. Times, Dec. 30, 1972, at 21, cols. 5-6 (city ed.).

<sup>1</sup>15 U.S.C. §§ 1601-65 (1970).

<sup>2</sup>*Id.* § 1601.

<sup>3</sup>*Id.*

<sup>4</sup>12 C.F.R. Part 226 (1972).

<sup>5</sup>B. CLARK & J. FONESCA, *HANDLING CONSUMER CREDIT CASES 137* (1972) [hereinafter cited as CLARK & FONESCA].

<sup>6</sup> "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages,