Carter's Agenda: Secrecy

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By Anthony Lewis

BOSTON, Feb. 2—In the course of a lawsuit against Federal officials, the plaintiffs ask for certain documents. Government lawyers hand them over. They are not classified; experts have screened them and removed any security secrets. But the Government lawyers go to court and ask for an order forbidding the plaintiffs to make the nonsecret documents public.

Is that a scene from the lawyers' edition of "Alice in Wonderland"? No, it is a real-life event now taking place in Washington, D.C. And it repays some study, for it is a fine example of the waste of time and money and common sense so often involved in the business of government secrecy.

The suit in question was brought by ten individuals and seven organizations that were opposed to the Vietnam war. They have reason to believe that they were among the targets of various illicit surveillance programs—mail-opening, reading of cables and so on. They seek damages for invasion of their constitutional rights from present and former officials of the agencies involved.

Among the material sought in the usual discovery proceedings were documents describing Operation Chaos. This was the program started by the C.I.A. in 1967 in response to President Johnson's request to discover the extent of ties between American antiwar people and foreign governments or interests.

According to the Rockefeller Commission, Operation Chaos indexed 300,000 names, kept 13,000 subject files and obtained large numbers of intercepted letters and cables to or from the targets. The Rockefeller report said Operation Chaos, in piling up "large quantities of information on the domestic activities of American citizens," had "unlawfully exceeded the C.I.A.'s statutory authority."

Last Dec. 30, Government lawyers turned over 55 documents on Operation Chaos from C.I.A. files. In what was probably an excess of politeness, lawyers for the plaintiffs told Government counsel that they planned to tell the press what the documents said. The Government reacted by moving for a gag order. The motion should be argued shortly in the U.S. District Court in Washington..

The theory advanced by the Government is that disclosure of these nonsecret documents might harm the chance for a trial of this case "in an uncolored and unbiased climate." It points to a District Court rule barring lawyers from commenting on evidence, except by reference to "public records," if that might "interfere with a fair trial." And the Government lawyers say these documents are not yet part of the record.

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That argument should win the Jarndyce Award for legal ingenuity. If it were to succeed, the Government would have a wonderful way to keep unclassified documents secret during the months and years that such cases are usually in the courts.

In fact, the argument is not likely to succeed in the long run, because it conflicts with established principles of American law. Fair trial is a legitimate concern. But even in criminal cases it has to be balanced against the constitutional rights of free expression, and criminal trials are considered much more sensitive to prejudicial publicity than ordinary civil damage suits.

Just last June the Supreme Court unanimously struck down a gag order imposed on the press in a major test case in Nebraska. Chief Justice Burger said then: "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."

A case decided by the U.S. Court of Appeals for the Seventh Circuit in 1975 is even more to the point. The Chicago bar had proposed rules limiting what lawyers could say about pending cases. The court found the rules unconstitutionally severe, especially in regard to civil cases.

In our society, Judge Luther Swygert said, civil suits may involve important social issues and may be brought "for the very purpose of gaining information for the public." They often expose "the need for governmental action or correction," the opinion continued, and "such revelations should not be kept from the public." The plaintiffs' lawyer may be "the only articulate voice" on that side, Judge Swygert concluded; "we should be extremely skeptical about any rule that silences that voice."

But if the Government's argument fails in the long run it still may serve the purposes of delay and obfuscation during that run. What is needed to stop such tactics is not only more court decisions against secrecy but firm directions to Government lawyers that their interest should lie the other way: in openness.

One of Jimmy Carter's campaign pledges was to fight secrecy in Washington. He will find it an illusive enemy, lurking in the habits of bureaucracy and lawyers, thriving in inertia. If he really wants to fight it, he should designate someone in the White House to move quickly whenever the urge for suppression appears.