Repression By Lawsuit

By Anthony Lewis

BERKELEY, Calif., Feb. 15—On the White House tape of June 23, 1972—the one that finally forced his resignation—Richard Nixon told H. R. Haldeman why they could expect Richard Helms, the C.I.A. chief, to cooperate on Watergate. "We protected Helms from one hell of a lot of things," he said.

When the Senate Intelligence Committee asked what "things," Mr. Nixon described one episode. Mr. Helms had come to him about a book that a former C.I.A. employee planned to publish, he said, and he agreed to legal action against it. The problem was turned over to John Ehrlichman, who approved the C.I.A.'s legal strategy.

Those were the political origins of what some think was the worst defeat suffered by the First Amendment in recent years. Mr. Nixon's Department of Justice got an injunction against the former C.I.A. employee, Victor Marchetti. The C.I.A. censored his book. And Mr. Marchetti was ordered to clear with the agency before writing any more about its classified activities —for the rest of his life.

The dangerous precedent of the Marchetti case is now being invoked against another ex-C.I.A. man, Frank Snepp, and his book. This time the Justice Department is suing for a lifetime injunction *and* damages. That such a case has been brought at all is reason for concern. That it was brought by Jimmy Carter's Justice Department is reason for despair—or so it seems to one who thought this Administration had a commitment to civil liberty.

Mr. Snepp's book, "Decent Interval," is about the last days of the American presence in Vietnam. He details incompetence and deception on the part of United States officials and argues that they betrayed thousands of South Vietnamese who had cooperated with the C.I.A. or the American military.

Mr. Snepp took care not to disclose genuine secrets, such as the names of agents; in fact, the Director of Central Intelligence, Stansfield Turner, termed him "very circumspect." His book deals with Government policy and performance—which is surely expression of the kind the First Amendment was intended to protect.

But the C.I.A., and now the Justice Department, argue that what the book says does not matter, and neither does the First Amendment. That is because Mr. Snepp, like other employees of the agency, signed an agreement to say nothing about its classified work without getting its permission first. The Government suit claims damages from Mr. Snepp—all his royalties—for breaking the promise.

Why didn't Mr. Snepp submit his manuscript for review? If he could have expected C.I.A. censors to treat the book reasonably—to object only to disclosures that would really threaten grave security interests — then he would have had little excuse. But history gave him no reason to expect such restrained behavior.

In the case of the Marchetti book, the C.I.A. first tried to delete 339 passages—some of them of the most trivial character. One reported that Mr. Helms, in a meeting of the National Security Council, had mispronounced the name of the Malagasy Republic.

The decision in the Marchetti case, by the U.S. Court of Appeals for the Fourth Circuit, gave the C.I.A. almost complete censorship discretion. Agency officials did not have to prove any likelihood of actual harm to security if something was published, the opinion said. It was enough for them to show that an item had been classified, however technically. They were entitled to "a presumption of regularity."

Moreover, it took three years for the Marchetti case to wind its way through the courts. Thus Mr. Snepp, if he had submitted the manuscript, would have faced very great uncertainty about when or in what form the book could appear. The relevance of its criticism might have been lost.

Of course it is wrong to break a promise. But not every moral fault is legally punishable, or should be. The Government may use moral pressure, including secrecy oaths, to try to keep employees within desired bounds. But it does not follow that such promises are legally enforcible as "contracts." The Constitution limits what sort of oaths may be extracted from people, and enforced, as a condition of Government employment.

American freedom often depends on whistle-blowing by people who are not so nice. It may take a disaffected Deep Throat to expose the abuse of official power. And no one can doubt that there has been abuse in intelligence agencies.

Attorney General Bell, explaining the decision to sue Frank Snepp, said he just wanted to find out from the courts whether secrecy "contracts" were valid. But the Attorney General should not so glibly go to court when sensitive interests of free expression are at risk. As the late Alexander Bickel said, freedom is safer when we do not litigate such questions.

The C.I.A. naturally pressed for legal action against Frank Snepp. But it is the very function of the Attorney General to resist pressure of that kind unless he is convinced that the national security is imminently threatened. He has to have the courage, and the wisdom, to say no.

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