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81-08290

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH W. MC GEHEE, and THE NATION,

Plaintiffs,

v.

WILLIAM CASEY, Director of Central Intelligence,

Defendant.

Civil Action No. 81-0734

FILED

SEP 25 1981

JAMES F. DAVEY, Clerk

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is before the Court on the parties' cross motions for summary judgment. The plaintiffs seek an Order from this Court directing the defendant, the Director of the Central Intelligence Agency ("CIA"), to permit plaintiffs to publish the censored portions of plaintiff McGehee's article or, in the alternative, finding that such censorship is not a constitutionally sufficient standard to justify prior restraint. For the following reasons, the Court finds that the defendants have properly censored portions of the article.

BACKGROUND

Plaintiff Ralph W. McGehee was employed by the CIA between February, 1952, and February, 1977. (Complaint ¶ 3). Upon beginning and ending employment with the CIA, and as a condition thereof, McGehee executed certain written agreements which provided that he is obliged to submit to the CIA for pre-publication review all writings that contain information concerning the CIA which he learned during the course of his employment with the agency. (Complaint ¶ 6). On March 20, 1981, McGehee submitted to the CIA for pre-publication review a twelve-page draft article entitled "CIA Operations in El Salvador." (Complaint ¶ 10). Upon review of the article, the CIA informed McGehee on March 24, 1981, that it would censor certain portions of his article. (Complaint ¶ 15). On March 26, 1981, McGehee submitted the censored version of his article to The Nation. (Complaint ¶ 17).

OGC Has Reviewed

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The Nation decided to publish the censored version in its April 3 issue. (Complaint ¶ 18). McGehee and The Nation now seek to publish the censored portions of the article and have thus applied to this Court for relief. (Complaint ¶ 19).

ANALYSIS

It is clear that McGehee's promise not to divulge classified information without authorization and not to publish any information relating to the CIA without pre-publication clearance was an integral part of his employment. The effect of that agreement was enunciated in the recent Supreme Court case of Snepp v. United States, 444 U.S. 507, 509 n.3 (1980), wherein the Court stated:

> --even in the absence of an express agreement--the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. CSC v. Letter Carriers, 413 U.S. 548, 565 (1973); see Brown v. Glines, ante, p. 348; Buckley v. Valco, 424 U.S. 1, 25-28 (1976); Green v. Spock, 424 U.S. 828 (1976); id., at 844-848 (Powell, J., concurring); Cole v. Richardson, 405 U.S. 676 (1972). The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. See infra, at 511-512. The agreement that Snepp signed is a reasonable means for protecting this vital interest.

See Knopf v. Colby, 509 F.2d 1362, 1370-71 (4th Cir.) cert. denied, 421 U.S. 992 (1975).

Where it is found that the CIA may censor any information about itself, the critical question is whether that information has been properly classified and thus subject to censorship. The authority upon which the CIA censors information is found in Executive Order 12065, 3 C.F.R. 190 (1979). Pursuant to that executive order §1-301, information may not be considered for classification unless it concerns:

(a) military plans, weapons, or operations;

(b) foreign government information;

(c) intelligence activities, sources or methods;

(d) foreign relations or foreign activities in the United States;

(e) scientific technological or economic matters

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> (f) United States Government programs for safeguarding nuclear materials or facilities; or
>
> (g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.

The plaintiffs argue that the information has been improperly classified and, thus, release must be mandated. The Court does not agree. A de novo review of the documents submitted for in camera inspection shows that the defendants had in fact properly classified the documents and were warranted in their censorship. The censored information falls within the purview of one or more of the following:

> (1) foreign government information [§1-301(b)];
>
> (2) CIA foreign intelligence capabilities, activities, sources or methods [§1-301(c)]; and
>
> (3) foreign relations or foreign activities of the United States [§1-301(d)].

In determining whether the documents were properly classified, the Court notes that:

> [t]here is a presumption of regularity in the performance by a public official of his public duty. The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.

Knopf, Inc. v. Colby, 509 F.2d 1362, 1368 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

A review of the in camera affidavits submitted by both parties fails to persuade the Court that any other result would be appropriate. Moreover, the rationale of the CIA preclearance was articulated by the Supreme Court in Snepp v. United States, 444 U.S. 507, 512 (1980) wherein the Court stated:

> [w]hen a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA - with its broader understanding of what may expose classified information and confidential sources - could have identified as harmful.

Accordingly, this Court must exercise judicial deference to the administrative expertise.

Plaintiffs also assert that the defendants have failed to comply with the requirement of E.O. 12065 that agencies

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balance the public interest in disclosure against the need to protect information relating to the national security. Section 3-303 of the Executive Order states:

> 3-303 It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

However, by its terms, this provision places discretion with the appropriate agency head to determine when balancing is required and then to do the balancing. Andres v. CIA, No. 80-0865, (D.D.C. April 28, 1981). Further, the record is clear that this balancing has been performed by the appropriate officials.

Based on the foregoing, the plaintiffs' motion must be denied. An Order in accordance with the foregoing shall be issued of even date herewith.

Charles R. Richey
United States District Judge

Dated: September 25th, 1981.

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JAMES E. DAVEY, Clerk

ORDER

In accordance with the Memorandum-Opinion issued of even date herewith, it is, by the Court, this 24th day of September, 1981,

ORDERED that plaintiffs' motion for summary judgment is hereby denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment is hereby granted; and it is

FURTHER ORDERED that the complaint herein be, and the same hereby is, dismissed.

Charles R. Richey
United States District Judge

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