

*Jimmy Carter is proposing  
a new secrecy order that is even  
worse than Richard Nixon's.  
And Congress is threatening  
to give it real teeth.*

# TOWARD AN OFFICIAL SECRETS ACT

By DAVID WISE

**T**HROUGHOUT THE LONG, hot summer of 1977, a group of middle-level officials of the Carter administration from the Pentagon, the CIA, the State Department, and other agencies labored, in secrecy, in the offices of the National Security Council across the street from the White House. Their task was to revise the government's system for keeping secrets.

By September, the group's efforts had materialized in the form of a 32-page draft entitled "National Security Information and Material." It was designed to replace the existing executive order on classification and secrecy, issued in 1972 by Richard Nixon.

For those who had hoped that in the post-Vietnam, post-Watergate era, a president dedicated to open government would substantially reduce the mountains of rubber-stamped secret paper generated daily in Washington, the draft order came as a bitter disappointment. Nine organizations, including the American Civil Liberties Union, Common Cause, and Ralph Nader's Public Citizen Litigation Group, joined forces to deliver a sharp critique to the White House. The Carter draft was not appreciably different from the Nixon order, the groups said;

in several respects it was "even worse."

The criticism from the president's Democratic colleagues on the Hill was more muted, but no less disapproving. Richardson Preyer, the soft-spoken southern gentleman from Greensboro, North Carolina, who is chairman of the House subcommittee on government information, took the floor and pronounced the proposed order "weighted toward secrecy," and "notably deficient in detecting and correcting abuses of the system." Moreover, said Preyer, the draft order contained some provisions that would have the effect of "promoting secrecy, rather than openness." Senators Joseph R. Biden, Jr., of Delaware, and Edmund S. Muskie of Maine, who head subcommittees studying the classification system, wrote a joint letter to the president. The Carter draft, they concluded, signified "business . . . as usual." One Senate committee aide put the matter more succinctly. "The draft order," he said, "was a disaster."

Despite these expressions of dismay, the Carter draft—since revised in preparation for the president's signature—should not have come as any great surprise. John H. F. Shattuck, director of the Washington office of the ACLU, noted that "early in 1977, during the Hussein flap, the first signals came out from the administration indicating that they would go the wrong way on secrecy." Those signals were emitted in February of last year, less than a month after President Carter

took office, when Bob Woodward reported in the *Washington Post* that the CIA had paid Jordan's King Hussein millions of dollars over a 20-year period.

Carter's reaction was to defend the CIA ("I have not found anything illegal or improper") and to warn that such leaks can be "extremely damaging to our relationship with other nations." The president also said he was "concerned about the number of people who now have access" to government secrets. Soon afterward, Carter told a news conference he wanted "tighter control over the number of people who have access to material that's highly sensitive. . . . We've already initiated steps to that degree. And we'll be pursuing it."

From the start, therefore, Carter adopted a classic pro-secrecy position, consistent with that of his modern predecessors and oddly insensitive, not only to his own campaign promises, but to the lessons of recent history.

For it is largely through the system of official secrecy, embodied in executive orders issued or enforced by the last seven presidents, that the government has all too often been able to mislead the American people and to conceal important foreign policy information from the public. In the case of the Vietnam War, the dimension of the deception was revealed by the publication of the Pentagon Papers, which had been classified "Top Secret-Sensitive." The Nixon administration reacted by at-

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tempting to restrain the publication of the Pentagon Papers and by indicting and harassing the former official who had leaked them, Daniel Ellsberg.

Watergate brought dozens of new examples of how the government had used official secrecy to conceal high crimes and misdemeanors. The logs of the Nixon-Kissinger wiretaps of 17 White House aides and reporters were, for example, classified "Top Secret, Group 1." At one point Nixon and his advisers even attempted to classify a burglary. On the White House tapes, it is suggested to Nixon by John Dean that the burglary of Ellsberg's psychiatrist might be explained on national security grounds. "National Security," Nixon exclaims. "We had to get the information for national security . . . the whole thing was national security."

"I think we could get by on that," Dean replies.

In the wake of Watergate, the hearings of the Senate Intelligence Committee headed by Senator Frank Church revealed a horrendous series of abuses by the CIA and the FBI, ranging from assassination plots to drug and mind-control experiments, to break-ins, wiretaps, and illegal mail openings. These, too, were more often than not concealed behind secrecy stamps, the better to be hidden from the American people. Or sometimes from other bureaucrats. Former CIA director Richard Helms, who recently joined the long line of former federal officials convicted of crimes, but who will not, thanks to a plea bargain, have to wear his badge of honor in Allenwood or Lompoc, testified to the Church committee in 1975 that the presidential order requiring the destruction of the CIA's deadly shellfish toxin and cobra venom might not have been shown to the appropriate CIA official (who failed to destroy them) because the order, a National Security Council Decision Memorandum (NSCDM), had been classified "Secret."

**A**LTHOUGH THE SECRECY system was used to conceal vital information from the public during Vietnam and Watergate, and to mask the abuses of constitutional rights by the intelligence agencies, there remains a strong reservoir of support for secrecy within the bureaucracy, which is secretive by nature; in Congress; and among the many members of the public who tend to equate secrecy with national security. It is an issue on which it is easy "to manipulate

public opinion," Shattuck points out. "The abuse of power brought out by the Church committee is not related by most people to the issue of secrecy. People shocked by abuses are not shocked by secrecy."

Although the abuses of the classification system are well known by now, overclassification of national security information remains a way of life in Washington, with "Top Secret" authority a badge of prestige among the policy makers. (In the intelligence world, there are even many

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classifications *above* Top Secret, the very names of which are themselves classified. Access to these rarefied, Special Intelligence categories carries even greater prestige.)

According to figures compiled by the Preyer subcommittee, the executive branch classified 4.5 million documents in 1976. But since a document is often many pages long, the subcommittee staff estimates that the number of classified pages could easily be 10 times greater, or 45 million pages. I have estimated there may be as many as 100 million classified documents in active government files. But nobody really knows. The Pentagon's chief classifier told the House government information subcommittee a few years ago that the Defense Department had more than a million cubic feet of classified documents—the equivalent, if stacked high, of 2297 Washington monuments. The oldest of these was a 1912 war contingency plan.

Ludicrous examples of classification abuses abound. During World War II, the Army actually classified the bow and arrow; it was included in a report on "silent flashless weapons." During the Eisenhower administration, the

Pentagon classified the fact it was sending monkeys into outer space, although one of the macaques was on full view at the Washington Zoo, along with a plaque informing visitors that he had soared to a height of 200,000 feet. Even Richard Nixon, whose devotion to secrecy was indisputable, complained that the menus for the official dinners for visiting heads of state arrived at the White House stamped "Top Secret." And secrecy costs the public literally hundreds of millions of dollars a year; a 1972 study by Congress's General Accounting Office concluded that the Pentagon and three other departments alone spent \$126 million annually on classification and related security.

**A**LTHOUGH VARIOUS SEcrecy labels have been used by the military throughout American history, it was not until 1951 that President Truman issued the first executive order extending a formal system of secrecy to civilian departments of the government. The Truman order allowed *any* agency to classify national security information. Two years later, Eisenhower issued a revised executive order that provided the basic framework for the current system. Kennedy added provisions for declassifying some documents. Then in 1972, in the wake of the controversy over the Pentagon Papers, Nixon issued a new executive order. While it made a number of changes, it did not depart drastically from the basic secrecy structure.

The Nixon order retained the three standard security stamps—Top Secret (for information which, if disclosed, "could reasonably be expected to cause exceptionally grave damage to the national security"); Secret (for which the phrase is "serious damage"), and Confidential (just plain "damage"). Nixon's order created something new, a General Declassification Schedule, or conveyer belt, that permitted some Top Secret documents to be declassified automatically after 10 years. But documents could be exempted from the conveyer belt and never placed upon it for any one of four reasons, the third of which, "essential to the national security," was so broad as to permit continued secrecy whenever it suited the classifier. Nixon's order also provided that an exempt item might be reviewed for possible release after 10 years, provided a citizen could describe the document in sufficient detail as to en-

able the department to find it easily—a neat trick for a document that is secret in the first place. Finally the Nixon order called for declassification of “all” documents after 30 years—except for those “essential to the national security.” The bottom line was that if the government wished to keep a document secret, it could do so forever.

Against this background, the Carter administration’s secrecy managers began meeting last summer to hammer out a new executive order. The inter-agency ad hoc committee was formed in response to a PRM (pronounced “prim”), or presidential review memorandum, issued on June 1. The members included representatives of the NSC, the Defense Department, the Joint Chiefs of Staff, the CIA, the State Department, the Energy Research and Development Administration, the Justice Department, the Office of Management and Budget, the president’s domestic policy staff, the Interagency Classification Review Committee, and the code-breaking National Security Agency (which, as a subunit of the Defense Department, sat as an observer with no vote).

“Once it was decided which agencies would be asked to draft the secrecy order,” said one disenchanted participant, “the outcome was settled.” It became rapidly clear that among the drafters only a Gang of Four advocated major surgery on the existing classification system. They were Rick Neustadt, of Carter’s domestic policy staff, Eric Hirschhorn, of OMB, Newal Squyres of Justice, and James O’Neill of the National Archives. Arrayed against them were the veteran classifiers whose bureaucratic interests traditionally favor secrecy—Arthur F. Van Cook, the deputy assistant secretary of defense for security policy, Donald Paschal and William Allard of the CIA, Robert W. Wells of the ICRC, and Robert Gates and Gary Barron of the NSC.

Some of the traditionalists did suggest improvements in the Nixon order; the Pentagon’s Van Cook, for example—much to the dismay of the CIA—successfully insisted that the Carter draft require classifiers to indicate which portions of documents actually contain classified data. In general, however, the national security agencies opposed anything more than cosmetic changes. “A president who wanted openness,” said one observer, “set the cat to guard the cream.”

The Gang of Four received some informal advice from Morton H. Halper-

in, a leading opponent of government secrecy and himself a victim of the Nixon-Kissinger classified wiretaps. But it was a losing struggle, with the results preordained.

The proposed executive order somehow escaped the administration’s *diktat* requiring clarity of language in government documents. It was an almost incomprehensible maze, crafted in insurance-policy prose. Boiled down, however, the draft order retained the three traditional levels of classification and required that documents be de-

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classified within six years (instead of within 10, as under the Nixon order). But then came the exceptions: When there is a “need, directly related to the national security,” documents may, after all, be classified beyond six years, in fact up to 20 years. After that, agency heads may continue to extend the classification of many documents for any number of 10-year periods. Thus, the bottom line of the Carter draft, as in the Nixon order, was that the government could keep a document classified indefinitely.

There were, of course, some improvements in the Carter draft: Six years is less than 10, and unlike the Nixon order, which required a citizen to wait 10 years before requesting a document, the Carter draft permits a member of the public to request a classified document at any time. Whether he gets it or not is another matter.

The Carter draft also eliminated the General Declassification Schedule—the Nixon conveyer belt—because, according to Rick Neustadt, the four criteria for exempting information from the conveyer belt were so broad as to invite evasion. “The four reasons were

meaningless,” he said. “XGDS (Exempt from the General Declassification Schedule) is now a rubber stamp.” There is some statistical support for Neustadt’s argument; in 1976, according to the partial data available, 60 percent of classified documents never got on the automatic declassification conveyer belt.

Overall, the ACLU’s Shattuck found the Carter draft “worse than the Nixon order” in a number of important respects. Not the least of these was a provision encouraging government agencies to require secrecy agreements from their new employees. Typically, these agreements require employees never to disclose classified information learned on the job. The CIA used such an agreement to censor the book *The CIA and the Cult of Intelligence*, co-authored by Victor Marchetti, a former CIA official, and John Marks.

In all, the White House was deluged with 504 comments on the Carter draft, which had been circulated informally to interested groups and individuals and to the appropriate congressional committees. The ad hoc committee went back to the drawing board, with the work of rewriting the draft order coordinated by Neustadt and Bob Gates of the NSC staff.

Sometime early this year, perhaps in February, the revised draft is expected to be ready for the president’s review and signature. The drafters indicated that they would take into account some of the comments received from outside groups, tighten the language of the order, and remove a number of ambiguities. But no one predicted radical revisions; unless Carter suddenly shifts his stance, the prospect is that the secrecy system imposed on the public at the height of the Cold War will continue without any really meaningful change.

**B**UT AS THE DEBATE OVER the new Carter order recedes, a more ominous prospect may gradually be coming into focus—secrecy legislation that would establish classification categories by law and replace the existing system.

The presidential executive orders on secrecy in effect since the Truman administration are just that—executive orders that apply to employees of the federal government but not to the press or others outside the government. Yet such is the mystique of “national security” and the words “Top Secret,”



that the average citizen—even many news reporters—would hesitate to accept such a document from an official. But the law does not, in general, prohibit the possession or publication of classified information as such.

The nation's espionage laws were originally passed in 1917 to catch German spies. They were not meant to catch newspaper reporters or government officials who leaked information to the press. In general, therefore, the espionage laws refer not to classified information but to information "relating to the national defense." When the government seeks to use the espionage laws to enforce the classification system and punish leakers, it must prove that a particular classified document fits the definition contained in the law. It is not enough to show that a bureaucrat has stamped the document. (The only narrow exceptions to this are sections of the law prohibiting the unauthorized use of "classified information" about codes or communications intelligence, or the passing of classified information by a government official to foreign agents or Communists.)

There is, in short, a gap between the classification system and the espionage laws. If it were otherwise, if the leak to the press of a classified document, for example, were automatically a crime, the government would be tempted to classify everything, and its control over information affecting our lives would be total. Over the years there have been pressures, particularly by the CIA, to close this gap and build a bridge between the classification system and the spy laws, so that unauthorized possession of classified information would create automatic guilt.

This was precisely the concept embodied in S.1, the bill to revise the entire federal criminal code, as it was introduced by the late Senator McClellan in 1975. Until the offending provisions were eliminated in the spring of 1976, the bill contained language making it a crime for officials to transmit "classified information" to unauthorized persons, such as journalists. When reintroduced as S.1437 in the 95th Congress last May, the bill omitted this provision and simply left intact the existing espionage laws. The bill, and a companion measure in the House, is before the Congress this year. By general agreement, no attempt to revise the espionage laws is now likely in the course of revising the federal criminal code. But the issue is merely dormant; in time, Congress will undoubtedly consider changing the

antiquated spy laws, which are admittedly a hodgepodge of ambiguities.

The CIA, meanwhile, has continued to espouse legislation to make it a crime to leak classified intelligence information. Then, in prosecuting cases, the government would have to do no more than prove that the information in question was rubber-stamped as intelligence data. As a CIA legal study a decade ago admiringly put it, such a law "would be a step in the direction of 'crown privilege,' which is the basis of the British Official Secrets Act."

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In 1976, at the urging of the CIA, President Ford sponsored just such a bill: In addition to outlawing intelligence leaks, it provided for federal court injunctions whenever the CIA suspected that a present or former government official was about to publish something it did not like. Under the proposed law, Victor Marchetti could have published only at the risk of going to jail; and it is unlikely that former CIA agent Frank Snepp would have dared to publish his recent book, *Decent Interval*, accusing the agency of abandoning its allies in Vietnam. And under such a law, the chances would be greatly reduced that a CIA official would risk telling a Seymour Hersh about the agency's illegal domestic spying.

In an executive session of the Senate Intelligence Committee on February 22 of last year, President Carter's CIA director, Admiral Stansfield Turner, replied "Yes, sir" when asked if he favored criminal penalties for leakers of sensitive information. At a breakfast meeting with reporters a few weeks later, he spelled out his support of criminal sanctions for those who disclose classified information. But Vice President Mondale was by then on rec-

ord as opposed to criminal sanctions for leakers. Carter, seeming to side with Mondale, declared he would like to "minimize" (but he did not necessarily rule out) the use of criminal penalties for the disclosure of classified information.

Admiral Turner backpedaled somewhat after that, but the idea cannot be far from his thoughts these days, what with "Beat Navy" graffiti sprouting on the walls of Langley as a result of those curt dismissal notices he sent to some 800 clandestine CIA officers. The fear in the CIA is that Turner may have 800 Frank Snepps on his hands, at least some of whom may decide to sell their memoirs to New York publishers.

**P**RESSURE FOR TIGHTER secrecy legislation is not surprising when it comes from the CIA or the Pentagon or the NSA. What is perhaps more alarming is that—in a misguided reaction to the Carter draft—some liberals and moderates, who genuinely favor a greater flow of information to the public, are now talking about the need for secrets legislation in place of the current system of classification by executive order. For example, Senators Biden and Muskie concluded their letter to the president by declaring: "We view the draft executive order with reservations as to its ability to carry out your objectives for openness. Rather, it seems to underscore the need for the enactment of a legislative basis for the classification system. . . ." (Emphasis added.)

Similarly, Congressman Preyer praised and placed in the record a memo by the staff of the House government information subcommittee. The memo concluded that in the absence of a better executive order, the subcommittee should consider a secrets bill "to provide a security classification system by statute."

Preyer says he has not made up his mind on the issue, "but it does seem a statutory basis might be desirable." He added: "I think we'll want to hold hearings. There isn't any statutory basis for an executive order on classification. It's just based on the president's general powers as conductor of foreign affairs." In considering the subcommittee's course of action, Preyer may be influenced by the panel's conclusions after its series of hearings on secrecy in 1971 and 1972. The subcommittee, then headed by Representative William S. Moorhead of Pennsylvania,

strongly recommended a secrets bill to establish a classification system by statute, a recommendation endorsed by the parent House government operations committee.

Senator Biden's subcommittee on secrecy, disclosure and classification, a unit of the Senate Intelligence Committee, is also charged with studying the secrecy issue. Its official responsibility is "to frame statutes" and encourage the development of executive branch regulations defining what is and what is not "a legitimate national secret." Any secrets bill would also have to be considered by Senator Muskie's subcommittee on intergovernmental relations. The subcommittee's counsel, Jim Davidson, does not perceive "a lot of momentum" for secrets legislation at present.

New impetus for secrecy legislation has come, however, in a recently published book, *Top Secret: National Security and the Right to Know*, by Morton Halperin and Daniel N. Hoffman. Halperin argues that the presidential secrecy system simply hasn't worked. He advocates a law that would, in general, classify details of advanced weapons systems, military operations, diplomatic negotiations, and intelligence methods. All other information would be made public unless officials decided the damage to national security outweighed "the value of the information for public debate." Halperin's proposal also includes a review board to administer the new system.

Secrets legislation has been introduced in the past; in 1973, for example, Representative Moorhead sponsored a bill to control classification and to establish a review board. Senator Muskie has also previously introduced legislation to create a disclosure board to manage the nation's secrets.

There is, however, no assurance that in legislating secrecy, Congress might not create a more restrictive, rather than a more open system. One has only to recall the actions of the House in voting to suppress the Pike committee report, which documented widespread intelligence agency abuses and would never have seen the light of day without the intervention of Daniel Schorr.

But an even greater danger in the proposals for a secrets bill is that Congress will attach criminal sanctions for violations of that law. Even if such sanctions were not initially part of the law, they could easily be added on at a later time. Congress does not often create laws without penalties for breaking

them. "I don't think I have ever seen a prohibition law with no sanctions," the ACLU's John Shattuck noted. "I think legislation would be a mistake. It would be more binding and more chilling than an executive order."

A review board, usually included in proposals for a secrecy law, could easily become a board of censors. If such a board were created by statute, and a *New York Times* reporter received some future equivalent of the Pentagon Papers, he might well be under strong pressure, perhaps even from his own editors, to clear the material with the board before publishing it.

The danger of such legislation, in short—however much its sponsors are dedicated to freedom of information—is that it could create something like a British Official Secrets Act in America.

The British act is sweeping in scope. It prohibits officials of the crown from communicating *any* information to unauthorized persons, even if the information does not relate to national security. It also bars unauthorized persons from receiving official information. If Congress enacted a secrets bill with criminal sanctions, it would thus parallel the British act, at least in the area of classified information.

Covering diplomatic or military affairs in Washington is only possible if reporters are able to talk freely and confidentially to their sources. Even if an American secrets bill contained only administrative penalties—such as suspension, fines, or dismissal for employees who leaked classified information to the press—the law would undoubtedly have a chilling effect on the flow of information to the governed. The Nixon order already directs department heads to take "prompt and stringent administrative action" against leakers, and the Carter draft even spells them out ("reprimand, suspension without pay, removal, or other sanction"). But including these provisions in a law would be certain to an even greater degree to inhibit "whistleblowers"—officials determined to expose corruption or other government wrongdoing—or others who might be inclined to talk to the press. It might even encourage the government to bring suits for money damages against employees who leaked.

There is a good deal of hypocrisy about secrecy. The same government officials who protest the loudest about leaks of sensitive information do not hesitate to release classified data when

it suits their policy purposes. Indeed, the entire secrecy system remains a sham as long as official "authorized" leaks occur daily, and as long as presidents and lesser officials continue to use classified information in their memoirs. At present, classified information denied to the American people when it is relevant to their welfare is later being sold to them between hard covers by their elected or appointed officials. A lot of declassification seems to take place on the way to the bookstore.

**I**F SECRECY REFORMS CANNOT be achieved by executive action, there may nevertheless be a certain virtue in the untidiness of the present system. At least there is not now any general, across-the-board statute providing that the leaker of classified information go to jail. All that could change, however, if Congress decides to legislate secrecy.

A more useful area of congressional action—although, again, not without risks—would be the revision of the outmoded espionage laws to make clear that they apply only to spies, with intent to injure the United States, and not to officials who tell secrets to reporters. It is true that up to now, no official who has leaked a classified document to the press, and no reporter who has published one, has been convicted of a crime. But the government *could* attempt to apply the espionage laws to officials and reporters at any time. It did so in the Ellsberg case; less well remembered is the fact that a federal grand jury also investigated, but did not indict, Neil Sheehan, the *New York Times* reporter who obtained the Pentagon Papers.

There is, unfortunately, no simple formula for ending the secrecy mess. Nor are the prospects encouraging. Six years after the government sought to suppress the Pentagon Papers, reporters and their sources still risk prosecution for espionage; a president who campaigned for open government has apparently opted for secrecy as usual; the CIA wants to jail leakers; and some liberals, in exasperation, are pushing for a legislative solution that could, ironically, metamorphose into an Official Secrets Act. It was Nixon's lie that he covered up the Watergate burglary for reasons of national security that ultimately forced his resignation. But there is small comfort in this. The nation seems not to have understood the lesson.

**DISPATCHES, by Michael Herr. Alfred A. Knopf, 260 pp., \$8.95.**

## Vietnam as literature

PHILIP CAPUTO

**T**HE VIETNAM WAR MAY have been the most documented conflict in our history. The number of words written about it in books and articles probably exceeds by several million all the bullets, bombs, and shells expended in it. To the printed word one would have to add the reports and commentaries broadcast on television and radio: thousands of scripts, miles of film footage. Almost all of the chronicling has been done by journalists and is therefore characterized by the quality that ultimately distinguishes journalism from art, namely, timeliness as contrasted to timelessness. Certainly the very best of these works, books like Frances Fitzgerald's *Fire in the Lake* and C. D. B. Bryant's *Friendly Fire*, as well as documentaries like *A Face of War*, will have a fairly long life. It's my opinion, however, that their considerable merits are informational rather than artistic in nature. They tell us about Vietnam, or some aspect of it, but they do not show us war itself; nor do they seek to find in the Vietnamese conflict those truths that can be found in all wars.

Considering all the books written about the Indochina disaster, it's time to distinguish between those that are literature and those that are not. I'm getting rather tired of hearing, each time a new Vietnam book comes along, phrases like "it tells us what it was really like." By this time we all know what "it was really like": it was really

awful. In that sense Michael Herr's *Dispatches* tells us nothing new—but that isn't important. What's important is that Herr shows us what war is like, that he tells the old, old story of men at war in a way that transcends the present and touches the universal. And Herr, though he was in Vietnam as a correspondent for *Esquire*, is more an artist than a journalist.

The everlasting truths about com-

bat—death, the mystical bond of comradeship, the strange joy young men feel before their first experience of battle, the terrible loss of youth they suffer after they've experienced it, fear and the capacity of the human spirit to overcome it—have traditionally been best expressed in poetry and fiction. Occasionally an intensity and truth of emotion equal to the best novels has been achieved by factual memoirs. Most of these were products of that most appalling of all conflicts, World War I. Here I'm thinking of Guy Chapman's *A Passionate Prodigality* and Robert Graves's *Goodbye to All That*, both of which will last a very long time. In American nonfiction, Mark Twain's satiric account of his brief, absurd service as a Confederate irregular, *The Private History of a Campaign That Failed*, is still as true to life as it was when written a century ago.

The Vietnam War has, for some rea-



NORMAN COHEN

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