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Frederick W. Whatley

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CASE COMMENT: *SNEPP V. UNITED STATES*

FREDERICK W. WHATLEY*

January 5, 1976—A book was published in East Germany in 1968 listing the names of scores of covert Central Intelligence Agency operatives, including that of the late Richard S. Welch, the CIA Chief of Station in Athens, who was murdered there last month . . . . William E. Colby, the Director of Central Intelligence, has suggested along with a spokesman for President Ford that the naming of Mr. Welch in the current edition of *Counter-Spy* had been a factor contributing to his death.[1]

December 10, 1979—For most of its 190-year history, the U.S. Supreme Court has worked behind Washington's most tightly closed doors, its deliberations largely immune to the kind of close public scrutiny visited on presidents and Congresses. But even that last sanctuary has now been massively breached in a new book, "The Brethren," by old Watergate hands Bob Woodward and Scott Armstrong. The results are, mildly put, provocative for the Court and the nation. In two years of backstairs reporting, the authors have assembled an unflattering group portrait of the Justices *in camera*, shading votes, doing deals, cultivating allies, nursing enmities, intriguing where reason fails, united most visibly by their high esteem for the Court—and their low personal and professional regard for its incumbent Chief Justice . . . . Supreme Court clerks—honors law graduates who serve as confidential aides for one term—did more than talk. Some apparently handed over reams of internal Court documents, including draft opinions and internal memoranda charting the Court's most private affairs. . . . Included in the hemorrhage was a detailed 77-page secret study of the Nixon tapes case prepared for Justice William J. Brennan Jr. According to Woodward, since Brennan was appointed to the Court in 1956, he has assigned clerks to prepare behind-the-scenes histories of the Court's cases. Brennan keeps them locked in his safe and intends, Woodward says, to leave them to his grandchildren—but his Watergate chronicle found its way to Woodward and Armstrong.[2]

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[1] N.Y. Times, Jan. 5, 1976, § A, at 3, col. 1.

[2] NEWSWEEK, Dec. 10, 1979, at 76, 78-79.

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> *February 6, 1980*—Phillip Agee, a former agent of the Central Intelligence Agency, faced legal moves against him in two Federal courts today as the Justice Department sought to block him from publishing a second book critical of the CIA. . . .
>
> Government lawyers said that advertisements for the book announced "an intention to expose hundreds of undercover CIA employees stationed in Africa. . . ." They argued that Mr. Agee, who is said to have already disclosed the names of about 1,000 agents, had signed a secrecy agreement before joining the agency in 1957 and that his actions were a threat to national security. . . .[3]

ON FEBRUARY 19, 1980, THE SUPREME COURT HANDED DOWN ITS DECISION in the case of *Snepp v. United States*.[4] The Court based its decision on the writs of certiorari filed by Snepp and the government. There were no briefs or oral arguments on the merits of the case.[5] The above quotes serve as more than a mere backdrop to the *Snepp* case. Whether the decision was rendered out of a concern that the actions of persons such as Mr. Agee may lead to the deaths of Central Intelligence Agency (hereinafter sometimes referred to as CIA) operatives, such as Mr. Welch's murder, whether it was a reaction to the breach of the Supreme Court's confidentiality, or whether, as is most probably the case, the decision was based upon a combination of these concerns, it is clear that the decision did not adhere to applicable legal principles, nor did it follow the precedents of similar cases.

I. INTRODUCTION

A. *Background of the Case*

Mr. Frank Snepp was an employee of the Central Intelligence Agency[6] for approximately eight years. As a condition of his employment with the CIA, Mr. Snepp, in 1968, signed a secrecy agreement. The agreement basically stated that Mr. Snepp would not publish or participate in the publication of any information or material concerning the CIA or CIA activities without first submitting the material to the CIA for prepublication review.[7] Upon his resignation in 1976, Mr. Snepp signed a

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[3] N.Y. Times, Feb. 6, 1980, § A, at 17, col. 6.

[4] Snepp v. United States, 444 U.S. 507 (1980).

[5] Petition for Rehearing, at 1, Snepp v. United States, 444 U.S. 507 (1980).

[6] The Central Intelligence Agency [hereinafter sometimes referred to as CIA] is an integral component of the United States' national security program in the foreign intelligence field. The CIA exists and is regulated pursuant to 50 U.S.C. §§ 401-05 (1976).

[7] In pertinent part, the Agreement provided as follows:
Secrecy Agreement
1. I, Frank W. Snepp, III, understand that upon entering on duty with

termination agreement. In this agreement, Mr. Snepp promised, among other things, not to publish any classified information or any information concerning the CIA which had not been made public by the CIA.[8]

During his period of employment with the CIA, Mr. Snepp had easy access to classified material.[9] Also during his employment, Mr. Snepp served in Vietnam for four and one-half years.[10] Subsequent to his resignation, Mr. Snepp wrote and had published his book, *Decent Interval*.[11] He did not submit his manuscript to the CIA for prepublication approval.

In his book, Mr. Snepp was highly critical of the CIA's involvement in, and activities relating to, the withdrawal of United States forces from Vietnam. However, *Decent Interval* contained no classified material or information relating the CIA which the CIA had not previously made public.[12] There is some question as to whether the CIA relied, prior to

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the Central Intelligence Agency I am undertaking a position of trust in that Agency of the Government responsible to the President and the National Security Council for intelligence relating to the security of the United States of America. I understand that in the course of my employment I will acquire information about the Agency and its activities and about intelligence acquired or produced by the Agency.

8. Inasmuch as employment by the Government is a privilege not a right, in consideration of my employment by CIA I undertake *not to publish or participate in the publication of any information or material relating to the Agency*, its activities or intelligence activities generally, either during or after the term of my employment by the Agency *without specific prior approval by the Agency*. I understand that it is established Agency policy to refuse approval to publication of or participation in publication of any such information or material.

United States v. Snepp, 595 F.2d 926, 930 n.1 (4th Cir. 1979) (emphasis added), *aff'd*, 444 U.S. 507 (1980).

[8] *Termination of Secrecy Agreement*

1. I, Frank Snepp, III, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence that concern the present and future security of the United States of America.

3. I will never divulge, publish, or reveal by writing conduct, or otherwise *any classified information, or any information concerning intelligence or CIA that has not been made public by CIA*, to any unauthorized person including, but not limited to, any future governmental or private employer or official without the express written consent of the Director of Central Intelligence or his representative.

595 F.2d at 930 n.2 (emphasis added).

[9] *Id.* at 930.

[10] *Id.*

[11] F. SNEPP, DECENT INTERVAL (1977).

[12] The following interrogatory was propounded by Snepp to the government during pretrial discovery: "Do you contend that *Decent Interval* contains

the publication of *Decent Interval*, on alleged representations by Mr. Snepp that he would submit his manuscript for prepublication review.[13]

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classified information or any information concerning intelligence or CIA that has not been made public by CIA." The Government's response was: "For the purpose of this action, plaintiff does not so contend." Brief for Defendant-Appellant, at 6, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[13] The government contended that Snepp made repeated assurances to the CIA officials that he would submit his manuscript for prepublication review. Brief for United States in Opposition to Petitioner Snepp's Petition for Certiorari, at 3, 444 U.S. 507 (1980).

The Appellate Court found that Snepp had "represented on a number of occasions that he intended to submit the manuscript to the CIA for prior approval...." United States v. Snepp, 595 F.2d 926, 930 (4th Cir. 1979). The Appellate Court was apparently relying on the District Court's findings that Snepp had "made assurances" or had led various CIA officials to believe that he was submitting his manuscript for prepublication review. The Court went on to hold that Snepp had "surreptitiously breached" his secrecy agreement. United States v. Snepp, 456 F. Supp. 176, 179 (E.D. Va. 1978).

The Supreme Court took note of the district court's finding that Snepp had "surreptitiously violated" his secrecy agreement. Snepp v. United States, 444 U.S. 507, 508 (1980). Even a commentator on the Snepp appellate decision stated that:

> He repeatedly assured CIA officials that he would abide by the secrecy agreement and submit his text to the Agency for review prior to publication, and apparently in reliance on these assurances the government declined to pursue an injunction against publication. The Agency was caught by surprise when Snepp then secretly arranged to have his book published without prior review. . . .

Comment, *Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action*, 32 STANFORD L. REV. 409, 410-11 (1980).

However, the testimony at trial tends to diminish the claim that Snepp was "surreptitious" and that the CIA was "surprised" or relied upon Snepp's alleged representations:

> The Court ruled that defendant "assured, or at least lead [sic] both Admiral Turner and Mr. Morrison of the CIA legal staff to believe that he would submit his manuscripts for agency review before publication." Not only did the Court thus make a factual finding that should have been left to the jury, but it ignored Admiral Turner's concession on cross-examination that defendant did *not* "say he was going to submit the manuscript."
>
> Furthermore, additional evidence indicates that the CIA did not believe that Mr. Snepp was going to submit his manuscript. Subsequent to the May 17 meeting, John Morrison of the CIA General Counsel's office wrote to Mr. Snepp to demand a written assurance that the manuscript would be submitted for review. The CIA's internal memorandum of June 8 concerning this exchange of correspondence makes clear that the Agency was fully aware that Mr. Snepp had not promised to submit his manuscript. Indeed, at his deposition, Admiral Turner admitted that after he received the memorandum he was less than confident that Mr. Snepp intended to submit to pre-publication review of his book. In fact at the deposition Admiral Turner testified that after receiving the June 8 memorandum his attitude was, "Let us keep our fingers crossed and

In any event, Mr. Snepp capitalized on the fact that his book had not gone through prepublication review by the CIA by publicizing this fact when marketing his book.[14]

The United States sued Snepp in February of 1978. The government alleged that he had breached his contract with the CIA and that he had breached a fiduciary duty not to publish without prepublication approval. The government sought, among other things, money damages, a constructive trust over Mr. Snepp's profits from his book and an injunction against any further such publications by Snepp without his first submitting them for prepublication review.[15]

In the district court, testimony as to the harm done to the CIA because of the publication of Snepp's book came from Admiral Stansfield Turner, Director of the CIA, and Mr. William E. Colby, former Director of the CIA. While being able to estimate neither the damage done to the CIA nor the amount of the unquantifiable damages attributable to Snepp's actions, Admiral Turner did testify that there were a number of sources who discontinued working with the CIA during the previous six to nine months. He also testified that numerous

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hope that he can't pull those 700 pages into a manuscript and get it published." (citations omitted).

Brief for Defendant-Appellant, at 53 n.33, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

Furthermore, the CIA did go to the Attorney General in January of 1977 to seek an injunction, but the Attorney General would not go forward. Reply Brief for Defendant-Appellant, at 9 n.4, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[14] An interesting sidelight as to what might have caused particular irritation at the CIA is the following exchange between Admiral Turner, Director of the CIA, and Snepp's attorney:

A. I think this is a very major problem; however, because it has so publicly—the way the book was published was contrived to put emphasis on the fact it was published without authorization. That as played up as a marketing gimmick, in my opinion, that has particularly made this a grievous problem for us.

Q. Your testimony is, the way this book has been marketed is a factor that has injured the CIA?

A. Because it emphasized the fact it didn't go through the clearance process. It, therefore, helped to tear down the visible form of control that we have in the secrecy agreement.

Q. You're testifying, the statement Mr. Snepp made, and the publicity Random House gave it, the fact it was on 60 Minutes, those things damaged the CIA, is that your testimony?

A. I'm saying those are some of the things that damaged the CIA, and the way those things were done was particularly damaging.

Brief for Defendant-Appellant, at 15 n.12, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[15] Brief for United States in Opposition to Petitioner Snepp's Petition for Certiorari, Snepp v. United States, 444 U.S. 507 (1980).

sources had become nervous about working with the CIA or had strongly complained about the CIA's lack of control over secrecy.[16] Since Snepp's book divulged neither classified information nor any intelligence sources, this "drying up" of sources or nervousness of sources apparently came from the perception that the CIA lacked control over former employees.[17] Mr. Colby affirmed Admiral Turner's testimony.[18]

The interest asserted by the government was that as a result of Snepp's publication of his book without prepublication approval, the CIA appeared to have little or no control over information disclosed by former agents. This appearance of lack of control then caused apprehension on the part of CIA operatives or sources. Therefore, the operatives and sources of the CIA lessened or discontinued their relationship with CIA. As a result of this, the CIA would find it more difficult to gather the information necessary to maintain national security. It should again be noted that Snepp's book contained no classified information or any information about the CIA which had not been made public by the CIA. Thus, what allegedly triggered this chain of events was not the content of his book, but the mere fact of its publication.

The district court found that Snepp had willfully refused "to comply with his prepublication review obligations. . . ."[19] Holding that nominal damages were "grossly inadequate as redress for Snepp's willful breach of trust"[20] and that the damage sustained by the United States due to Snepp's actions could not be quantified, the court exercised its equity powers and imposed a constructive trust for the benefit of the government upon all Snepp's revenues from *Decent Interval*. Further, the court enjoined Snepp from publishing any work concerning the Central Intelligence Agency or its activities without the prepublication review of the CIA.[21]

Snepp appealed his case to the Fourth Circuit Court of Appeals.[22] While affirming the district court's granting of an injuction[23] the court found the imposition of a constructive trust in the government's favor to be inappropriate.[24]

Not satisified with nominal damages alone for Snepp's breach of his contract, although admitting that whatever damages suffered by the

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[16] United States v. Snepp, 456 F. Supp. 176, 179-80 (E.D. Va. 1978). The Court concluded, prior to trial, that all material facts were undisputed, and the Court heard the case without a jury. *Id.*

[17] *Id.* at 180.

[18] *Id.*

[19] *Id.* at 181.

[20] *Id.*

[21] *Id.* at 182.

[22] United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[23] *Id.* at 934.

[24] *Id.* at 935.

government were not quantifiable, the court put forth the idea that perhaps punitive damages were appropriate in this case.[25] Stating that Snepp knew of his contractual obligation to submit his work for prepublication review and that the government did not seek an injunction in reliance on Snepp's representations that he would submit his manuscript for review (the CIA did go to the Attorney General to seek an injunction, but the Attorney General refused to go forward),[26] the court felt that a trier of fact could find that these actions constituted deceit on Snepp's part. If so found, the Court held that punitive damages could be assessed, as the breach of contract had implications of a tort.[27] Senior District Judge Walter E. Hoffman concurred in part and dissented in part. Judge Hoffman agreed that Snepp had breached his contract with the CIA, but felt that a constructive trust was appropriate.[28]

The United States Supreme Court upheld the granting of the injunction.[29] The Court, however, found punitive damages to be inappropriate in this case. In proving the tortious conduct alluded to in the appellate court decision as being necessary for punitive damages, the Court feared that the government would be forced to disclose the secrets it sought to avoid disclosing.[30] Further, the Court found that punitive damages were speculative and unusual and would bear no relationship to the government's harm or Snepp's gain.[31] As the Court found that Snepp had breached his fiduciary duty to the government, a constructive trust on the proceeds on Snepp's book was granted.[32]

Three of the Supreme Court Justices dissented: Mr. Justice Stevens (who wrote the dissent), Mr. Justice Brennan and Mr. Justice Marshall. The dissenting opinion agreed that Snepp had breached his duty to turn in his manuscript.[33] Justice Stevens found that Snepp had not breached any fiduciary duty, but rather a contractual duty; thus, a constructive trust was inappropriate.[34]

B. *Background Cases*

In order to fully understand the court's holdings in the *Snepp* deci-

[25] *Id.* at 936.

[26] As to whether government really relied on Snepp's alleged representations, see note 13 *supra* and accompanying text.

[27] 595 F.2d at 937.

[28] *Id.* at 939-42.

[29] Snepp v. United States, 444 U.S. 507, 516 (1980).

[30] *Id.* at 514. See section below on "Methods of Control" for discussion of "Graymail."

[31] *Id.*

[32] *Id.* at 516.

[33] *Id.*

[34] *Id.* at 517.

sion, two earlier cases must be looked into. The first such case is *United States v. Marchetti*.[35]

Victor Marchetti was employed by the Central Intelligence Agency from October, 1955, until September, 1969. Marchetti, like Snepp, signed two secrecy agreements, one upon his entry into the CIA and one upon his termination.[36] Subsequent to his resignation, Marchetti published a novel and several articles and had submitted an outline to the CIA of

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[35] United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[36] *Id.* at 1312 n.1-2. The relevant sections of Marchetti's Agreements read as follows:

> *Entry Agreement*—Secrecy Agreement
>
> 1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of information relating to the National Defense and I am familiar with the penalties provided for violation thereof.
>
> 3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, *any classified information, intelligence or knowledge* except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives. . . .
>
> *Termination Agreement*—Secrecy Oath
>
> I, _____, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:
>
> 1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, *any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and* specifically Central Intelligence Agency operations, sources, *methods, personnel fiscal data, or security measures* to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee or official without the express written consent of the Director of Central Intelligence or his authorized representative.

Id. (emphasis added).

the book which he was writing about his intelligence experiences. Marchetti had previously disclosed classified information and was planning to do so again.[37]

The Fourth Circuit Court of Appeals upheld an injunction enjoining Marchetti from releasing any writing relating to the CIA or intelligence without prior authorization from the Director of the CIA.[38] However, the Court limited the order "to the language of the secrecy agreement Marchetti signed when he joined the Agency."[39] The Court found that freedom of speech and the press are not absolute[40] and that the government had a right to internal secrecy in certain circumstances where disclosure may be inconsistent with the national interest,[41] but found the agreements constitutional only insofar as they were limited to classified information.[42]

The second background case to *Snepp* is *Alfred A. Knopf, Inc. v. United States.*[43] This case is a sequel to *United States v. Marchetti*, and is often referred to as *Marchetti II*. After finishing this book, Marchetti and his co-author, John Marks, a former State Department employee, turned their manuscript over to the plaintiff Knopf, Inc., who was to publish it. Marks, like Marchetti, had also promised not to disclose classified information acquired by him during his employment.[44] The plaintiff then submitted the book to the CIA for prepublication review. After reviewing the book, the CIA initially attempted to delete 339 items. Subsequent to the filing of the suit, the CIA made several releases of information on its own and, at the trial, the CIA was defending its deletion of 168 items. Much of the case dealt with whether the information which the CIA wanted deleted from the book was properly classified, and how the system of classification of information utilized by the CIA interrelated with the Freedom of Information Act.[45]

As to the material the CIA deleted from the book, the court held that in order for the CIA to delete information, the information must be classifiable and classified.[46] All that the government must show was that

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[37] Comment, *Government Secrecy Agreements and the First Amendment*, 28 AM. U.L. REV. 395, 401 (1979).

[38] United States v. Marchetti, 466 F.2d 1309, 1311 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[39] *Id.*

[40] *Id.* at 1314.

[41] *Id.* at 1315.

[42] *Id.* at 1317.

[43] Alfred A. Knopf, Inc. v. United States, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

[44] *Id.* at 1365.

[45] 5 U.S.C. § 552 (1976).

[46] Alfred A. Knopf, Inc. v. United States, 509 F.2d 1362, 1367 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

each deletion contained information which was required to be classified in any way, "and which was contained in a document bearing a classification stamp."[47]

The court held that the

> First Amendment is no bar against an injunction forbidding the disclosure of classifiable information within the guidelines of the Executive Orders when (1) the classified information was acquired during the course of his employment by an employee of a United States agency or department in which such information is handled, and (2) its disclosure would violate a solemn agreement made by the employee at the commencement of his employment.[48]

The effect of the decision in the court of appeals[49] was to uphold almost all of the deletions made by the CIA.[50]

II. THE CONTRACT

All of the courts in the *Snepp* case found that Snepp had breached his contractual duties owed to the government, and the injunction and constructive trust both flowed from this finding. However, none of the courts seriously looked at the differences between Snepp's original agreement in 1968 and his termination agreement in 1976. In order to understand Snepp's contractual duties, it is necessary to look at the differences in these two agreements, and then analyze them in light of the interrogatory propounded by Snepp to the government.

Snepp's 1968 agreement with the CIA was very broad in the definition of material covered by the agreement: "I undertake not to publish or participate in the publication of *any information or material relating to the Agency* . . . without specific prior approval by the Agency."[51] However, the 1976 agreement was more narrow in its definition of the material covered: "I will never divulge, publish, or reveal by writing, work, contract, or otherwise *any classified information, or any informa-*

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[47] *Id.* at 1368. As to what constitutes acquiring information during the course of employment see *id.* at 1371, wherein the court stated that if the employee was employed at the Agency at the time the information was classified, he will be deemed to have acquired it during the course of his employment.

[48] *Id.* at 1370.

[49] *Id.* at 1371.

[50] The book, THE CIA AND THE CULT OF INTELLIGENCE, was published between the district court decision and the decision of the appellate court, and the 168 deletions were left out of the book. Note, United States v. Marchetti *and* Alfred A. Knopf, Inc. v. Colby: *Secrecy 2; First Amendment 0*, 3 HASTINGS CONST. L.Q. 1073, 1081 (1976).

[51] United States v. Snepp, 595 F.2d 926, 930 n.1 (4th Cir. 1979) (emphasis added). *See* note 6 *supra*.

tion concerning intelligence or CIA that has not been made public by CIA."[52] It is obvious that the first agreement covers a great deal more information than the second. The interrogatory propounded by Snepp used language which exactly mirrors the language of the second agreement: "Do you contend that *Decent Interval* contains *classified information or any information concerning intelligence or CIA that has not been made public by CIA*," and the government responded by stating that "[f]or the purposes of this action, plaintiff does not so contend."[53] It is arguable that Snepp did not breach the 1976 agreement because of the government's seeming acquiesence on this point. One crucial issue in analyzing these agreements ignored by all of the *Snepp* courts is how the fact that Snepp did not breach his second agreement affected his contractual relationship with the CIA. The second issue raised in determining Snepp's contractual duties to submit his material for prepublication review is the effect of the limitation placed upon such agreements by *Marchetti I*. Marchetti was enjoined from publishing his material without prepublication approval by the CIA because of his secrecy agreements. However, the *Marchetti* court strictly limited these agreements; in order for the agreements to be constitutional, they must deal only with classified information.[54] Therefore, the second crucial issue becomes whether Snepp's first agreement, which purported to deal with any information concerning the CIA, is constitutional.

The district court's reasoning with respect to these issues is highly questionable. First, the court quoted the part of *Marchetti I* upholding Marchetti's first secrecy agreement, and then stated that Snepp's 1968 agreement was sufficiently similar to Marchetti's agreement to warrant upholding Snepp's agreement.[55] This approach, however, ignores the plain meaning of the passage from *Marchetti* which the court quoted because the district court's quote starts with "that the secrecy agreement executed by Marchetti at the *commencement* of his employment. . . ."[56] Marchetti, like Snepp, signed two secrecy agreements, and the difference between Snepp's agreements and Marchetti's agreements was that Marchetti's first agreement was narrowly drawn as to the material covered, while his second agreement was broader in scope. In *Snepp*, the situation was reversed.

In discussing Marchetti's rights, the *Marchetti* court differentiated between the two agreements signed by Marchetti. The first agreement was enforceable only because, by signing it, Marchetti did not surrender

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[52] 595 F.2d at 930 n.2 (emphasis added). *See* note 8 *supra*.

[53] *See* discussion at note 12 *supra*.

[54] United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (emphasis added).

[55] United States v. Snepp, 456 F. Supp. 176, 180 (E.D. Va. 1978).

[56] *Id.*

any first amendment rights.[57] The court reached this conclusion because the first secrecy agreement dealt only with classified information.[58] However, the court went further and stated that it would decline to enforce that part of the secrecy agreement he signed when he resigned from the CIA which attempted to prevent disclosure of unclassified information. The court held that such a secrecy agreement would contravene Marchetti's first amendment rights.[59] Therefore, when the *Marchetti* court stated that it would uphold the agreement executed by Marchetti at the *commencement* of his employment, they were specifically speaking of the more narrowly-drawn agreement. By taking this quote from *Marchetti* out of context, the district court misused it to uphold Snepp's more broadly written agreement.

Second, in one of its most confusing passages, the court intimated that the agreements were the same: "Snepp's secrecy agreements are clear and unambiguous."[60] The court went on to say:

> [Snepp's] 1976 secrecy termination agreement is not limited to classified information, as he would have you read it—it reads classified information or any information concerning intelligence of CIA that has not been made public by CIA.
>
> Both secrecy agreements require submission of all such material for CIA prepublication review.[61]

It might seem from the above quote that the court's definition of what material must be submitted for prepublication review is defined by the 1976 agreement, but such is not the case. The court, when delineating what Snepp has a right to publish, found that he could not communicate *any* material relating to the CIA and consistently used the terminology of the 1968 agreement. As this is the only analysis by the district court of the differences between Snepp's two agreements, one must assume that the court found these agreements to cover the same material, and such a finding is clearly erroneous.

The appellate court's decision skirted the issue of whether Snepp's 1976 agreement was different from his 1968 agreement;[62] the court found that the 1968 agreement required Snepp to submit for prepublication review any material relating to the CIA. The court rationalized this holding by stating that Marchetti's obligation, under *Marchetti I*, was enforceable only to the extent that he had to submit all of his material relating to the CIA so that the CIA could determine what was classified

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[57] United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[58] *Id.* at 1313, 1317.

[59] *Id.* at 1317.

[60] United States v. Snepp, 456 F. Supp. 176, 180 (E.D. Va. 1978).

[61] *Id.*

[62] United States v. Snepp, 595 F.2d 926, 932 n.3 (4th Cir. 1979).

and therefore unpublishable.[63] This interpretation may come from the fact that Marchetti had to submit all of his material for prepublication review. Therefore, unless Marchetti was publishing a compendium of nothing but classified material and official secrets, the prior restraint of prepublication review necessarily reached those portions of his work which were not classified.

This analysis ignores two important points. First, the court in *Marchetti I* stated that the first amendment precluded prior restraints imposed upon government employees contractually or otherwise with respect to information which is unclassified or officially disclosed.[64] What the court meant by this holding is that classified information is not protected by the first amendment while unclassified information is protected. Therefore, if the government were to enforce its contractually based prior restraints through an injunction, as in Marchetti's case, or through any other judicial proceeding, the government must at least base its claim upon a disclosure of allegedly classified information. The government did not allege that Snepp was about to disclose classified information. In addition, Marchetti never denied that he was about to disclose classified information. Indeed, *Marchetti II* upheld the deletion of 168 items from Marchetti's book. The *Snepp* case is differentiated from *Marchetti I* because the government admitted that there was no classified information in Snepp's book.

The Supreme Court almost totally ignored both of these issues. While relying on *Marchetti I* to uphold the terms of Snepp's agreement, the Court completely ignored the *Marchetti* court's distinguishing between Marchetti's two agreements and thereby limiting the scope of such agreements. Further, the Court implied that the 1976 agreement was merely a reaffirmation of Snepp's 1968 pledge.[65] Indeed, this holding was exactly what the government contended: The two agreements were basically the same and the 1976 agreement continued "in effect the broad prepublication review requirements of the 1968 agreement."[66]

The Courts' attempts at reconciling Snepp's 1968 agreement covering any material and the *Marchetti* limitation on such agreements are, at best, nonpersuasive. The courts discriminately chose what language they wanted from *Marchetti* to uphold Snepp's agreement, and conveniently discarded the rest. The reason is quite clear. Had the courts followed the *Marchetti* decision, the government would not be able to control persons such as Snepp and the information, albeit unclassified, which they could disclose. The courts therefore opted for control.

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[63] *Id.* at 932.

[64] United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[65] Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).

[66] Brief for the United States in Opposition to Petitioner Snepp's Petition for Certiorari, at 11 n.4, Snepp v. United States, 444 U.S. 507 (1980).

Because the courts almost totally ignored the issue that Snepp did not breach his second agreement, a more in-depth look at this issue is necessary. All of the *Snepp* courts attempted, through one method or another, to find that the agreements covered the same material. The district court, as noted above, apparently found these agreements to cover the same material. The appellate court found that the language of the 1976 agreement was "indistinguishable in its effect" from the 1968 agreement.[67] The Supreme Court, by implication, found that the 1976 agreement was a reaffirmation of the 1968 agreement.

To state that the agreements cover the same material is to ignore the language of the agreements. The appellate court's and Supreme Court's result, however, might be attained by reading the two agreements together as one. Although neither court's reasoning is clear, by reading the first agreement as a pledge not to publish "any" material without submitting the work for prepublication review, and by reading the second agreement as merely a reaffirmation of a pledge not to divulge, publish, or reveal classified information, these two agreements might be read *in pari materia*. This tortuous reading ignores the text of the agreement and several basic rules of contract interpretation.

The second agreement is not merely a reaffirmation of the first. As the first agreement intimates prepublication review by saying "without specific prior approval,"[68] so does the second by saying "without the express written consent of the Director. . . ."[69] On the face of these agreements, the obligations of Snepp to submit material for prepublication review are basically the same. What has changed is the scope of material covered by the agreements.

The change in the material covered may change the contractual duties Snepp had to the government. While the Uniform Commercial Code allows modification of a contract without consideration,[70] trying to analogize Snepp's contract to a contract between merchants is a weak argument. Therefore, the question of whether the original contract has been modified, or whether the second agreement has superseded the first, revolves around the issue of whether there was consideration for the second agreement.

The question of consideration arises originally in the *Marchetti* case. Besides holding that part of Marchetti's termination agreement unenforceable because it violated Marchetti's rights, the court found that the termination agreement was void because there was no consideration.[71] In that case it was true: Marchetti's first agreement covered classified

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[67] United States v. Snepp, 595 F.2d 926, 932 (4th Cir. 1979).

[68] *Id.* at 930 n.1.

[69] *Id.* at 930 n.2.

[70] U.C.C. § 2-209(1) (1978).

[71] United States v. Marchetti, 466 F.2d 1309, 1317 n.6 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

information, while his second agreement added to his obligations by covering *any* information.[72] Marchetti received nothing in return for his added obligations. In Snepp's case, the opposite is true, as Snepp received less obligations in his termination agreement, and the government received something of value in return.

In order to constitute consideration, the performance or promise must be bargained for.[73] Further, "it is enough that one party manifests an intention to induce the other's response and to be induced by it, and that the other responds in accordance with the inducement."[74] The government wanted Snepp to promise to take certain procedures should certain situations arise:

> The CIA obtained at least three fresh promises from Mr. Snepp under the 1976 agreement. In paragraph 5, he agreed to notify the CIA in writing of any future action he might take to obtain satisfaction of any monetary claims against the Agency. He also promised to pursue any claim "in accordance with such security advice as CIA [sic] will furnish me." *Id.* In paragraph 7, he promised to report without delay any attempt by an unauthorized person to solicit classified information. Finally, in paragraph 8, he promised to notify the CIA of any attempt by other branches of the Government to secure his testimony. He further promises to advise such investigators of his secrecy commitments and to request that the Government establish his obligation to testify.[75]

In return, Snepp was to receive greater latitude in what he could publish without prepublication review.[76] As consideration has alternately been defined as a "benefit to the promisor" or a "detriment to the promisee," or a performance or promise exchange for the promisor's promise,[78] Snepp's additional promises in exchange for a less restrictive contract regarding publishing certainly was consistent because the government had modified its legal relationship with Snepp to the government's detriment. It is apparent that the 1976 agreement was a contract, and it is apparent from the CIA's action that they intended the 1976 agreement to be less restrictive than the 1968 agreement.

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[72] *See* note 36 *supra* and accompanying text.

[73] RESTATEMENT (SECOND) OF CONTRACTS § 75(1) (Tent. Draft 1973).

[74] *Id.* at Comment b.

[75] Brief for Defendant-Appellant, at 25, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[76] Snepp had been planning to write a book prior to his termination and had told this to his superiors. Reply Brief for Defendant-Appellant, at 9 n.4, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[77] 1 A. CORBIN, CONTRACTS §§ 121-22 (1963).

[78] RESTATEMENT (SECOND) OF CONTRACTS § 75(2) (Tent. Draft 1973).

Both the 1968 agreement of Snepp and the 1969 termination agreement of Marchetti covered "any material. . . ."[79] The Fourth Circuit Court of Appeals in 1972 held that the part of the 1969 agreement of Marchetti's, which went beyond classified information, was an unconstitutional encroachment of Marchetti's first amendment rights. The termination agreement which Snepp signed has a notation in the lower left-hand corner that indicated that this agreement had first been printed in 1973.[80] Questions which naturally arise are why the CIA had changed its agreement, and why this change occurred immediately after the *Marchetti* decision. The CIA arguably intended its agreements to be in closer compliance with the language contained in the *Marchetti* case.

As there has been consideration for the second agreement, the change in the material covered by the agreements modified Snepp's contractual duties. If the second agreement is a modification of the first, the entire contract, after applying all of the ordinary processes of contractual interpretation, should be interpreted against the party who wrote the contract.[81] Further, there is ample authority for treating an employment contract as an adhesion contract.[82] The necessary prerequisities of a classic contract of adhesion are present in Snepp's case: 1) standardized form; 2) presented on a take-it-or-leave-it basis; and 3) gross inequality of bargaining power.[83] While adhesion contract analysis does not automatically invalidate a contract, a court will review the contract for fairness and refuse to enforce those terms which are "unfair to the stuck party."[84] Similarly, the court could strike down or reform only those provisions which are deemed unfair.[85] If the second agreement is a modification of the first, it certainly seems unfair to enforce the provision which has been modified.

In light of the interrogatory propounded by Snepp, it is obvious that the inconsistencies of the two contracts would not allow them to stand together. As such, the 1976 agreement operated as a substituted contract and discharges so far as the inconsistency.[86] This view is also taken by the *Restatement of Contracts*: "A substituted contract is one that is itself accepted by the obligee as satisfaction of the original duty and thereby discharges it. A common type of substituted contract is one

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[79] *See* notes 7 and 36 *supra* and accompanying text.

[80] Brief for Defendant-Appellant, at 23 n.15, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[81] 3 A. CORBIN, CONTRACTS § 559 (1960).

[82] *Id.* § 559I(H) (Kaufman Supp. 1980).

[83] *Id.* § 559C(A) (Kaufman Supp. 1980).

[84] *Id.* § 559A(A) (Kaufman Supp. 1980).

[85] *Id.* § 559A(D) (Kaufman Supp. 1980).

[86] 6A A. CORBIN, CONTRACTS § 1296 (1962).

that contains a term that is inconsistent with a term of an earlier contract between two parties."[87]

The conclusion from the above analysis is that the effective contract between Snepp and the CIA was the 1976 agreement. As such, Snepp did not breach his contract. While it might be said that this result would seriously compromise the CIA, or at least be perceived as a weakening of the CIA's control over former employees, such is not the case. Even if limited to classified information, the CIA still has the power of injunction. Indeed, after Snepp's refusal to sign various pledges regarding prepublication review, the CIA attempted to have the Attorney General seek an injunction.[88] The government could seek an injunction under the *Marchetti* case based on allegations that the work contained classified information.[89] This would allow for judicial review of the government's claims prior to publication. While one would hope that the government would use this power in good faith, this power is nevertheless there, and this approach seems more equitable than ignoring basic contract law and economically disadvantaging an ex-employee of the federal government who published no harmful material.

III. WHAT INFORMATION CAN THE CIA PROTECT?

Since the Supreme Court has upheld Snepp's agreement with the CIA and has sanctioned the utilization of prior restraints[90] to control the dissemination of information, it is important to know what information the CIA can make subject to prior restraint and subject to complete deletion.

The statutory basis for the CIA protecting information is extremely vague. The government contended, and all three courts agreed, that 50 U.S.C. § 403(d)(3)[91] provided the necessary legislative authority for the prior restraints and the employment contracts utilized by the CIA. However, this statutory authority only vests power in the CIA director to "be responsible for protecting intelligence sources and methods from unauthorized disclosure."[92] This is in marked contrast to an agency, discussed below, created approximately seven years after the CIA was created.

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[87] RESTATEMENT (SECOND) OF CONTRACTS § 349, Comment a (Tent. Draft No. 13, 1973).

[88] *See* note 13 *supra* and accompanying text.

[89] Comment, *Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action*, 32 STANFORD L. REV. 409, at 411 n.9 (1980). While the commentator of the above article feels that an injunction would have been granted had the government sought one, it would seem that, had *Marchetti* been followed, such an injunction should not have been granted.

[90] *See generally* discussion at notes 112-217 *infra* and accompanying text.

[91] 50 U.S.C. § 403(d)(3) (1976).

[92] 50 U.S.C. § 403(g) (1976).

The authority vested in the Atomic Energy Commission by the Atomic Energy Act of 1954 is quite specific.[93] The Atomic Energy Act states: (1) the type of information to be protected by the Commission (Restricted Data); (2) how information is to be removed from the classification Restricted Data;[95] (3) the Commission is authorized to "prescribe such regulations or orders as it may deem necessary to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter. . . .";[96] (4) anyone who willfully violates any of the above regulations or orders, if there is no criminal penalty, is subject to a fine of $5,000 and/or up to two years in jail, except that if the violation is with intent to injure the United States, the fine may be $20,000 and/or imprisonment up to twenty years; (5) anyone who communicates Restricted Data to anyone with the intent to injure the United States or to "secure an advantage to any foreign nation" is subject to a fine of not more than $20,000 and/or imprisonment up to life, or if the violator communicates such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation" is subject to a fine up to $10,000 and/or imprisonment up to ten years;[98] (6) anyone who received such information with the proscribed intent is subject to imprisonment up to life and/or a fine up to $20,000;[99] (7) anyone with the proscribed intent who "tampers" with Restricted Data is subject to imprisonment up to life/or a fine of $20,000;[100] (8) an employee or ex-employee, who communicates data, knowing or having reason to believe it is Restricted Data, to a person, knowing or having reason to believe such person is not authorized to receive Restricted Data, may be fined up to $2,500;[101] and (9) if, in the judgment of the Commission, someone is about to violate any of the above statutes or regulations or orders issued thereunder, the Attorney General may apply for an injunction to prohibit such activity.[102] Obviously, the Atomic Energy Act not only defines the type of information controlled by the Commission, but also

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[93] *See* 42 U.S.C. §§ 2011 *et seq.* (1977), for a general overview.

[94] 42 U.S.C. § 2014(Y) (1977). "The term 'Restricted Data' means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to § 2162 of this title." *Id.*

[95] 42 U.S.C. § 2162 (1977).

[96] 42 U.S.C. § 2201(i) (1977).

[97] 42 U.S.C. § 2273 (1977).

[98] 42 U.S.C. § 2274 (1977).

[99] 42 U.S.C. § 2275 (1977).

[100] 42 U.S.C. § 2276 (1977).

[101] 42 U.S.C. § 2277 (1977).

[102] 42 U.S.C. § 2280 (1977).

the methods of control to be used. Such is not the case with the CIA. There are no penalties prescribed in the legislative authority granted the CIA, and the definition of what the Director of the CIA can protect is very vague and therefore possibly meaningless. As such, it creates severe problems,[103] including whether there are any limits on what information the CIA can control.

While on its face the statutory authority for the CIA for the limitation of information is only as to *sources and methods* of gathering information, this is actually no limitation. Any information communicated could reflect, however minutely, its source or method of gathering. Since the government already has criminal penalties for disclosing classified information,[104] the question of the judicial interpretation of what the CIA's limits are in relation to civil actions enforcing employment contracts such as Snepp's is crucial.

In *Marchetti*, the court cited the statutory authority of 50 U.S.C. § 403(d)(3),[105] and then stated that Marchetti's secrecy agreement was a reasonable means of protecting classified information from unauthorized disclosure.[106] The phrase "sources and materials" includes classified information, but the Supreme Court in *Snepp* went even further. After citing 50 U.S.C. § 403(d)(3),[107] the Court stated that the CIA could have acted, even without the secrecy agreement, to protect the "compelling interests" of both the "secrecy of information important to our national security and the *appearance of confidentiality*. . . ."[108] Exactly what constitutes "information important to our national security" is very unclear. What information the CIA may protect in order to maintain its "appearance of confidentiality" is equally unclear. Obviously, the Court has gone beyond the strict adherence to the classified information standard which the *Marchetti* court used. Further, the Court added that efforts would have to be made to delete "sensitive material" which would lead to "harmful disclosures."[109] Trying to synthesize these vague terms into a standard which anyone, including the Supreme Court, could understand, is virtually impossible. In any event, the standard which the Court has enunciated seems to be that the CIA may control sensitive material in order to protect the compelling state interests of: (1) the secrecy of information important to our national security; and (2) the appearance of confidentiality of our intelligence agencies.

This standard will surely restrict the flow of information about our

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[103] *See generally* discussion at notes 112-217 *infra* and accompanying text.

[104] *See generally* 18 U.S.C. §§ 792-99 (1977).

[105] 50 U.S.C. § 403(d)(3) (1976).

[106] United States v. Marchetti, 466 F.2d 1309, 1316 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[107] 50 U.S.C. § 403(d)(3) (1976).

[108] 444 U.S. 507, 509 n.3 (1980) (emphasis added).

[109] *Id.* at 513 n.8.

government from those who would have access to such information. Taken on its face, the standard allows the CIA to control a great deal of information.

Two sections of this standard pose severe problems. The first such section deals with what the Court refers to as "sensitive material." While not defining this term, the Court includes unclassified as well as classified material in the definition of this term. The Court states that the CIA, with its broad understanding of what material may expose classified information and confidential sources, has a better understanding of what information is harmful,[110] and this "harmful" material includes more than just classified material: "[A] former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interest even if the published information is unclassified."[111] The second problematical section concerns the appearance of confidentiality of our intelligence agencies. The Court is stating that it is not enough that the intelligence agencies actually be secretive and protect sources and materials, but it is a compelling state interest that they maintain an *aura* of secrecy. This ill-considered phrase is extremely broad, and practically any utterance by an employee or ex-employee of the CIA could theoretically put into danger the "appearance" of confidentiality of the CIA.

By not limiting the information over which the CIA has control to classified information, as *Marchetti* did, the Supreme Court has authorized zealous bureaucrats and government officials to limit the flow of potentially embarrassing or critical material to the public. The standard enunciated by the Court has resolved little because there will surely be continued litigation to ascertain the limits of what information the CIA can control.

IV. METHODS OF CONTROL

The two most obvious methods of governmental control over the dissemination of intelligence related materials are: 1) criminal prosecution for the unauthorized disclosure of classified information; and 2) the enforcement of employment contracts, such as Snepp's, which call for prepublication review by a government censor. As Snepp did not publish any classified information, criminal prosecution was out of the question. Therefore, to control what Snepp could publish, the courts relied on enforcing Snepp's employment contract.

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[110] *Id.* at 512.

[111] *Id.* at 511-12.

A. *The Enforcement of Snepp's Employment Contract*

The district court held that because of his employment contract, Snepp had an obligation to submit his book to the CIA for prepublication review.[112] To ensure that Snepp would not publish such material without first submitting it to the CIA, the district court enjoined Snepp from publishing any work concerning the CIA or its activities without prepublication review.[113]

The appellate court also found that Snepp's employment contract obliged him to submit material concerning the CIA or intelligence for prepublication review[114] and affirmed the district court's granting of an injunction.[115] Similarly, the Supreme Court held that Snepp, through his employment contract, had pledged not to publish any information concerning the CIA without prepublication review,[116] and affirmed the granting of an injunction.[117]

Under *Marchetti*, prepublication review was allowed only upon a government allegation that a defendant intended to publish classified material, but the *Snepp* decision allows for the prepublication review of all material relating to the CIA, including nonclassified material. The government need no longer bear the burden of alleging that the publication of classified material is imminent. Therefore, the boundaries of permissible prepublication review have been expanded. The *Snepp* decision is sure to have a critical effect on the public's right of access to governmental information. The enforcement of employment contracts requiring prepublication review has become an effective tool for governmental control over information. All employees of the CIA, National Security Agency, Defense Intelligence Agency, some offices within the Department of Defense, the State Department's Bureau of Intelligence and Research, the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, the Drug Enforcement Administration, the staff members of the Rockefeller Commission, the Senate Select Committee to Study Intelligence Activities and the House Select Committee on Intelligence are required to enter into a secrecy agreement.[118] While most agreements only contain pledges not to divulge classified material, some of the agreements do require prepublication review.[119] In reviewing the

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[112] United States v. Snepp, 456 F. Supp. 176, 180 (E.D. Va. 1978).

[113] *Id.* at 185.

[114] United States v. Snepp, 595 F.2d 926, 932 (4th Cir. 1979).

[115] *Id.* at 934.

[116] Snepp v. United States, 444 U.S. 507, 511 (1980).

[117] *Id.* at 516.

[118] Comment, *Government Secrecy Agreement and the First Amendment*, 28 AM. U. L. REV. 395, 395-96, n.1 and n.8 (1979) and accompanying text.

[119] *Id.* at 396 n.9-10 and accompanying text.

constitutionality of Snepp's agreement, two constitutional standards come into play. The first standard is the presumption against prior restraints, and the second standard is that certain conditions of government employment may infringe upon the first amendment rights of government employees if the conditions are reasonable.

It should be understood that the term "prior restraint" has a meaning separate and distinct from the term "subsequent punishment." The concept of prior restraint deals with official government restrictions upon expression prior to publication,[120] and subsequent punishment deals with penalties imposed after publication.[121] To understand the rationale for the doctrine against prior restraint and its application to *Snepp*, it is instructive to take a brief look at the history of the doctrine.

During the course of the Eighteenth Century, subsequent to the lapse of the English licensing laws on publication,[122] freedom of the press from licensing rose to the level of common or natural law.[123] Blackstone summarized this as well as the dichotomy between prior restraint and subsequent punishment in the following passage:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.[124]

The underlying purpose of the first amendment was to preclude such prior restraints on publication.[125] The courts in the *Snepp* case studiously ignored any mention of the first amendment in relation to the doctrine of prior restraint. As will be explained below, had the Court chosen to apply the traditional prior restraint doctrine, the government could not have controlled the release of information such as Snepp's. Instead, the Court chose the reasonableness standard relating to conditions of public employment in order to allow such government control.

The employment contract, as enforced by the courts, provided that Snepp had to turn over to the CIA any material he planned to publish

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[120] Emerson, *The Doctrine of Prior Restraint*, 20 LAW AND CONTEMP. PROB. 648 (1955) [hereinafter cited as Emerson].

[121] *Id.* at 648.

[122] The English law expired in 1695 and the laws imposed by England on the United States had "broken down" by the second decade of the 1700's. *Id.* at 651.

[123] *Id.*

[124] *Id.* (emphasis added). *See also* Near v. Minnesota, 283 U.S. 697, 713-14 (1931).

[125] *See* Emerson, *supra* note 120, at 652. *See also* Near v. Minnesota, 283 U.S. 697, 713 (1931).

which in any way dealt with the CIA prior to publication. A CIA censor would then review this material, and delete that portion of the material which the CIA wished to be deleted. In discussing the nature of prior restraint, Emerson states: "[T]he clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official."[126] This is exactly the situation in *Snepp*. Also, the contract, like the statute in *Near v. Minnesota*, "does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication."[127] Indeed, the remedy for the alleged breach involved quite a bit of judicial construction. Further, the injunction issued by the district court to enforce the contract is very similar to the injunction issued in *Near*, as Snepp could be punished for contempt of court for publishing any material relating to the CIA without prepublication review. Therefore, the contract enforced in *Snepp* gave rise to a classic prior restraint.

Emerson also discusses the more onerous elements of such a system of prior restraint, all of which may be found in the *Snepp* case. The first element is breadth, whereas the material brought under governmental scrutiny by prior restraint is far greater than that of subsequent punishment.[128] The prior restraint upheld by the *Snepp* courts included *any* material relating to the CIA, whereas subsequent punishment, in light of the current laws, would only deal with classified material. Second, the system of prior restraint either withholds the information altogether or creates a serious delay in publication until the issue of its release is settled.[129] The *Marchetti* case, wherein it took over three years for final litigation regarding what could or could not be published, is very illustrative on this point. Although the original *Marchetti* case stated that thirty days should be the maximum amount of time necessary for review by the CIA,[130] the final outcome was measured in years, not days. Third, a system of prior restraint is much easier to implement than subsequent punishment. Once material has been published, the decisions regarding prosecution are much harder to make than those decisions of whether to allow publication. A single bureaucrat can institute prior restraint by a "stroke of the pen," while a phalanx of lawyers may be necessary to prosecute.[131] This point is also il-

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[126] *See* Emerson, *supra* note 120, at 655.

[127] Near v. Minnesota, 283 U.S. 697, 715 (1931).

[128] *See* Emerson, *supra* note 120, at 656.

[129] *Id.* at 657.

[130] United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[131] *See* Emerson, *supra* note 120, at 657.

lustrated by *Marchetti* where there were originally 339 items deleted, while only 168 were litigated.[132] Fourth, under prior restraint, administrative regulations determine whether something shall be published, whereas under subsequent punishment, procedural guarantees built around criminal prosecutions prevail.[133] Fifth, subsequent punishment is usually in the public forum, but prior restraint takes place behind "a screen of informality."[134] This is certainly true of the procedure for CIA review. The CIA, under *Marchetti*, has thirty days to review the material itself. None of the decisions made during that time are made publicly. Sixth, "[p]erhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, over-zealous, and usually absurd administration."[135] This is also illustrated by *Marchetti* and the review standards of the CIA:

> Following are some of the 171 items which the CIA initially deleted from *The CIA and the Cult of Intelligence* and then agreed could be published.
>
> "The Chilean election was scheduled for the following September, and Allende, a declared Marxist, was one of the principal candidates" (p. 14); "Henry Kissinger, the single most powerful man at the 40 Committee meeting on Chile" (p. 17); "On occasion, the agency will sponsor the training of foreign officials at the facilities of another government agency" (p. 53); "As incredible as it may seem in retrospect, some of the CIA's economic analysts (and many other officials in Washington) were in the early 1960s still inclined to accept much of Peking's propaganda as to the success of Mao's economic experiment" (p. 117); referring to a National Security Council briefing by Richard Helms, "His otherwise flawless performance was marred only by his mispronunciation of 'Malagasy' (formerly Madagascar) when referring to the young republic" (p. 293); "Prepared by the Pentagon's National Reconnaissance office, the Joint Reconnaissance Schedule is always several inches thick and filled with hundreds of pages of highly technical data and maps" (p. 332).[136]

Seventh, while an individual may be more certain as to what he may publish under a system of prior restraint, and thereby reduce this risk

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[132] *See* discussion at note 8 *supra* and accompanying text.

[133] *See* Emerson, *supra* note 120, at 657.

[134] *Id.* at 658.

[135] *Id.*

[136] Petition for Rehearing, at 9-10, n.6, Snepp v. United States, 444 U.S. 507 (1980).

of punishment, the societal interest in free expression far outweighs such certainty.[137] Indeed, such a philosophy implies a timidity at expressing controversial ideas. It is obvious that Snepp preferred to take the risk of subsequent punishment for publishing his material. Through the enforcement of his 1968 contract and subsequent injunction, he will not be able to take that risk. Finally, a system of prior restraint is more readily enforceable than a system of subsequent punishment.[138]

In *Near v. Minnesota*, the Supreme Court decided a case based upon the doctrine of prior restraint,[139] clearly stating that a system of prior restraint was inconsistent with the first amendment, and that a system of subsequent punishment was necessary.[140] While the Court allowed certain exceptions to this rule, the exceptions were very limited. Even these exceptions may lead to problems because some prior restraints *have* been upheld in later years. Justice Brennan has made a distinction in the area of prior restraints which may be helpful. He delineated the exceptions in *Near* into two categories. The first catagory consists of obscene material and "incitements to acts of violence and the overthrow by force of orderly government."[141] Justice Brennan categorizes these exceptions to the rule against prior restraints as those situations in which the speech involved is "not encompassed within the meaning of the First Amendment."[142] The second category is illustrated in *Near* as the government being able to prevent "actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[143] In this category, the speech merits first amendment protection and yet may be suppressed by an "overriding countervailing interest."[144]

Some commentators have made other distinctions, for example, the situation where "the presumption against prior restraints may be overcome . . . where the expected loss from impeding speech in advance is minimized by the unusual clarity of the prepublication showing of harm."[145] In conjunction with the above, the factor of the type of speech, *i.e.*, commercial or political speech, will play a part.[146]

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[137] *See* Emerson, *supra* note 120, at 659.

[138] *Id.*

[139] *Id.* at 652.

[140] Near v. Minnesota, 283 U.S. 697, 717 (1931).

[141] *Id.* at 716.

[142] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 590 (1976) (Brennan, J., concurring).

[143] Near v. Minnesota, 283 U.S. 697, 716 (1931).

[144] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 591 (1976) (Brennan, J., concurring).

[145] L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-33, at 729 (1978) [hereinafter cited as TRIBE].

[146] *Id.* at 730-31.

No matter which of the above standards one uses, Snepp's material should have been protected. As Snepp did not reveal classified information or any material not made public by the CIA, the problem of his speech not being protected by the first amendment[147] is nonexistent. However, even if Snepp's material fell into Justice Brennan's first category, certain safeguards protect the first amendment rights of such speech. In traditional prior restraint cases, the Supreme Court has repeatedly stated that any system of prior restraint bears the heavy burden of a presumption that it is unconstitutional.[148] The Court, in a typical and often cited prior restraint case dealing with obscenity, overturned a Rhode Island statute because it was a short cut taken by officials around the procedural process of a criminal prosecution and, as such, constituted a prior restraint.[149] The Court stated that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy burden against its constitutional validity."[150] However, the prior restraint reached in this case did not reach the level of prior restraint in *Snepp*; the "Commission" in *Bantam Books* would list objectionable books and send a notice to a distributor that he was distributing "objectionable" books, and the Commission had a duty to recommend prosecution to the state's attorney general of purveyors of obscenity.[151] While the Commission's activities stopped distribution of the books[152] and was, in effect, a prior restraint, the Commission's power was in no way equal to that of the CIA in prepublication review. The distributor could continue distributing the book and risk criminal prosecution; he would, however, be surrounded by criminal procedural safeguards should there be a criminal prosecution. Snepp cannot publish today until he receives approval. If certain materials are deleted, he must institute civil proceedings to challenge the deletion. Further, the Court has held that the presumption against prior restraints is heavier than that against limitations on expression imposed by criminal statutes because our society prefers to punish those who abuse free speech "*after* they break the law than to throttle them and all others beforehand."[153] The presumption against prior restraints has been upheld in a number of cases wherein the power of the censor never reached the level used in *Snepp*.

Within the first category set up by Justice Brennan, there are strict

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[147] The proposition that the first amendment does not protect the publication of classified material is mentioned in United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972).

[148] *See* TRIBE, *supra* note 145, at §§ 12-31.

[149] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[150] *Id.* at 70.

[151] *Id.* at 61-62.

[152] *Id.* at 68.

[153] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1974) (emphasis added).

procedural safeguards regarding prior restraints which have been specifically done away with in situations such as Snepp's. In an obscenity case dealing with the procedures of prior censorship of alleged obscene material,[154] the Supreme Court formulated the following procedural guidelines necessary for prior restraints to be constitutional. First, the burden of proving that the material is "unprotected expression" lies solely on the censor.[155] Second, by either statute or judicial construction, the process by which the material is to be restrained must include a requirement that, within a specified period of time, the censor will either allow the material to be shown or go to court to restrain its showing.[156] Third, this procedure must also assure a prompt, final judicial determination.[157] Incredibly, even these safeguards were stripped from Snepp. In *Marchetti* the court held that because of the nature of the material covered and the confidentiality of the relationship under which the information was obtained, the burden of obtaining judicial review of the material deleted by the CIA "ought to be on Marchetti."[158] Therefore, the second and third procedural safeguards of mandatory and prompt judicial review were denied Marchetti. While "the material covered" in Marchetti, as noted above, was strictly limited to classified material, in *Snepp* it was not so limited. Nevertheless, the courts in the *Snepp* decisions apparently upheld this removal of procedural safeguards by ignoring this facet of the decision and by alluding to *Marchetti* with apparent favor: "[W]e recognized an obligation on the part of the CIA to respond promptly to a request for authority to publish, and we held that there was a *right* of judicial review if permission was withheld."[159]

A "right" of judicial review is certainly different from a procedure where the "censor" must seek judicial review of his "restraint," and the burden of proof is on the censor. Furthermore, Snepp's speech or expression was political in nature, and not obscene, and as such was entitled to a higher standard of protection. Moreover, the material which the CIA can control is not limited to classified information but "sensitive material" which, if disclosed, would imperil the compelling state interests of the secrecy of information important to our national security and the appearance of confidentiality of our intelligence agencies.[160] That there is no mandated judicial review over what the CIA may attempt to delete in the name of this meaningless phrase, especially in

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[154] Freedman v. Maryland, 380 U.S. 51 (1965).

[155] *Id.* at 58.

[156] *Id.* at 58-59.

[157] *Id.* at 59.

[158] United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972).

[159] United States v. Snepp, 595 F.2d 926, 932 (4th Cir. 1979) (emphasis added).

[160] *See generally* discussion at notes 90-111 *supra* and accompanying text.

light of what the CIA initially tried to delete from Marchetti's book,[161] leads one to suspect that there is the potential for widespread abuse by the CIA of its censorship powers.

One could not seriously argue that Snepp's speech fell into Justice Brennan's second category of expression protected by the first amendment; this category necessarily presupposes that this speech is carried out during a time of war.[162] Further, this category "has only been adverted to in dictum and has never served as the basis for actually upholding a prior restraint against the publication of constitutionally protected materials."[163] Indeed, in *New York Times Co. v. United States*,[164] the material published was classified "Top Secret—Sensitive" and was obtained surreptitiously.[165] Further, the "unusual clarity of harm" was present in a much greater degree in the *Times* case than in *Snepp*. The majority of the *New York Times* Court felt that these materials "would be harmful to the Nation."[166] Moreover, the majority of the Court who felt that there was a military security exception to the rule against prior restraints, also felt that in order to override the presumption, the damage had to be direct, immediate and irreparable.[167] The damage done by Snepp was indirect and depended upon other people's perception of the CIA. Indeed, as stated above, not only could the government not quantify the damage, it could not even estimate how much of this rather nebulous damage could be attributed to Snepp's actions. Notwithstanding Fourth District Court of Appeals Judge Walter E. Hoffman's statement that Snepp's first amendment defense was "patently frivolous,"[168] there are serious first amendment problems with the *Snepp* decisions. While the courts in *Snepp* chose to ignore the

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[161] *See* note 139 *supra* and accompanying text.

[162] The obstruction of recruitment is taken from Schenck v. United States, 249 U.S. 47 (1919), which was always couched in terms of the situation of war surrounding the obstruction. As Emerson noted:

> One is the exception for prior restraint necessary to military operations in time of war. So long as this exception is confined to periods of actual hostilities, it is perhaps not a matter of great significance. In the next war, the issue of prior restraint is likely to be over-shadowed by other problems. The exception could prove dangerous, however, if it is applied to defensive or preparatory operations. In this application, it should be strictly limited.

Emerson, *supra* note 120, at 670.

[163] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 591 (1975) (Brennan, J., concurring).

[164] New York Times Co. v. United States, 403 U.S. 713 (1971).

[165] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 591-92 (1975) (Brennan, J., concurring).

[166] *Id.* at 592.

[167] *Id.* at 593.

[168] United States v. Snepp, 595 F.2d 926, 942 (4th Cir. 1979).

issue, it is obvious that the enforcement of the contract utilizes a classic prior restraint. The courts' usage of such a system is completely at odds with the traditional doctrine of prior restraints. Moreover, the courts have seen fit to give the most blatant examples of pornographic material more first amendment protection than they have given Snepp's political speech. Whether such a system of prior restraint will spread to other government agencies remains to be seen. The *Snepp* decisions will certainly curtail the public's access to information concerning their own government.

The Court's decision in *Snepp* upheld the prior restraint of his publications because the Court felt that such a prior restraint was a "reasonable" condition of public employment. While not mentioning their reasons in the body of their decision, the Supreme Court, in a footnote, found that: 1) The CIA had the right to "protect substantial government interests by imposing reasonable restrictions on employees activities that in other contexts might be protected by the First Amendment. . . ."; 2) "[T]he 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. . . ."; and 3) "[T]he agreement that Snepp signed is a reasonable means for protecting this vital interest."[169]

The first problem with this analysis deals directly with the dichotomy between prior restraint and subsequent punishment, as discussed above. Traditionally, the conditions of government employment were dealt with on a subsequent punishment basis. After an employee had been denied employment, terminated from employment or threatened termination because of membership in an alleged subversive group,[170] failure to take a loyalty oath,[171] criticism of one's employer,[172] violation of the Hatch Act[173] or because of membership in a political party,[174] the aggrieved party would bring suit to challenge the "punishment" he had received. However, at no time was a prior restraint used. Not until recently did the Supreme Court find a prior restraint to be preferrable to subsequent punishment.

In *Civil Service Commission v. Letter Carriers*,[175] the Court held parts of the Hatch Act were not so broad or vague as to be unconstitutional. One of the reasons why the statute was not vague was that the

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[169] Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).

[170] Adler v. Board of Education, 342 U.S. 485 (1951).

[171] Keyishian v. Board of Regents, 385 U.S. 589 (1966).

[172] Pickering v. Board of Education, 391 U.S. 563 (1961).

[173] Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1972).

[174] Elrod v. Burns, 427 U.S. 347 (1975). While this list is not all inclusive, it does illustrate the variety of situations which have come up in this area.

[175] Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1972).

Civil Service Commission would rule upon challenged activities prior to their being carried out.[176] This was a classic prior restraint, to be used to "remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned."[177] This offhand remark was made with no mention of the problems of prior restraint. Subsequently, classic examples of prior restraint have been employed as reasonable conditions of employment.

In *Greer v. Spock*,[178] the Supreme Court upheld a system of prior restraint where the commander of a military base was entitled to review political literature to be distributed by civilians on the base.[179] This case did not involve a "time, place or manner" regulation, such as would apply to parades or labor picketing; the sole issue was the content of the literature.[180] In *Brown v. Glines*,[181] the Supreme Court upheld regulations that required members of the Air Force to obtain approval of their commanders before circulating a petition, but this again was a content regulation. "Thus, the regulations in both services prevent commanders from interfering with the circulation of any material other than those posing a clear danger to military loyalty, discipline, or morale."[182] Approximately one month later, the *Snepp* decision was handed down, authorizing a classic prior restraint.

Whether these three cases can be distinguished due to the fact that two were cases involving military bases and the other case involved the CIA is unimportant; what is important is that the Supreme Court upheld classic systems of prior restraint with absolutely no mention of prior restraint doctrine. Indeed, with the inclusion of the sentiments expressed in *Civil Service Commission v. Letter Carriers*[183] regarding prior approval of governmental employees' activities, the implication is that systems of prior review by governmental authorities of activities or expressions of all government employees is *preferred* over subsequent punishment. It also should be noted that all of the speech so restrained was "political" speech in which "the element of timeliness may be important."[184] The ability of the Supreme Court to sanction such prior restraints without a backward glance at *Near v. Minnesota* and *New York Times Co. v. United States* is cause for concern.

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[176] *Id.* at 580.

[177] *Id.* As to this being one element of prior restraint see note 137 *supra* and accompanying text.

[178] 424 U.S. 828 (1976).

[179] *Id.* at 840.

[180] *Id.* at 846.

[181] Brown v. Glines, 444 U.S. 348 (1980).

[182] *Id.* at 355.

[183] *See* note 177 *supra* and accompanying text.

[184] Carroll v. Princess Anne, 393 U.S. 175, 182 (1968).

The second problem in the "conditions of government employment" analysis of the court is the reasonableness of the infringement on Snepp's first amendment rights. Restraints on the first amendment rights of government employees are permitted for appropriate reasons;[185] however, the conditions attached to public employment must be reasonable.[186] Further, "significant encroachments on First Amendment rights . . . must survive exacting scrutiny" and cannot be upheld "by a mere showing of some legitimate governmental interest."[187] Also, the state cannot restrict constitutional liberties without precise regulations.[188] Finally, where actions are taken which deprive persons of their constitutional rights, such action must be taken by the President or Congress and cannot be delegated to a bureaucracy.[189] The meager and vague congressional mandate of charging the Director of the Central Intelligence Agency with "protecting intelligence sources and methods from unauthorized disclosure,"[190] relied upon by the Court in upholding the prior restraint in *Snepp* as a "reasonable condition" of public employment, hardly meets the above standards.

Even using the standards applied by the Supreme Court, the prior restraint of Snepp's material cannot possibly be a "reasonable condition" of government employment. The Court has sanctioned the use of prior restraints where traditionally subsequent punishment was relied upon. Further, the safeguards developed through the years relating to what the government must show and the procedure necessary to enact legislation which infringes upon the first amendment rights of government employees were completely ignored.

B. *Criminal Prosecution*

Employment contracts such as Snepp's, while an effective means of government control over information, pose serious first amendment problems. One option for the government is criminal prosecutions. This is the most obvious method of governmental control over information it wishes not to be published.

The legislature has specifically acted in this area as it relates to the unauthorized disclosure of classified information.[191] While the Supreme Court has never held these statutes to be unconstitutional, the ques-

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[185] Elrod v. Burns, 427 U.S. 347, 360 (1975).

[186] Keyishian v. Board of Regents, 385 U.S. 589, 605, 606 (1966). *See also* Sherbert v. Verner, 374 U.S. 398 (1963).

[187] Buckley v. Valeo, 424 U.S. 1, 64 (1975).

[188] Elrod v. Burns, 427 U.S. 347, 363 (1975) (*citing* Kusper v. Pontikas, 414 U.S. 51, 59 (1973)).

[189] Greene v. McElroy, 360 U.S. 474, 506, 507 (1958).

[190] 50 U.S.C. § 403(d)(3) (1976).

[191] 18 U.S.C. §§ 792-799 (1977).

tions of whether the information is properly classified, whether the information should be declassified and the mandates of the Freedom of Information Act in relation to classified information, have led to extensive litigation.[192] There are other troubling aspects of a criminal prosecution which have led to a decreased usefulness of this method of control.

The first and most troubling aspect, especially in relation to the Court's pronouncement that national security and the appearance of confidentiality of intelligence agencies are compelling state interests, is that criminal prosecutions are necessarily after the fact. Obviously, if there is to be a criminal prosecution, the crime has to have been committed, and the secrets divulged. At that point, national security has been compromised and the appearance of confidentiality either lessened or nonexistent, depending on the nature and extent of the secrets divulged. Criminal prosecutions are only useful to the above-mentioned compelling state interests in their deterrence effect. Also, criminal prosecutions by their nature are more difficult to maintain than a civil action to enforce a contract. Because of the strict procedural safeguards surrounding a criminal prosecution and the burden of proof necessary to convict under a criminal statute, the government faces a much greater task in trying to prosecute a violator.

A more recent phenomenon of such criminal prosecutions is the spectre of the defense using "graymail":

> The term describes efforts by defendants and their lawyers to introduce sensitive matters that may be only remotely connected to their cases—secrets of just plain espionage embarrassments the government doesn't want to admit—in hopes of finding something the government can't afford to disclose during a public trial. By graymailing the government in this fashion, the defendants have a chance for de facto immunity from prosecution. The process becomes a "game of chicken" between prosecutor and defendant says Joseph Biden (D-Del.), chairman of a Senate intelligence subcommittee.
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> Biden explains, "an astute defense counsel who might represent a defendant who has leaked sensitive information, bribed government officials, or spied for a foreign power, can threaten the Justice Department with disclosure of classified information in the course of the trial. He hopes that with this threat he can force dismissal of the prosecution."[193]

The methods of using graymail can entail both pretrial discovery and the use of classified or embarrassing information in a public trial. Two cases illustrate how graymail can be an effective "defense" procedure.

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[192] *See* note 45 *supra* and accompanying text.

[193] Jenkins, *Graymail*, STUDENT LAW. 18 (December, 1979).

Puttaporn Khramkhruan was a CIA agent in Thailand. While coming into this country to attend a seminar, Khramkhruan also brought in twenty-five kilos of opium.[194] He was discovered and arrested. To effectively prosecute Khramkhruan, the CIA was asked by the Justice Department to supply a witness to refute Khramkhruan's contention that the CIA knew of his smuggling operation and refused to interfere.[195] Because of the Federal Rules of Criminal Procedure and statutes and case law dealing with criminal procedure, the CIA would have also had to turn over for inspection any documents material to the preparation of Khramkhruan's defense, any prior statements of government witnesses relating to the witnesses' testimony and any evidence the government had which was favorable to Khramkhruan.[196] The CIA refused to give any of this information to the Justice Department, and the Justice Department subsequently had to dismiss the case.[197]

Similarly, while Richard Helms was being investigated for his apparent perjury while being questioned by the Senate Foreign Affairs Committee, the prosecutors ran into the problem of a very embarrassing public trial.[198] Besides the threat of introducing classified material to prove he did not commit perjury, Helms could have defended himself by alleging that he had been instructed to say what he did by a higher authority. "Helms' testimony, it was reported, would be embarrassing to former Secretary of State, Henry Kissinger, . . . and to at least one senator on the Foreign Relations Committee."[199] Helms eventually pleaded *nolo contendere* to a two-count misdemeanor, with the Justice Department urging U.S. District Judge Barrington Parker not to jail Helms.[200] Helms received a $2,000 fine and one year's unsupervised probation.[201] The maximum penalty for felony perjury is a $5,000 fine and five years in jail for each count.[202]

Currently, the Congress is in the process of passing legislation in the graymail area. As reported by the House Permanent Select Committee on Intelligence on March 18, 1980, H.R. 4736 would establish special procedures relating to the use of classified material during trial.[203] The bill basically requires the defendant to notify the government if he intends to use classified information in his defense, and it allows the parties to

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[194] *Id.* at 19.
[195] *Id.*
[196] *Id.*
[197] *Id.* at 20.
[198] *Id.* at 18.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] 38 Cong. Q. Weekly Rep. 861 (March 29, 1980).

have a private adversary hearing before the judge to determine if the information may be used in trial. In case of an adverse decision, the government could appeal immediately. The judge could bar disclosure, allow limited disclosure or allow all of the information to be disclosed.[204] The bill covers both classified information and "restricted data."[205] The bill also provides procedures for limited disclosure, dismissing charges, and discovery proceedings.[206] Similarly, the Senate has passed "graymail legislation;"[207] the Senate Bill (S. 1482) is similar to the House bill, the only difference being that the House bill has more extensive coverage over the pretrial discovery proceedings.[208]

However, even such laws providing for rather extensive *in camera* proceedings have limited effectiveness. In March, 1978, the Justice Department charged Robert Berrellez, an ex-employee of International Telephone & Telegraph Company in Chile, of perjury in his testimony before a Senate Subcommittee investigating the CIA's involvement in the 1970 Chilean presidential election.[209] In October of 1978, the government requested a closed-court hearing regarding the Berrellez prosecution. The government dropped the prosecution on February 8, 1979.[210] The interesting part of the case, however, was the closed-court hearing in October of 1978, for in the February 24, 1979, issue of *The Nation*, the following appeared:

> A while ago, a bulky, brown envelope arrived at the offices of *The Nation*. The envelope had no return address and there was no explanation of who had sent it, or why. It contained sealed transcripts of a closed-court hearing that took place in Washington last October. The hearing was part of the perjury prosecution of Robert Berrellez, a high I.T.T. official who was stationed in Chile at the time of the election of Salvadore Allende.[211]

The article went on to speculate that: "Finally, it is conceivable that the documents were sent to *The Nation* as part of 'disinformation' plot to discredit a proposed new law designed to bolster such government prosecutions."[212] The magazine then went on to discuss and print portions of the transcript, stating that "the issues raised by the material

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[204] For a definition of "restricted data," see note 94 *supra*.

[205] 38 Cong. Quarterly Weekly Reports 861 (March 29, 1980).

[206] *Id.* at 862.

[207] *Id.* at 888.

[208] *Id.*

[209] *The Black Art of Graymail*, THE NATION, at 210 (February 24, 1979).

[210] *Id.* at 210-11.

[211] *Id.* at 193.

[212] *Id.* at 209.

transcend the more remote and speculative harm that might result from their publication."[213]

The courts have recognized the above disclosure problems. In *Marchetti*, the Court stated that "[o]ne may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and the maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted."[214] The district court in *Snepp* quoted the above with approval.[215] Further, the Supreme Court noted the problem of graymail, not only in the context of criminal prosecution, but also in proving the tortious conduct necessary to sustain an award of punitive damages. Whether this portends an expansion of protective legislation into this area of torts remains to be seen.

Whether cases such as *Snepp* should be decided upon the traditional doctrine of prior restraint with its reliance on subsequent punishment or upon the doctrine of conditions of public employment is a critical issue in this Article. There are many interests to be considered in a case such as *Snepp*. To decide what analysis or standard to apply is, in actuality, to decide the case. The weighing of interests leads one to the standard to apply, not how to apply the standard. The vital interest in the operation of a democratic government "that the citizens have facts and ideas on important issues before them,"[216] which is akin to a first amendment right to "receive information and ideas,"[217] pushes in the direction of applying the traditional prior restraint doctrine with its inherent and historical loathing of prior restraints. Once one reaches this plateau, all of the forces of free speech, freedom of the press and the almost insurmountable presumption against prior restraints can be marshalled to strike down prepublication review in favor of subsequent punishment. Alternatively, the obvious government interest in protecting the secrets vital to national security, coupled with the fear of graymail, pushes one to the analysis of conditions of public employment and their reasonableness. This latter analysis downplays the first amendment and gives the government greater latitude in how it can control material. It would seem that the first approach is preferable. If the pending legislation is passed on graymail, the effect of graymail will be lessened. Further, if criminal statutes are ineffective in protecting

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[213] *Id.*

[214] United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[215] United States v. Snepp, 456 F. Supp. 176, 181 (E.D. Va. 1978).

[216] A Quantity of Books v. Kansas, 378 U.S. 205, 224 (1964). *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978): "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 777 n.12 (*citing* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

[217] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

national security secrets, then the statutes should be changed. To subject material such as Snepp's to the obstacles of prior restraint is too great a price to pay for the shortcomings of the legislature.

V. DAMAGES: THE CONSTRUCTIVE TRUST AND PUNITIVE DAMAGES

Based upon Snepp's alleged breach of contract, the *Snepp* courts were hard-pressed to come up with a monetary award of damages to the government. The reason the courts were groping about for some measure of damages is quite clear: All of the courts realized that the damages allegedly suffered by the government were not quantifiable.[218] A plaintiff must prove "an amount of actual harm done by the defendant's breach that is measurable in terms of money"[219] in order to receive compensatory damages. Since the government could not meet this burden of proof, only nominal damages could be awarded,[220] but all of the courts found nominal damages to be an inadequate remedy.[221] Therefore, the courts had to become creative in formulating a monetary award.

The district court and the Supreme Court followed the same line of reasoning by imposing a constructive trust in favor of the government over the revenue from Snepp's book. The district court found that Snepp held a position of trust while employed by the CIA[222] and that the publishing of his book without prepublication approval constituted a willful breach of trust;[223] the court then imposed the constructive trust. The Supreme Court used the same rationale; finding that Snepp was obligated by his agreement not to publish any material relating to the CIA,[224] the Court held that this agreement also created a fiduciary relationship between Snepp and the CIA,[225] and by publishing his book, Snepp breached his trust and fiduciary duty.[226] Accordingly, the Court imposed the constructive trust.[227]

Justice Stevens' dissent found that Snepp's 1976 agreement was substantially the same as his 1968 agreement,[228] and that Snepp had breached this agreement. Justice Stevens stated, however, that since there was no objectionable material in the book, the CIA would have

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[218] United States v. Snepp, 444 U.S. 507, 514-15 (1980).

[219] 5 A. CORBIN, CONTRACTS § 1002 (1964).

[220] *Id.* § 1001.

[221] United States v. Snepp, 456 F. Supp. 176, 181 (E.D. Va. 1978), *aff'd*, 595 F.2d 926, 936 (4th Cir. 1979), *aff'd*, 444 U.S. 507, 514 (1980).

[222] United States v. Snepp, 456 F. Supp. 176, 179 (E.D. Va. 1978).

[223] *Id.* at 181.

[224] Snepp v. United States, 444 U.S. 507, 508 (1980).

[225] *Id.* at 510.

[226] *Id.*

[227] *Id.*

[228] *Id.* at 516 n.1.

been obliged to clear the book for publication in its entirety; therefore, none of the gains from the book were due to the nonsubmission for prepublication review, and a constructive trust was inappropriate.[229]

In dealing with the issue of the appropriateness of imposing a constructive trust upon the revenue of Snepp's book, the majority decision cited no authority in the body of its opinion. In discussing this remedy, the Court only mentions the results it wishes to gain; these results were: 1) disgorging "the benefits of [Snepp's] faithlessness;"[230] 2) "to deter those who would place sensitive information at risk;"[231] and 3) providing an "equitable and effective means of protecting intelligence that may contribute to national security."[232]

The Court mentioned some of its rationale in its response to Justice Stevens' dissent.[233] In particular, the Court cited certain sections of the *Restatement (Second) of Agency* and *Scott on Trusts*. The Court cited a section dealing with the remedies available for breach of an employment contract:

> The violation by the agent of a duty which is merely contractual does not of itself cause him to be a constructive trustee of profits thereby made. Thus, if an agent contracts to give his full time to the principal and commits a breach by spending part of his time working on his own account, although subject to liability for loss thereby caused to the principal, he is not thereby liable for the profits made in such time *if he does not use the facilities of the employer or confidential information*, and does not act in competition with him.[234]

Also, the Court cited a section which states that after the termination of the agency relationship, the agent "has a duty to account for profits made by the sale or use of trade secrets and other confidential information. . . ."[235] The problem, of course, is determining what is confidential information. The comment to the above section is of some use. "Trade secrets and other similar private information constitute assets of the principal."[236] In formulating a test to determine whether certain information was either a trade secret or a piece of confidential information, one court has recently stated the following:

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[229] *Id.* at 518-23.

[230] *Id.* at 515.

[231] *Id.* at 515.

[232] *Id.* at 516. That the Court is now concerned with protecting information which "*may contribute* to the national security" is somewhat disheartening. *Id.* (emphasis added).

[233] *Id.* at 515 n.11.

[234] RESTATEMENT (SECOND) OF AGENCY § 400, Comment c (1958) (emphasis added).

[235] *Id.* § 396(c). *See also* V. SCOTT ON TRUSTS § 505 (1967).

[236] RESTATEMENT (SECOND) OF AGENCY § 396(c), Comment (1958).

> Certain common elements can be distilled from these definitions and fashioned into a workable test encompassing both concepts. The elements comprising that test are: 1) the protected matter is not generally known or readily ascertainable, 2) it provides a demonstrable competitive advantage, 3) it was gained at expense to the employer, and 4) it is such that the employer intended to keep it confidential.
>
> It is commonly recognized that—"matters of general knowledge within the industry may not be classified as trade secrets or confidential information entitled to protection."[237]

Since the CIA admitted that there was no information in Snepp's book which the CIA had not made public, the government certainly did not intend to keep it confidential and, theoretically at least, it should have been readily ascertainable. Therefore, Snepp did not use confidential material.

Furthermore, it should be noted that the authorities cited assume that the information or asset used by the fiduciary is in fact the property of the principal. Indeed, in support of their imposing a constructive trust, the Court cited a section for the liability of the fiduciary who uses his principal's assets.[238] This is crucial as Congress has spoken on this subject as it relates to government ownership of information.

Through the Copyright Act of 1976,[239] Congress has stated that copyright protection is not afforded to "any work of the United States Government. . . ."[240] Furthermore, Congress has specifically stated that the government has no property right in its works:

> The effect of Section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright on it or restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term "work of the United States Government" does *not* mean that a work falling within the definition of that term is the property of the U.S. Government.[241]

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[237] Cherne Industries, Inc. v. Ground & Associates, 278 N.W.2d 81, 90 (Minn. 1979) (citations omitted).

[238] RESTATEMENT (SECOND) OF AGENCY § 404, Comments b and d (1958).

[239] Title 17 U.S.C. (1977).

[240] 17 U.S.C. § 105 (1977).

[241] *Id.* § 105. *See* HISTORICAL NOTE, NOTES OF COMMITTEE ON THE JUDICIARY, H.R. NO. 94-1476, *reprinted in* [1976] U.S. CODE & AD. NEWS 5673.

In a letter to Jack C. Landau, Esq., Director of The Reporters Committee for Freedom of the Press, Representative Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, who was a co-sponsor of the above bill, attended and chaired hearings on the bill and who was chairman of the House-Senate Conference Committee on the bill as finally passed by the Congress,[242] made the following statement regarding the *Snepp* case and its relation to the Copyright Act:

> The Congress, when it considered the Act, carefully studied the question of whether the government should be permitted to assert any proprietary interest in its own information; and to enforce this proprietary interest through Government Copyright by having injunctive relief and an accounting of royalties and other equitable remedies—precisely the relief requested in this case.
>
> The conclusion of the Congress, as expressed in the Act and in the voluminous legislative history, was that the principles of the First Amendment and the 1909 Copyright Act give to the people of this country the right to have information about their government; and that therefore, government employees have the right to publish information obtained during the course of government employment free from any prior restraints or post-publication equitable relief based on any theory of the government ownership.
>
> The Act makes clear that Congress was not merely neutral in this debate but with great specificity prohibited the United States from asserting or enforcing any proprietary interest in government information.
>
> Furthermore, the "contract" cause of action advanced by the government and lower court decision—if upheld—may threaten the Congressional prohibition against Government Copyright; and that any agency in the government will then be free to require their employees to sign such a "contract," negating the right given to him by the Congress to publish government information based on government employment.[243]

As the information used by Snepp was neither confidential nor the property of the United States, it is clear, both from Congressional action and the authorities cited by the Supreme Court, that the equitable remedy granted to the government was totally inappropriate.

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[242] Brief Amicus Curiae of The Reporters Committee for Freedom of the Press in support of Appellant, Appendix A, paragraph 1, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979).

[243] *Id.* at paragraphs 4, 5 and 7.

Another problem with the constructive trust deals with the way in which the Court utilized it. A constructive trust has traditionally been used as a method of restitution.[244] It is used to force restitution of property or money in order to prevent unjust enrichment.[245] Thus, the use of the constructive trust is to restore to the principal the property or revenue which should have been his. The material which Snepp used, however, was not the property of the CIA or the United States government. Therefore, there was nothing to restore to the CIA.

The Supreme Court used the constructive trust as a punishment and as a deterrent. In discussing the remedy of a constructive trust, the Court stated that without such a remedy, the government would have no "reliable deterrent against similar breaches"[246] and that "the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk."[247] As such, it is an "equitable and effective means of protecting intelligence. . . ."[248] Such damages are in the nature of punitive damages, not restitution, as deterrence is one aspect of punitive damages.[249] Indeed, none of the Court's rationale touches upon the basic goal of a constructive trust, *i.e.*, restitution to avoid unjust enrichment.

Justice Stevens, in his dissent, alludes to the fact that the constructive trust was being used as a punitive damage measure:

> In any event, to the extent that the Government seeks to punish Snepp for the generalized harm he has caused by failing to submit to prepublication review and to deter others from following in his footsteps, punitive damages is, as the Court of Appeals held, clearly the preferable remedy ". . . since a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment.[250]

It is clear that the Court's decision utilized a constructive trust as punishment, and as such, it was totally inappropriate.

The constructive trust imposed by the Supreme Court was an improper remedy in and of itself and was improperly utilized. Furthermore, the constructive trust encounters difficulties with the first amendment. A similar remedy was requested in a case wherein the plaintiff commenced his action subsequent to the time allotted under the

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[244] RESTATEMENT OF RESTITUTION § 160, Comment d (1937).

[245] *See* Hert v. Klavan, 374 A.2d 871, 873 (D.C. App. 1977); *see also* Ray v. Winter, 39 Ill. App. 3d 567, 350 N.E.2d 331 (5th Cir. 1976).

[246] Snepp v. United States, 444 U.S. 507, 515 (1980).

[247] *Id.* at 515.

[248] *Id.* at 516.

[249] 5 A. CORBIN, CONTRACTS § 1077 (1964).

[250] Snepp v. United States, 444 U.S. 507, 523 (1980) (Stevens, J., dissenting).

state statute of limitation for libel,[251] and the plaintiff sued for the money received as profit from the defendant's allegedly libelous book.[252] Such an action would fall under a longer statute of limitation for a contract obligation and the action would then have been timely filed.[253] The remedy the plaintiff was seeking in that case was basically what the government was seeking in *Snepp*. The Court, after reviewing the first amendment protection afforded speech and the press, stated:

> It is evident that the right to recover based upon libel has been limited to the recovery of damages under the common law and statutes applicable thereto. It would seem, therefore, that the law is so well established that *an innovation such as the plaintiff seeks in this action would impose new and unnecessary hazards upon publishers and would be contrary to the policy of our law.*[254]

The sort of innovation involved in the above case is almost exactly what the Court had to do in *Snepp*. As damages could not be properly ascertained to support an award of compensatory damages, the court imposed the constructive trust. It would certainly seem that this remedy will impose new hazards on publishers, and is contrary to our policy of free expression.

It is instructive to look at the first amendment limitations the Supreme Court has placed upon the damages awarded in libel cases. Libel is somewhat analogous to the *Snepp* situation for two reasons. First, as in libel cases, it was the *reputation* of the CIA which was harmed by the publication of the material. The court found that the CIA had been injured by Snepp's publication of his book because the CIA had lost a number of sources.[255] As stated above, this loss of sources must have been caused by the CIA's appearance of having a lack of security, because none of Snepp's material was classified nor had any of it not been made public by the CIA. Therefore, the actual security of the CIA was never breached. Second, in libel cases, the damage sustained by one's reputation is difficult to quantify, and in Snepp's case, the Court recognized that the injury done was practically impossible to quantify.

However, in libel actions one must go much farther in proving damages than the government went in *Snepp*. In order not to "inhibit the vigorous exercise of First Amendment freedoms,"[256] plaintiffs in libel actions must prove actual damages and not presumed damages.[257]

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[251] Hart v. E.R. Dutton & Co., 93 N.Y.S.2d 871 (Sup. Ct. Oreida County 1949).

[252] *Id.* at 873-74.

[253] *Id.* at 874.

[254] *Id.* at 880 (emphasis added).

[255] Snepp v. United States, 444 U.S. 507, 512-13 (1980).

[256] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

[257] *Id.* at 349.

While there need not be "evidence which assigns an actual dollar value to the injury,"[258] the monetary awards must be supported by competent evidence of the injury.[259] This certainly was not the case in *Snepp*, as the only evidence presented concerning the injury to the CIA were the vague statements of Admiral Stansfield Turner and William Colby. Indeed, in their testimony, they not only admitted that the harm done was not quantifiable, but they also admitted that they did not know how much of this damage was done by Snepp.[260]

The damages awarded by the Court in *Snepp* were not supported by any evidence of pecuniary loss by the CIA. As such, they bore no relationship whatsoever to the supposed harm done. The amount of damages awarded depends entirely upon the whims of the book-buying public. The reasons such damages were awarded without proof of pecuniary loss were to punish Snepp and deter others from doing what Snepp had done. Further, a civil action was instituted instead of a criminal action because Snepp could not possibly have been convicted under any criminal statute.[261] The Supreme Court has spoken about the awarding of civil damages, when proof of pecuniary loss is absent, as a substitute for criminal prosecution, and how such civil action contravenes the first amendment:

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. *The fear of damage awards under a rule such as that invoked by the Alabama courts have may be markedly more inhibiting than the fear of prosecution under a criminal statute....* Alabama, for example, has a criminal libel law which. . . allows as punishment upon a conviction a fine not exceeding $500 and a prison sentence of six months. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. The safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. . . . *Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.* Plainly the

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[258] *Id.* at 350.

[259] *Id.*

[260] *See* note 16 *supra* and accompanying text.

[261] *See generally* discussion at notes 112-217 *supra* and accompanying text.

> Alabama law of civil libel is "a form of regulation that creates hazards to protect freedoms markedly greater than those that attend reliance upon the criminal law."[262]

It is clear that the damages awarded in *Snepp* will have an inhibiting affect on the dissemination of information otherwise fully protected by the first amendment.

As stated by Justice Stevens,[263] and noted above,[264] the Supreme Court utilized the constructive trust as a form of punitive damages. The effect of such an award was precisely what the appellate court had in mind when it urged that punitive damages be awarded. As the purpose of punitive damages in Snepp's case would be to both punish and deter others in the same situation as Snepp from taking his course of action, the appellate court stated that the amount of punitive damages to be awarded should be viewed not only in light of Snepp's culpability, but also in light of his financial situation at the time of the alleged breach of his employment contract and "when he will have realized all of the fruits of the breach."[265] Once again, such a remedy is totally at odds with the first amendment as applied in libel cases.

The Supreme Court has held that in order to lessen the likelihood of the punishment of expressions of unpopular views and media self-censorship, malice must be proven to justify an award of punitive damages in libel cases.[266] Therefore, the statement must be false and the person making the libelous statement must know that the statement was false or must make the statement with reckless disregard as to whether it was false or not.[267] In Snepp's case there can be no requisite malice as he did not make a statement containing proscribed information. None of his statements contained any classified information or information not made public by the CIA. Thus he could not have made the statements with knowledge that they were classified or with reckless disregard as to whether they were classified.

By ignoring the first amendment as it applies to damages, the Supreme Court has afforded libelous statements more protection than the truthful statements of Snepp. The Court punished Snepp for publishing that which the government admitted they had already made public, in order to deter those who would, like Snepp, publish such

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[262] New York Times Co. v. Sullivan, 376 U.S. 254, 277-78 (1964) (emphasis added) (footnotes and citations omitted).

[263] *See* note 250 *supra* and accompanying text.

[264] *See* notes 244-50 *supra* and accompanying text.

[265] United States v. Snepp, 595 F.2d 926, 937-38 (4th Cir. 1979).

[266] Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974). *See also* Maheu v. Huges Tool Co., 569 F.2d 459 (9th Cir. 1977), wherein a "public figure" was held to be able to collect punitive damages once actual malice had been shown.

[267] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

material. Such "punishment" and "deterrence" is certainly not in keeping with "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. . . ."[268]

Once again, the Supreme Court in *Snepp* was completely in error. The imposition of the constructive trust is not supported by the authorities cited by the Court. Further, the constructive trust was used incorrectly to punish and deter. Finally, by totally ignoring the first amendment protections normally afforded speech in this nation, the Court has taken a course of action diametrically opposed to our country's commitment towards fostering free and full public debate.

VI. CONCLUSION

Nothing positive can be said about the Supreme Court's decision in *Snepp*. By not allowing briefs or oral arguments on the merits of the case, it is arguable that the Court demonstrated that it knew what decision it wanted to make and did not want to concern itself with legal niceties. Indeed, it is unclear why, if the case was so clear-cut that briefs and arguments were not needed to decide the case, the Court even granted certiorari. As Justice Stevens noted,[269] the government's cross-petition for certiorari was only filed in order to bring the entire case before the Court if Snepp's petition for certiorari was granted. If Snepp's petition was to be denied by the Court, the government requested that its cross-petition be denied.[270] As Justice Stevens pointed out, the Court summarily dismissed Snepp's claims in a footnote.[271] "It is clear that Snepp's petition would not have been granted on its own merits."[272] Thus, it is questionable whether the Court should have even heard this case. The majority of the Court not only had predetermined the outcome of the case, not worrying about applicable legal principles or *stare decisis*, but, apparently, they also felt that their ideas on the issues presented in *Snepp* were so important they necessitated being chiseled in the stone of constitutional law. Such notion is certainly questionable: "The Court's decision to dispose of this case summarily on the Government's conditional cross-petition for certiorari is just as unprecedented as its disposition of the merits."[273]

What was so important about *Snepp*? What government interest was so overriding that it necessitated the extraordinary action taken by the Court? It is submitted that the first three quotes of this Article coupled

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[268] *Id.* at 270.

[269] Snepp v. United States, 444 U.S. 507, 524 (1980) (Stevens, J., dissenting).

[270] *Id.* at 507, 524.

[271] *Id.* at 524-25 (Stevens, J., dissenting).

[272] *Id.* at 525.

[273] *Id.* at 524.

with the fear of graymail indicate the core, if not the only, rationale of the Court. The death of Mr. Welch and the antics of Mr. Agee illustrated to the Court the fragile, life-or-death nature of the security of the CIA. The ease with which security can be breached was dramatically brought home to the Court by the publishing of *The Brethren*.[274] The Court's reasoning for imposing the constructive trust as opposed to punitive damages was based on two factors. First, the Court sought a reliable deterrent. Second, the Court did not want the government to have to bear the burden of proof necessary to sustain an award of punitive damages, as secrets of "confidences" might have to be divulged.[275] Indeed, then-Attorney General of the United States, Griffin Bell, had this to say about the *Snepp* case in 1978:

> Mr. Bell, however, said today that he thought the suit was important because he had come to the conclusion that enforcement of such contracts might be the only realistic way for the Government to protect legitimate secrets.
>
> The only two ways to protect them are through criminal prosecutions for unauthorized disclosures, or through civil suits for breach of contract he said. "But you can't prosecute if it's much of a secret," Mr. Bell said, "because you have to make the secret" public in the court "to prosecute."[276]

These concerns against the backdrop of a volatile world atmosphere, coupled with a growing concern as to whether the CIA is effectively doing its job of collecting the intelligence necessary for national security, provide the incentive for repressing information to protect the CIA.

Was it necessary for the Court to take this action, as it related specifically to Frank Snepp, to protect the CIA? Was it necessary for the Court to carve up *Marchetti* to extract those portions necessary to uphold its decision, and then discard the rest? Was it necessary for the Court to formulate a standard whereby a government censor has practically unlimited control over what an ex-employee of the CIA may publish? Was it necessary for the Court to sanction the use of a system of prior restraint completely at odds with historical constitutional law principles and stripped of the procedural safeguards afforded even "kiddie porn?" Was it necessary for the Court to say that such a system of prior restraint was a "reasonable condition of public employment" and yet ignore the legal principles developed to test such reasonableness? Was it really necessary for the Court to punish Snepp for, and deter others from, publishing information which the government admitted it

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[274] *Id.* at 514-15.

[275] *See* note 2 *supra*.

[276] N.Y. Times, March 31, 1978, § A at 9, col. 2.

had already made public? The answer to all of the above questions should be "no."

As stated above, Congress is currently considering a bill to substantially ease the effects of graymail.[277] While in all likelihood this bill will not be a panacea, it will make criminal prosecutions for the disclosure of classified information easier. Similarly, both Houses of Congress are currently considering bills (H.R. 5615 and S. 2216) for the criminal prosecution of those who intentionally disclose the identity of covert American agents. The bills provide for up to ten years in prison and fines up to $50,000 for those with authorized access to classified information who violate the law, and a prison sentence of up to three years and a fine of up to $15,000 for private citizens who intentionally disclose the identity of a covert United States agent "in effect to impair or impede the foreign intelligence activities of the United States."[278] Also, both Houses of Congress are working on a comprehensive charter for the CIA. One would hope that the Congress would strive for the same specificity displayed in the Atomic Energy Act.[279]

While none of these bills, including the Atomic Energy Act, is perfect, and all of the proposed bills will surely face challenges in the courts, this is as it should be. The process of congressional debate and judicial review would constitute a more orderly, equitable, understandable and constitutional procedure for dealing with the government interest in security than the judicial creativity evidenced in *Snepp*.

Furthermore, there are important countervailing interests presented in *Snepp*. By its nature, the CIA is secretive. Also by its nature, the activities and policies of the CIA are extremely important to the United States. If the citizens of the United States are to have any voice as to the proper activities and policies of the CIA, which they should, then it is necessary that they receive information concerning the CIA. The kinds of information necessary for citizens to make informed decisions come from not only the government, but from people within the CIA who are informed and can pass on critical information. To rely only on the data released by the government is by definition hearing only one side of the story. As Snepp did not divulge any classified information, nor did he disclose any covert sources in his book, the writing of his book was in fact a public service to the people of the United States.

The Supreme Court in *Snepp* fashioned "a drastic new remedy. . . to enforce a species of prior restraint on a citizen's right to criticize his government."[280] This remedy and prior restraint will most assuredly go

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[277] *See* notes 203-10 *supra* and accompanying text.

[278] Congressional Quarterly Weekly Reports, August 2, 1980, at 2229.

[279] *See* notes 93-102 *supra* and accompanying text.

[280] Snepp v. United States, 444 U.S. 507, 526 (1980) (footnote omitted).

beyond just Frank Snepp. As stated above, many departments and agencies within the government require secrecy agreements. Thus, a great deal of information concerning our government may be withheld from the public. In the end, the real losers in the *Snepp* decision are the public and our form of government:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. [They believed] that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognize the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that representation breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[281]

[281] Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (footnote omitted).