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Constitutional Law--Snepp v. United States--Short Shrift for the Prior Restraint Doctrine

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Constitutional Law—*Snepp v. United States*—Short Shrift for the Prior Restraint Doctrine

Like other government agencies charged with protecting national security, the United States Central Intelligence Agency ("CIA") has typically required employees to covenant against publishing information gained during employment. Because CIA officers deal with extremely sensitive security and foreign policy information, the agency has traditionally conditioned employment on a promise to seek prior clearance of publications about CIA and intelligence activities.[1] *Snepp v. United States*[2] is a unique case upholding this type of employment contract. There, the United States Supreme Court summarily imposed a constructive trust on profits from a former CIA officer's book on the agency's Vietnam activities, even though it apparently disclosed no classified information, because the author had failed to seek the CIA's prior approval. This unusual censorship case, raising numerous constitutional and legal questions, has sparked sharp public commentary[3] and received congressional attention.[4]

Frank W. Snepp III ("Snepp") signed an oath when he joined the CIA in 1968, promising never to "publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after . . . [his] employment . . . without specific prior approval by the Agency."[5] Snepp had worked as the CIA's Chief Strategy Analyst in Vietnam, and witnessed Saigon's fall in 1975. He disapproved of CIA and United States government policies there, particularly the disorganized and hasty American withdrawal, and the failure to evacuate Vietnamese employees and friends. Snepp tried, but failed, to effect an official report on the withdrawal; then, just after signing a "termination secrecy agreement," he resigned from the agency in January 1976.[6]

In November 1977, Snepp secretly published *Decent Interval*, a highly critical "insider's account of Saigon's indecent end."[7] Despite contrary indications to CIA officials, he did not seek the agency's clearance prior to publica-

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1. Apparently in response to the decision in United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), the CIA has changed the wording of its secrecy agreement from a broad inclusion of all information gained during employment to only classified information. *Compare* Snepp's 1968 entering agreement, 444 U.S. 507, 508 (1980), *with* his 1976 departing agreement, *id.* at 508 n.1.

2. 444 U.S. 507 (1980) (per curiam).

3. Among articles and columns commenting on the decision are Levin, *The High Court Taxes Free Speech*, NEW REPUBLIC, March 22, 1980, at 18; Jacobs, *The CIA Needs More Than Glue*, Washington Post, April 15, 1980; Lewis, *Kissinger, Snepp Illustrate Double Standard*, Raleigh News & Observer, June 10, 1980, at 4 (irony of Kissinger publishing *classified* secrets unscathed, while Snepp punished for publishing *un*classified material); McGrory, *Court Stands Foursquare for Privilege*, Washington Star, March 16, 1980.

4. Committees in both houses have produced bills regulating executive agency employment agreements.

5. 444 U.S. at 508.

6. *Id.* at 508 n.1.

7. F. SNEPP, DECENT INTERVAL (1977) (title page).

tion.[8] Government lawyers, although admitting that the book contained no classified information, promptly asked the United States District Court for the Eastern District of Virginia to enjoin other publications and grant the CIA damages for Snepp's breach.[9] The court, after trial without a jury, upheld the secrecy agreements.[10] It imposed a constructive trust on Snepp's profits, and forbade him from again publishing about the CIA without the agency's prior approval.[11] On appeal, the Fourth Circuit Court of Appeals affirmed the decision, but concluded that compensatory and punitive damages at law, not the equitable constructive trust, were appropriate remedies.[12]

The United States Supreme Court granted both Snepp's petition for certiorari and the government's conditional cross-petition, then summarily disposed of the case in a per curiam opinion.[13] The Court found that Snepp had breached a high degree of trust arising from both the contract and his special position. It reinstated the district court's judgment and its constructive trust remedy, and found equitable relief appropriate because of Snepp's fiduciary breach. It termed this "swift and sure" remedy "tailored to deter" and a "natural and customary consequence of a breach of trust."[14] The Court rejected nominal and compensatory damages as inadequate and punitive damages as impractical and too "speculative and unusual."[15] Justice Stevens dissented strongly, arguing that Snepp breached no fiduciary duty because he had disclosed no confidential information. He characterized the agreement as an abuseable prior restraint,[16] and criticized the Court's summary disposition of the case without briefs or argument.[17]

Historically courts have approved of narrowly drawn employment agreements, and considering that most common employment contracts contain covenants not to compete, have developed and applied widely accepted standards. A landmark case, *Mitchel v. Reynolds*,[18] required that covenants not to compete meet a "rule of reason."[19] The rule demands the covenants be reasonably necessary to protect the employer's legitimate interest, and of the minimum necessary duration and scope.[20]

Courts considering breaches of agreements respecting corporate trade

8. In a meeting with CIA Director Stansfield Turner, Snepp had indicated he would seek review. But actually he had concluded that "if the CIA could officially leak to the press to whitewash its role in Vietnam, it had forfeited the right to censor me in the name of security or national interest." *Id.* at 577.

9. 456 F. Supp. 176, 182 (E.D. Va. 1978), *aff'd*, 595 F.2d 926 (4th Cir. 1979), *rev'd*, 444 U.S. 507 (1980).

10. *Id.* at 179.

11. *Id.* at 182.

12. 595 F.2d 926, 937-38 (4th Cir. 1979) *rev'd*, 444 U.S. 507 (1980).

13. 444 U.S. 507 (1980).

14. *Id.* at 515.

15. *Id.* at 514.

16. *Id.* at 525-26 (Stevens, J., dissenting).

17. *Id.* at 524-25.

18. 24 Eng. Rep. 347 (1711).

19. *Id.* at 349-51.

20. *See* 444 U.S. at 519 nn.7 & 8 (interpretive cases).

secrets and confidential information, however, unlike those presented with competition covenants, have not applied the "rule of reason." Instead, they have conclusively presumed that competitive use of trade secrets and confidential information is unreasonable. In *Sperry Rand Corp. v. A-T-O, Inc.*,[21] for example, company engineers agreed in writing not to divulge secret information, then misappropriated company secrets and bidding data. The appellate court affirmed the order for injunctive relief lasting two years, plus money damages equalling the employer's loss.[22] In *Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp.*,[23] former technical employees used confidential computer program information despite written nondisclosure agreements. The district court interpreted the contracts, which reached "privileged, proprietary and confidential" information,[24] as imposing broad agency duties, and concluded that confidential information fell within the agreement.[25] Similarly, in *Schwayder Chemical Metallurgy Corp. v. Baum*,[26] the court found that a company's former business manager, who had signed a secrecy agreement, had breached his fiduciary duty by removing confidential material.[27]

Cases have also consistently recognized an implied fiduciary duty respecting confidential information gained during employment. In *Tlapek v. Chevron Oil Co.*,[28] a geologist profited by using both his unique theory and information produced during employment. The court determined that the theory fell within the employee's fiduciary obligation, despite the absence of an express contract or a finding that it was a trade secret.[29] Similarly, in *Hunter v. Shell Oil Co.*,[30] a company geologist profited by supplying an outsider with confidential information about mineral interests. The court found that the fiduciary relation demanded utmost good faith, and imposed a constructive trust on the profits.[31]

Government employees, particularly those in the military and national security areas, have long been subject to restrictions on their first amendment rights. Most cases in the field, however, have considered only legislative or administrative, rather than contractual, limitations. Beginning in 1947 the Supreme Court, in *United Public Workers v. Mitchell*,[32] concluded that regu-

21. 447 F.2d 1387 (4th Cir. 1971).

22. *Id.* at 1392-93.

23. 401 F. Supp. 1102 (E.D. Mich. 1975).

24. *Id.* at 1114.

25. *Id.* at 1113-14.

26. 45 Mich. App. 220, 206 N.W.2d 484 (1973).

27. The court, however, awarded no damages and remanded the case because the plaintiff failed to account precisely for its losses. *Id.* at 225, 206 N.W.2d at 487. The opinion did not explore what effect the written agreement had on the fiduciary relation, or expressly conclude that the fiduciary relation arose solely from the employment, not the contract.

28. 407 F.2d 1129 (8th Cir. 1969).

29. *Id.* at 1134.

30. 198 F.2d 485 (5th Cir. 1952). A company rule, not an agreement, was the basis for the obligation in *Hunter*. *Id.* at 487.

31. *Id.* at 487-89.

32. 330 U.S. 75 (1947).

lating expression of federal employees, even when it curtailed first amendment freedoms, was permissible when the limited activity is "reasonably deemed by Congress to interfere with the efficiency of the public service."[33] As applied in later cases, that standard has allowed the government to require employees to surrender constitutional rights when reasonably necessary to protect important government interests.[34]

The Supreme Court has consistently allowed restrictions on expression of military personnel when the activity threatens interference with military effectiveness.[35] In *Parker v. Levy*[36] the Court upheld a military officer's conviction for publicly urging black soldiers to refuse duty in Vietnam. The Court reasoned that the unique purpose of the military,[37] a "specialized society,"[38] demanded that military employees sometimes yield rights "to meet certain overriding demands of discipline and duty."[39] In 1980 the Supreme Court applied this reasoning in *Brown v. Glines*,[40] while upholding Air Force regulations that required command approval before servicemen could circulate petitions on base. The Court again found that special military requirements, such as loyalty, morale, and discipline, were warranted by substantial government

33. *Id.* at 96-103.

34. Until the decision in *Mitchell*, the "right-privilege doctrine" had governed this area. That doctrine, as expressed in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (Holmes, J.), provided that one "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517. The Supreme Court expressly rejected the doctrine in Graham v. Richardson, 403 U.S. 365, 374 (1971). One case applying the reasonableness standard is Adler v. Board of Educ., 342 U.S. 485 (1952) (approving state statute that prohibited hiring teachers who advocated government overthrow). The *Adler* court determined that:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State . . . on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

Id. at 492. Another case applying the reasonableness standard is Pickering v. Board of Educ., 391 U.S. 563 (1968) (school board violated first amendment by dismissing teacher for letter criticizing school board because no impairment of school system's efficiency resulted). In *Pickering*, the Court recognized the problem of balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. *See also* United States Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973) (statutory definition of "political activity" not overbroad); Shelton v. Tucker, 364 U.S. 479 (1960) (state statute requiring teacher to list organizational membership intrudes into fundamental liberty); Wieman v. Updegraff, 344 U.S. 183 (1952) (state loyalty oath concerning communist or subversive organization membership created arbitrary class violating due process); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (Hatch Act restricting government employee's political activity does not violate first amendment); Note, *The CIA and the First Amendment*, 3 HASTINGS CONST. L.Q. 1073, 1086-89 (1976).

35. *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980).

36. 417 U.S. 733 (1974).

37. *Id.* at 759 (quoting United States v. Priest, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972)).

38. *Id.* at 743.

39. *Id.* at 744 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

40. 444 U.S. 348 (1980).

interests unrelated to suppression of free expression,[41] and allowed the first amendment infringement.

Although United States intelligence agencies have long required employees to promise prior clearance of publications as a condition of employment, not until 1972 did a court first consider the practice's validity. In *United States v. Marchetti*,[42] the Fourth Circuit enforced a former CIA agent's signed secrecy agreement after he had published books containing classified information. The court upheld the district court's conclusion that the narrowly drawn contract did not create an impermissible prior restraint. It also acknowledged, however, that it would "decline enforcement of the . . . oath . . . to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would . . . [contravene] . . . First Amendment rights."[43]

In deciding *Snepp*, the Supreme Court readily dismissed the threshold question whether the employment contract satisfied the requirements typically applied to employment agreements.[44] It reasoned that a "body of private law intended to preserve competition . . . simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation . . . ."[45] This agreement, however, would certainly not have passed scrutiny under the "rule of reason" laid down in *Mitchel v. Reynolds*[46] because it lacks reasonable time and geographical limits. The Court did not, however, elaborate on why the contract's national security origins lifted it above the rules governing other employment contracts.[47]

Nor did the Court fully address the fundamental question whether the separation of powers doctrine allowed the CIA, as an executive agency, to erect a prior restraint system without express congressional authorization.[48] Yet the Court has recognized the need for "express and appropriately limited congressional authorization"[49] of prior restraints in the executive branch. Jus-

41. *Id.* at 356-57. *See* Procunier v. Martinez, 416 U.S. 396, 413 (1974) (state prisoner's mail censorship does not violate first amendment when it furthers substantial government interests of security, order, rehabilitation, and is no greater than necessary to further legitimate government interest involved).

42. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

43. *Id.* at 1317. *See also* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied* 421 U.S. 992 (1975) (reviewing and approving CIA's manuscript deletions).

44. Dissenting, Justice Stevens had argued that the contract's indefinite duration and scope made it unenforceable under state law. 444 U.S. at 520 n.9 (Stevens, J., dissenting). *See, e.g.*, Alston Studios, Inc. v. Lloyd V. Gress & Assocs., 492 F.2d 279, 283 (4th Cir. 1974) (voiding Virginia covenant lacking geographical limits); American Hot Rod Ass'n, Inc. v. Carrier, 500 F.2d 1269, 1279 (4th Cir. 1974) (voiding North Carolina covenant lacking geographical and time limits); E.L. Conwell & Co. v. Gutberlet, 429 F.2d 527, 528 (4th Cir. 1970) (voiding Maryland covenant).

45. 444 U.S. at 513 & n.9.

46. 24 Eng. Rep. 347 (1711).

47. *See* Respondent's Petition for Rehearing, United States v. Snepp, 444 U.S. 507 (1980), at 3-7; Petitioner's Brief in Opposition to Writ of Certiorari, *id.*, at 6-10.

48. Congress has authorized prior restraint, through injunction, of only one category of classified information, atomic secrets. Atomic Energy Act, 42 U.S.C. § 2280 (1976).

49. New York Times Co. v. United States, 403 U.S. 713, 731 (per curiam) (White, J., concurring). The concurrence noted that Congress had authorized some prior restraints against private parties. *E.g.*, 29 U.S.C. § 160(c) (1976) authorizes the National Labor Relations Board to issue cease and desist orders against employers who threaten or coerce workers exercising protected

tice White, concurring in *New York Times Co. v. United States*,[50] concluded that absent congressional legislation, the executive and judicial branches lacked the inherent power to issue remedies restraining publication.[51] Instead, he wrote, Congress intended them to rely on the deterrent effect of criminal sanctions.[52]

Congress did, however, charge the CIA Director with responsibility for "protecting intelligence sources and methods from unauthorized disclosure."[53] Broad construction of that mandate would allow the CIA's contractual prior restraint. Important cases, however, have required that Congress delegate authority to the executive branch only in explicit terms, especially where individual freedoms are involved.[54] In *Greene v. McElroy*[55] the Supreme Court considered a Defense Department security program allowing summary dismissal of employees. The Court struck down the program because no presidential or congressional authorization expressly allowed agencies to fire employees without due process safeguards.[56] The Supreme Court in *Snepp* did not try to reconcile the absence of delegated authority in *Snepp* with the standards established in *Greene*.

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rights; 15 U.S.C. § 45(b) (1976) enables the Federal Trade Commission to impose cease and desist orders against unfair methods of competition. 403 U.S. at 731 n.1.

50. 403 U.S. 713 (1971) (per curiam).

51. *Id.* at 732 (White, J., concurring).

52. *Id.* at 740. *See id.* at 718-19 (opinion of Justice Black); *id.* at 720, 722 (opinion of Justice Douglas); *id.* at 742-47 (opinion of Justice Marshall).

53. 50 U.S.C. § 403(d)(3) (1976).

54. Kent v. Dulles, 357 U.S. 116, 128-29 (1958) (statute did not authorize Secretary of State to deny citizen's passport because of communist associations and beliefs). "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen . . . are involved, we will construe narrowly all delegated powers that curtail or dilute them. *Id.* at 129. Absent "such provision in explicit terms . . . the Secretary may not . . . restrict the citizen's right of free movement." *Id.* at 130.

55. 360 U.S. 474 (1959). The program in *Greene* provided no opportunity for confrontation or cross-examination.

56. The Court required clear proof

> that the President or Congress, . . . specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action. . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action . . . requires careful and purposeful consideration by those responsible for . . . our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Id. at 507. *See also* Schneider v. Smith, 390 U.S. 17, 22-27 (1968) (Coast Guard regulation barring seaman belonging to "subversive" groups unjustified by validation statute, which must be read narrowly to avoid interfering with first amendment freedoms); *id.* at 27-28 (Fortas, J., joined by Stewart, J., concurring). In *Greene* the Court found that enabling and other statutes similar to those in *Snepp*, while recognizing the existence of military secrets, were insufficient to authorize the elaborate security program. 360 U.S. at 504. Three cases allowing prior restraints involved legislatively imposed sanctions: Buckley v. Valeo, 424 U.S. 1 (1976); Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548 (1973); Cole v. Richardson, 405 U.S. 676 (1972). Two others involved military employees, Brown v. Glines, 444 U.S. 348 (1980); and bases, Greer v. Spock, 424 U.S. 828 (1976). *See* Petitioner's (Snepp's) Petition for Rehearing, Snepp v. United States, 100 S. Ct. 1668 (1980), at 7 (denial of rehearing). While arguably the military's different history and character distinguish it from the intelligence services, many of the same considerations apply to the CIA, certainly a quasi-military agency sharing with the military the national security purpose.

Perhaps most striking was the Court's easy treatment of the case's hardest question: Did Snepp's contract, even though voluntary, impose an impermissible prior restraint on protected speech?[57] The Court dismissed this issue in a footnote.[58] It reasoned that the voluntary agreement was a reasonable, "entirely appropriate," exercise of the CIA's mandate to protect sources and methods.[59] The Court did not balance Snepp's interest in free expression against the CIA's security needs, as do many courts considering censorship.[60] Nor did it consider the problem of overbreadth raised by the *Marchetti* court, which had determined that prior restraints on unclassified information would be unenforceable as overbroad infringements on first amendment freedoms.[61]

Since the Supreme Court's benchmark decision in *Near v. Minnesota*[62] in 1931, only in "exceptional cases"[63] has the Court approved prior restraints, repeating that "any system of prior restraints . . . bear[s] . . . a heavy presumption against its constitutional validity."[64] That concern guided the important decision in *New York Times*,[65] in which the government had sought to place its effort to block publication of classified documents concerning the Vietnam War within a military security exception suggested in *Near*. The Supreme Court rejected this argument, deciding instead that the government had failed to meet its heavy burden of demonstrating that the publication would surely cause harm.[66]

Probably the first case using the national security exception to justify imposing prior restraint on publication was decided in 1979. In *United States v.*

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57. 444 U.S. at 509 n.3.

58. *Id.*

59. *Id. See* 50 U.S.C. § 403(d)(3) (1976). The court, drawing on *Brown v. Glines*, concluded that even without a contract, the CIA could restrict employees' first amendment rights of expression to protect substantial government interests; arguably, the interests to be protected in *Snepp* are national security secrets and the appearance of confidentiality. *See* 444 U.S. at 509 n.3.

60. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

61. 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

62. 283 U.S. 697 (1931).

63. *Id.* at 716. Chief Justice Hughes gave three illustrations of "exceptional cases:" 1) wartime restraints preventing disclosure of military actions; 2) enforcement of obscenity laws; 3) enforcing laws against incitement to violent acts or revolution. *Id.*

64. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *Accord*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-59 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979); A. BICKEL, THE MORALITY OF CONSENT 61 (1975).

65. 403 U.S. 713 (1971) (per curiam).

66. *Id.* at 726-27 (Brennan, J., concurring) (government required to show disclosure "must inevitably, directly, and immediately cause . . . an event kindred to imperiling the safety of a transport already at sea . . . ."); *Id.* at 730 (Stewart, J., joined by White, J., concurring) (must show disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people"). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 729-30 (1978). Other important cases prohibiting prior restraints are Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563 (1976) (court's 'gag' order prohibiting reporters from murder trial violated first amendment because publicity's impact "was of necessity speculative, dealing . . . with factors unknown and unknowable.") Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theatre board members' refusal to allow "Hair" musical production violated first amendment); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (injunction, to protect privacy, against neighborhood leaflet distribution violated first amendment).

Progressive, Inc.,[67] the United States District Court for the Western District of Wisconsin temporarily restrained publication of an article about the hydrogen bomb. The court determined that the article fell within the narrow national security exception developed in *Near*[68] because publication might allow a foreign nation to develop the atomic weapon more quickly.[69] It distinguished *New York Times* in three ways. First, it said that *New York Times* involved only historical data.[70] Second, in *New York Times* the government could not suggest a good reason, beyond embarassment, why publication would harm national security.[71] Third, federal statutes authorized restrictions on publishing atomic data.[72] The *Progressive* court concluded that the government, by showing "grave, direct, immediate and irreparable harm to the United States," and indeed the world, had met its heavy burden.[73]

The Supreme Court's facile treatment of the prior restraint question in *Snepp* contrasts sharply with the *Progressive* court's painstaking deliberation, yet both cases upheld a prior restraint, a rare event in American judicial history. The restraint in *Snepp* differs from that in *New York Times*, the case most factually similar to *Snepp*. Snepp's restraint originated in a voluntary contract, not a judicial order. Also, the restraint arose in the executive branch. But the subject matter at issue, Vietnam military history occurring at least two years before, was strikingly similar. Unlike the proposed hydrogen bomb publication, no imminent danger, such as imperiling a transport already at sea during wartime,[74] was threatened in either case. In both cases, publication of the material would, however, prove highly embarassing to the government.[75] The Supreme Court, by focusing on the voluntary and contractual nature of the restraint in *Snepp*, effectively ignored its own rules for evaluating prior restraints.

Even though the Supreme Court perceived no contractual or constitutional obstacles to enforcing some kind of restraint against Snepp, it did not consider whether the CIA's censorship procedure met established standards for censorship. Several cases evaluating school censorship of first amendment

67. 467 F. Supp. 990 (W.D. Wis.) (Warren, J.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

68. *Id.* at 996. The court reasoned that in modern times, publishing technical information about the hydrogen bomb was analogous to publishing ship movements in wartime. *Id.*

69. *Id.* at 993-94.

70. *Id.* at 994. The events in *New York Times* had occurred between three and twenty years before publication, although the Vietnam War continued.

71. *Id.*

72. *Id.* The *Progressive* court distinguished the dangers in *New York Times* by saying that the information, "dealing with the most destructive weapon in the history of mankind . . . [could] nullify the right to free speech and . . . endanger the right to life itself." *Id.* at 995. The court believed the case to be so difficult "because the consequences of error involve human life itself and on such an awesome scale." *Id.* Judge Warren concluded that his issuance of an injunction would "constitute the first instance of prior restraint against a publication in this fashion in the history of this country . . ." but that it was justified because a mistaken ruling "could pave the way for thermonuclear annihilation for us all." *Id.* at 996.

73. *Id.* at 996.

74. New York Times, Inc. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

75. The critical nature of the book led Snepp to raise the defense of selective enforcement, but none of the courts considering his case accepted the argument.

materials, for example, have demanded "narrow, objective, and reasonable standards" for judging material.[76] In *Baughman v. Freienmuth*,[77] the court considered school regulations prohibiting distribution of material that was "libelous or obscene," or grossly insulting, or that advocated illegal action. It declined to enforce the rules because they lacked time limits and precision. The court perceived the "intolerable danger, in the context of prior restraint, that under the guise of such vague labels [school officials] may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive. That they may not to do."[78] In *Snepp*, however, the Supreme Court did not mention the absence of any objective criteria for CIA censorship, and ignored the question whether the contractual restraint, though voluntary, suffered from overbreadth and violated the first amendment.[79]

In part II of its opinion, the Court determined that the equitable constructive trust was appropriate redress for Snepp's fiduciary breach. It found two sources for Snepp's fiduciary duty: the contract itself, and the high degree of implied trust arising from his unique employment.[80] Citing the implied duty allowed the Court effectively to bypass the question of the contract's constitutional validity. According to the Court, this implied duty extended to both classified information and any other information gained during Snepp's CIA duty, whether secret or not. Yet the case's holding turned not on the actual disclosure, but on Snepp's failure to seek clearance. This failure, not the pub-

76. Baughman v. Freienmuth, 478 F.2d 1345, 1350 (4th Cir. 1973); *See also* Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 809 (2d Cir. 1971).

77. 478 F.2d 1345 (4th Cir. 1973).

78. *Id.* at 1351. This was necessary so that those "enforcing the regulation are not given impermissible power to judge the material on an ad hoc and subjective basis and that forbidden activity be clearly delineated so as not to inhibit basic first amendment freedoms." *Id.* at 1350. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (vague laws allowing arbitrary and discriminatory application may inhibit "sensitive areas of basic First Amendment freedoms"). *See also* Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970) (public criticism of school officials has positive value); Pickering v. Board of Educ., 391 U.S. 563, 573-74 (1968) (matters of public interest and statements by public officials on public matters receive special protection); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 809 (2d Cir. 1971) (rule allows school authorities to suppress criticism of own actions and policies). The *Baughman* court concluded that even precisely defined prior restraint systems required definitions of key terms, prompt action on submissions, specific sanctions for delay, and a prompt appeals procedure. 478 F.2d at 1351.

79. *See* Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (in FOIA suit seeking disclosure of plaintiff's CIA files, court concluded that "government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure. . . ." In *Snepp*, even though the CIA admitted that numerous officers had not submitted articles, speeches, testimony and interviews for review, the Supreme Court lightly dismissed the issue of selective enforcement. *Snepp* had relied on United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (reversing criminal convictions partly because of discriminatory enforcement against "unpopular" viewpoints). *See also* Pell v. Procunier, 417 U.S. 817, 828 (1974) (administrative restrictions on press interviews of prisoners must "operate in neutral fashion"); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (ordinance allowing only labor picketing near schools violates Equal Protection Clause of fourteenth amendment; government-imposed burdens on speech must be even-handedly applied: "government may not grant . . . a forum to people whose views it finds acceptable, but deny use to those express[ing] less favored . . . views. Selective exclusions from a public forum may not be based on content alone, and may not be justified by content alone."

80. 444 U.S. at 510-11.

lication, was the breach of trust.[81]

Focusing on the failure to seek clearance forced the Court to remove with one hand what it had given with the other. The Court acknowledged "as a general principle" Snepp's "right to publish unclassified information."[82] That right should logically allow using only post-publication criminal sanctions to achieve national security purposes. Instead, Snepp's contract and his implied trust created a broad fiduciary duty that the court interpreted to range far beyond the ordinary. Clearly that duty extended to national secrets.[83] Less clear is whether it also included all information gained during employment.[84]

The Court determined that finding a fiduciary breach was necessary and essential to the equitable constructive trust remedy. The Court especially desired this remedy, over those available at law, because it deters so cleanly and completely. Under modern American rules, however, constructive trusts may be freely imposed, whether or not a fiduciary breach or other event establishing an equitable basis has occurred. American courts allow constructive trusts whenever they seem appropriate. This contrasts with the English practice, which requires an equitable basis.

The Supreme Court considered *Snepp* through an unusual and rather disturbing procedure. It granted both Snepp's petition for certiorari and the government's conditional cross-petition,[85] then summarily denied Snepp's claim without having called for full briefing or having heard oral argument.[86] Technically, the court did gain jurisdiction by granting Snepp's petition, contrary to Justice Stevens's dissenting conclusion. But this procedure greatly prejudices litigants, particularly the losing respondent, for it effectively denies the opportunity to be fully heard. This deprivation results in too few due process safeguards.[87] Commentators have suggested that the summary per curiam

81. *Id.* The Court decided that publication, even of unclassified information, was harmful because an individual officer lacked sufficient breadth of experience and knowledge to determine what material, although unclassified, could actually jeopardize national security. *Id.* at 512.

82. *Id.* at 511.

83. The Court had buttressed its finding of a fiduciary breach by emphasizing that Snepp's unreviewed book harmed national interests in two ways: by allowing an individual, not the agency, to determine what material would expose sources and information, and by causing foreign sources to lose confidence in the CIA's ability to keep secrets. *Id.* at 511-12.

84. Some authority does exist for the government's position that publication of *all* information Snepp gained during his employment could be restricted by contract. There is also authority, by analogy to cases forbidding personal profit from employment-gained information, that Snepp could not profit from that information without prior clearance. This would be doubly so when the information's publication would arguably jeopardize national security. The innumerable memoirs of former government officials would negate this theory. *See* Tlapek v. Chevron Oil Co., 407 F.2d 1129 (8th Cir. 1969) (geologist who acquired oil locations, not otherwise publicly available, and profited from his theories developed during employment, became constructive trustee); Essex Trust Co. v. Enwright, 214 Mass. 507, 102 N.E. 441 (1913) (newspaper reporter who through job learned of employer's leasehold, then tried to sell it to employer at higher price, became constructive trustee because he acquired information as result of employment); 5 A. SCOTT, THE LAW OF TRUSTS § 505 (2d ed. 1967).

85. 444 U.S. at 507. Dissenting, Justice Stevens concluded that the Court in essence "grant[ed] the Government's petition while denying Snepp's." *Id.* at 524 (Stevens, J., dissenting).

86. *Id.* at 517 (Stevens, J., dissenting).

87. The summary per curiam disposition of the *Snepp* case was one of 10 such summary actions taken by the Court during its 1979-80 term. In all such cases the Court calls for the entire

practice disadvantages both parties, who must submit only the briefest petitions for certiorari and briefs in opposition. An alternative procedure has been suggested whereby the Court would direct the parties to file full briefs to show cause why the judgment below should or should not be reversed without oral argument.[88] The Court, in its 1980 rule revisions, however, firmly rejected that alternative by proclaiming that "a summary disposition on the merits" continues to be a viable possibility in any certiorari case.[89]

The Supreme Court's decision in *United States v. Snepp* was unusual for both the Court's procedure and reasoning. The summary procedure indicated that the Court was in no mood to undertake analysis of the prior restraint doctrine in the context of a voluntary contract, or the issue of legislative delegation of authority to the executive branch. Instead, the Court sought to hold Snepp to his agreement, perhaps ultimately on the theory that one should honor his promise. The Court considered Snepp's voluntary and knowing entry into the contract essential to its decision. Possibly the result would have differed had the restriction originated in regulations or legislation. While the decision was logical in what it did treat, it is regrettable for its many omissions. Recent activity in Congress may soon correct one omission by granting intelligence agencies statutory authority to impose some restraints on employees. Even that legislation, however, must one day undergo the scrutiny so noticeably absent in *Snepp*. A future Supreme Court, less intent on punishing one who reneged on his promise, must still consider the important constitutional questions raised, but not resolved, in *Snepp*.

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record in the court below, if it is not already lodged with the Court, before proceeding to dispose of the case in a summary fashion. Interview with Eugene Gressman, Professor of Law at University of North Carolina School of Law, in Chapel Hill, N.C. (March, 1980).

88. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 5.12, at 364-65 (5th ed. 1978); Brown, *Foreward: Process of Law*, 72 HARV. L. REV. 77, 81-82 (1958).

89. *See* revised Rule 23.1, dealing with disposition of petitions for certiorari. At the same time, revised Rules 21.4 and 22.2 admonish the parties to keep the petition for certiorari and the brief in opposition "as short as possible." The revised rules are set forth in 48 U.S. L.W. 4339 (1980).