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A CRITICAL APPRAISAL OF SNEPP V. UNITED STATES: ARE THERE ALTERNATIVES TO GOVERNMENT CENSORSHIP?

Howard C. Anawalt*

INTRODUCTION

In Snepp v. United States, Frank W. Snepp III was denied the right to gain a profit from a book which was based on information obtained when he was an agent of the Central Intelligence Agency. He was also ordered to submit any future writings concerning the Central Intelligence Agency (CIA or Agency) to that agency for prepublication review. This article examines the litigation and concludes that the order to submit writings for prepublication review should have been considered an invalid prior restraint, and that, while the denial of profit from the book did not directly encroach on first amendment rights, authors should be accorded greater protections based on common law and constitutional doctrines.

THE BACKGROUND OF THE CASE

The Vietnam war has had an immense impact on American society. It shook many basic elements of our entire political process and contributed to economic changes which continue to be felt today. It forced profound personal decisions on the part of a generation of our people—whether to serve the country, and how to serve the country in that time. Some served the war effort directly. Others chose to resist for humanitarian, patriotic, or personal reasons.

Frank W. Snepp III, native of North Carolina, was a twenty-five year old graduate student when he joined the

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Agency. Snepp served two tours of duty in Vietnam, totaling four-and-one-half years. His second tour ended in the early morning hours of April 30, 1975, when he was taken by helicopter from the top of the American Embassy. Several hours before, the Embassy radio had sent its final coded communication to Washington:

[T]he severity of the defeat and the circumstances of it, . . . would seem to call for reassessment of the policies of the niggardly half measures which have characterized much of our participation here despite the commitment of manpower and resources which were certainly generous. Those who fail to learn from history are forced to repeat it. Let us hope that we will not have another Vietnam experience and that we have learned our lesson.

Saigon signing off.

Snepp’s tours in Vietnam placed him in important and influential positions. In his words: “I ran one of the CIA’s most productive informant networks, interrogated its best agents and became the Agency’s principal briefer and political-strategic analyst at the Embassy.” After his return to the United States, he became convinced that Americans were being deceived about the collapse of Saigon, in part due to the Pentagon’s “determined effort to keep the truth under classified wraps.” He decided to write a book to help bring more evidence before the public. Snepp states that the book, Decent Interval, “attempts to strip away some of that camouflage. It does not pretend to be a definitive history . . . . But it does offer at least one perspective from the bull’s eye.”

THE LITIGATION

Decent Interval was published in November 1977. On February 15, 1978, the United States brought an action against Snepp for damages and for two forms of equitable re-

2. A journalist has speculated that, “[a] Jekyll-Hyde mixture of the South’s chivalric code and Snepp’s desire to beat the draft led him to accept a professor’s recruitment into the CIA in 1968.” Moody, Struggling Author Ex-CIA Officer Must Keep Writing to Pay Damages from First Book, San Jose Mercury, November 9, 1980, § G, at 1, col. 2.

3. F. Snepp, DECENT INTERVAL 557 (1977). Many others have drawn a far different conclusion—that the United States should have terminated its military involvement in Vietnam far sooner.

4. Id. at ix.

5. Id.
life, a constructive trust of the profits of the book and an injunction against future violations of an agreement between Snepp and the CIA. The government’s case depended upon two secrecy agreements that Snepp had signed and upon the nature of his employment, which was claimed to be a relationship of trust. Snepp signed the first of the agreements when he entered the Agency in 1968. It provided:

1. I, Frank W. Snepp, III, understand that upon entering on duty with 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 during or after the term of my employment 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.

The second agreement was signed by Snepp when he left the Agency in 1977. It recited that he had in fact received intelligence information and bound him not to reveal any classified information to others.

Snepp demanded a jury trial, but the district court, after receiving evidence, determined that all issues of the case were integral to its equity jurisdiction and discharged the jury. The court found that Snepp knew that he had undertaken a position of trust when he entered the Agency, that he fully understood his responsibilities regarding secrecy, that he conducted secret negotiations with his publisher before leaving the Agency, that he did everything he could to prevent the Agency from learning about the book before publication, and that the government had suffered irreparable damage. Based on these findings, the court concluded that Snepp “willfully,
deliberately and surreptitiously breached his position of trust with the CIA and the secrecy agreement."\(^8\) The court imposed, for the benefit of the government, a constructive trust on all profits which might accrue to Snepp from *Decent Interval*.\(^9\) It also enjoined him from any further violation of his secrecy agreement with the CIA.

On appeal, Snepp urged that he had a first amendment right to publish the information. In addition, he claimed to have a right to a jury trial regarding the breach of contract claims. The court of appeals determined that the CIA would not be able to enforce a prohibition against publication of non-classified information, but that it was well within government authority to require prepublication review of all information offered for publication.\(^10\) The court reversed the district court's imposition of a constructive trust, concluding that it was clear that Snepp had violated his contract, but that he occupied a position of trust only with respect to classified information. Therefore, imposition of a constructive trust was inappropriate absent a fiduciary relationship with respect to the disclosed information.\(^11\) The court found damages, including punitive damages, to be the appropriate remedy,\(^12\) and

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8. *Id.* at 179.

9. An argument not presented in *Snepp*, but successfully raised by another ex-CIA author to avoid imposition of a constructive trust on book profits is found in *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980). The court in that case held that discriminatory enforcement may be a defense against the imposition of a constructive trust. The CIA allegedly sued Agee on the basis of the content of his publications while choosing not to prosecute others whose writings, though in violation of the Secrecy Agreement, were less critical of the agency.

10. 595 F.2d 926. The distinction between classified and nonclassified information had been made in earlier Fourth Circuit litigation. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975), United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). The distinction between these two types of information remains an important one and is discussed at note 66 infra.

11. But we do not think, having regard to the defendant's first amendment right to publish unclassified information, that the contract, even in the light of the circumstances under which it was made, creates any fiduciary relationship to submit writings for prepublication review which do not disclose classified information, there is only a contractual duty to submit writings to prepublication review, although it is one that, because of the risk to national security of an inadvertent or ill-advised publication of classified information, should be rigorously enforced by injunction and otherwise.

595 F.2d at 936.

12. Punitive damages are not ordinarily available in contract actions, but the court reasoned that this contractual breach was akin to a tort. The court stated:

Since the government contends and the district court found that the
held, that Snepp was entitled to a jury trial on the issue of damages. The court also affirmed the injunction requiring pre-publication review of future writings.

THE SUPREME COURT DECISION

Snepp petitioned the Supreme Court for a writ of certiorari, claiming that the secrecy agreements were unenforceable prior restraints on speech, and that in any event, punitive damages were inappropriate. The court, in a per curiam decision, reinstated the district court judgment awarding a constructive trust and reaffirmed the injunction. The Court determined that the CIA was authorized to utilize contracts to protect intelligence, as these were a reasonable means of assuring a vital and compelling national security interest. The government’s compensatory damages are not quantifiable and we view the function of punitive damages in a case such as this as the dual one of punishing the defendant and deterring others from like misconduct, we think it follows that there is no necessary correlation between the amount of punitive damages that may properly be assessed and the amount of compensatory damages that the government may prove.

Id. at 937.

13. The Supreme Court relied on several previously decided cases when it brushed aside Mr. Snepp’s first amendment claims. 444 U.S. at 509 n.3. It does not appear, however, that those cases are dispositive of the issue of the validity of a prior restraint on publication.


Neither United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973), nor Cole v. Richardson, 405 U.S. 676 (1972) involved prior restraints. National Ass’n of Letter Carriers sustained the Hatch Act prohibition against active participation in partisan political activities by federal employees. The court stated: “[I]t is in the best interest of the country, indeed essential, that federal service should depend on meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.” 413 U.S. at 557. Snepp, however, was not a government employee at the time the injunction was issued, and this policy would appear to have no application to one not currently in government employ. Cole affirmed the constitutionality of a requirement that state employees subscribe to an oath to uphold and defend the constitution and to oppose violent or illegal overthrow of the government. The court noted that the constitution itself requires similar oaths from state and federal officers, that the oath was merely an amenity, and there was no serious possibility of prosecution for failure to live up to the oath.

While the cases discussed above do establish that government employees may be subject to restrictions not imposed on the private sector, Pickering v. Board of Education, 391 U.S. 563 (1968) established that government employees retain a wide range of protected first amendment activity. Further, none of the above cases impose restrictions on the basis of past government employment.
Court found that Snepp's employment "involved an extremely high degree of trust," and that the nature of the information at issue could be viewed as requiring the protection of confidentiality.\(^{14}\) The Court concluded that Snepp was a fiduciary as to all information acquired in the course of his employment, and that imposition of a constructive trust was appropriate as "the natural and customary consequence of a breach of trust."\(^ {16}\) The Court also subscribed to the theory of the dissent in the court of appeal, that an enforcement of the contract through a jury trial would deprive the government of the benefit of its bargain, since discovery proceedings would involve probing confidential agency affairs. The constructive trust, the Court stated, is "swift and sure, it is tailored to deter those who would place sensitive information at risk."\(^ {16}\)

Justice Stevens, joined by Justices Brennan and Marshall, dissented. He contended that the imposition of the trust was supported by neither contract law nor common law. He noted, "[t]he Court's *per curiam* opinion seems to suggest that its result is supported by a blend of the law of trusts and the law of contracts."\(^ {17}\) Relying on a mixture of contract and first amendment doctrine, the dissent argued that Snepp's fiduciary duty was limited to the protection of classified information. Since the government had conceded for purposes of the action, that Snepp had disclosed no classified information, its claim was merely a contractual one. As such, it swept too broadly across a common law liberty of economic activity. The secrecy agreement was likened to a covenant not to compete, enforceable only under the "rule of reason" which requires that a covenant not to compete "be reasonably necessary to protect a legitimate interest of the employer (such as an interest in confidentiality), that the employer's interest not be outweighed by the public interest, and that the covenant not be of any longer duration or wider geographic scope than necessary to protect the employer's interest."\(^ {18}\) The dissent ac-

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14. "When a former agent relies on his judgment about what is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful." 444 U.S. at 512.
15. *Id.* at 515.
16. *Id.*
17. *Id.* at 517-18.
18. *Id.* at 519 (footnotes omitted). This portion of Justice Steven's argument—that an agreement like Snepp's must be confined by the rule of reason—is discussed at note 81 *infra*. Basically, I offer the conclusion that this portion of the
knowledged that there was a public interest in preserving secrecy, but insisted that it was countered by the employee's interest in preserving work opportunities and first amendment rights. "The public interest lies in a proper accommodation that will preserve the intelligence mission of the agency while not abridging the free flow of unclassified information." The contract arguably satisfied the rule of reason to the extent of permitting damages, but a constructive trust was unjustified, since the record demonstrated no leak of classified information, without which there could be neither a violation of true confidentiality nor unjust enrichment. Stevens concluded that, had the book been offered to the Agency for prepublication review, "it would have been obliged to clear the book for publication in precisely the same form as it now stands."

THE GOVERNMENT INTEREST IN SECRECY

The Supreme Court accepted the proposition that the government has an important interest in protecting information which it regards as confidential. The dissent argued that the interest extends only to the protection of classified information, and that it must accommodate the individual's economic and first amendment interests.

The government interest in confidentiality is generally the same as that of an individual. The government is essentially conducting a business, certain elements of which are best accomplished if its plans and capabilities are not disclosed. Spying or intelligence gathering requires stealth. The effectiveness of informers, important to intelligence gathering, can easily be destroyed if their "cover is blown." Snepp acknowledged the difficulties of preserving the anonymity of many of the actors in his book who "still belong to the shadowy world of espionage," and took efforts to conceal their identities. Intelligence operations may also be compromised if the nature and amount of information required is revealed to the "other side". Publication of CIA activities enhances risk of exposure of methods, contacts, and sources used in intelligence gathering. Investigation is a matter of determining

dissent is not only valid, but can be applied in future litigation consistent with the actual ruling in the Snepp case.

19.  Id. at 520.
20.  Id. at 521.
22.  A recent case commented on this process. In Halkin v. Helms, 598 F.2d 1
what is not apparent on the surface of things. If foreign agencies can learn of Agency conclusions or observations they may improve their own investigations, for example, by pursuing certain lines of communication or reviewing organizational charts. This intelligence procedure resembles the process of "reverse engineering"—taking apart a product in order to be able to copy it or reproduce its functions.

Each court that reviewed the case accepted the CIA's national security evaluation. While intelligence policy determinations are essentially political, the scope of domestic secrecy retains elements subject to judicial inquiry, especially in view of the congressional policy reflected in the Freedom of Information Act. Consequently, the factual basis of government secrecy claims may be successfully disputed in future litigation.

(D.C. Cir. 1978), the plaintiffs had brought suit for damages for violation of their constitutional rights. In denying the plaintiffs' right to discover whether certain of their international communications had been intercepted, the court stated:

Disclosure of the identities of senders or recipients of acquired messages would enable foreign governments or organizations to extrapolate the focus and concerns of our nation's intelligence agencies. It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to construction of a mosaic than it is to the management of a cloak and dagger affair.

Id. at 8.


24. Government security claims appear to be contested with some frequency in civil litigation and Freedom of Information Act actions. A "state secret" or national security requirement has been held to occupy the highest degree of secrecy. Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1978). However, courts have recognized that even these claims must be subjected to appropriate procedures to determine their validity. See, e.g., ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

Congress has recently passed legislation that reaffirms the proposition that assertion of national security needs should not automatically assume a compelling status in litigation. The Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat 1879 (to be codified in 42 U.S.C. §§ 2000aa-2000aa12) is an act to limit government searches and seizures in connection with the investigation or prosecution of a criminal offense. The Act is designed to protect the work-product and documentary materials of those engaged in disseminating information to the public through a subpoena-first procedure. The legislative history of this Act provides clear language regarding its purpose. "[T]he Committee decided to proceed with a statutory proposal which would apply to federal, state and local governments, protecting those engaged in First Amendment activities, and mandating the development of guidelines for federal officials by the Department (of Justice) for obtaining documentary evidence from nonsuspect third parties." S. REP. No. 879, 96th Cong., 2d Sess. 9 (1980), reprinted in (1980) U.S. Code Cong. & Ad News 3950, 3955 (1980). In the section by section analysis of § 101 it is noted that the statute does not apply to "searches and seizures which occur in the course of foreign intelligence operations." Id. at 10, reprinted in U.S. Code Cong. & Ad News at 3956 (1980). "Nevertheless the [k]ey to the legislation is the concept of public communication. It is this flow of information to the public which is central to
THE INJUNCTION—THE ISSUE OF PRIOR RESTRAINT

The injunction requiring Snepp to submit all future CIA-related manuscripts to the Agency for review is an effective means of protecting government secrecy claims. However, it raises the serious question of prior restraint of communication.25

A prior restraint is a sanction imposed in advance of publication. It curtails the flow of information before it can reach an audience. The traditional form of prior restraint under English common law was censorship by an administrative official, who reviewed writings before publication and imposed his judgment directly—with his scissors.26 By the eighteenth century, Blackstone could claim that English citizens enjoyed lib-

the First Amendment, and which is highly vulnerable to the effects of governmental intrusiveness.” Id. The Act is designed to minimize exceptions to the subpoena-first requirement. “Broader search powers would be susceptible of abuse in chilling critical comment about the government.” Id. at 12, reprinted in (1980) U.S. CODE CONG. & AD. NEWS at 3959 (1980).

See also Classified Information Procedures Act Pub. L. No. 96-456, §§ 1-16, 94 Stat. 2025 (1980) (to be codified in 18 U.S.C. app.) (1980). The accompanying Senate Judiciary Committee Report observes that the Act provides “certain pretrial, trial, and appellate procedures for criminal cases involving classified information . . . .” Id. S. Rpt. No. 96-823, 96th Cong. 2nd Sess. 1482 (1980), reprinted in U.S. CODE CONG. & AD. NEWS 7738 (1980). The Committee Report’s General Statement notes that: “The purpose of this bill is to help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both national security and civil liberties.” S. Rpt. No. 823, 96th Cong., 2d Sess. 3, reprinted in U.S. CODE CONG. & AD. NEWS 4294, 4296 (1980). The Act protects government classified information during trial proceedings and will enable the government to pursue criminal remedies in its efforts to punish and deter former employees who disclose information without authorization. This would appear to eliminate the government’s argument that civil remedies are the only means of avoiding the “unacceptable risks” of “probing discovery” proceedings. Snepp 444 U.S. at 515; Petitioner’s Brief for Certiorari at 20-1 n.17; Haig v. Agee, 101 S.Ct 2766 (1981).

25. In the analysis that follows, it will be important to keep several different concepts in mind. Basically, there are three separate legal constructs involved in the case: the contract itself, the constructive trust, and the injunction requiring prepublication review. Arguably, the contract requiring pre-publication review is itself a prior restraint. If the powerful remedy of constructive trust is added to the contract, that argument gathers greater force. It appears that Justice Stevens considered the contract, when supplemented by the constructive trust remedy, to be a prior restraint. See 444 U.S. at 526, n.17 (dissenting opinion). The argument in this portion of the article focuses on the injunction itself. It appears that that issue received relatively minor attention in the litigation. It is difficult to ascertain why this is the case, but the observation is borne out by examination of all three levels of court review and examination of the briefs and other papers filed with the Supreme Court. Perhaps the injunction with respect to future writings was simply of less importance to Snepp.

erty of the press, which consisted "in laying no previous restraint upon publications. . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy freedom of the press; but if he published what is improper, mischievous or illegal, he must take the consequences of his own temerity."27

While American constitutional freedom protects speakers and writers against subsequent punishment as well as prior restraint, there remains a very strong argument in favor of special protections against prior restraint. Although subsequent penalties may be more devastating to the individual speaker, the message is nonetheless transmitted. Thus, though Eugene V. Debs was sentenced to ten years' imprisonment for a speech praising draft resistance, his audience heard his opinion that "you need to know that you are fit for something better than slavery or cannon fodder."28 Some of Debs's ideas must have been influential, for he garnered nearly one million votes for President while he was in prison.29 Ideas concerning resistance to war took root forty-five years later among thousands who refused military service during the Vietnam war. The rule against prior restraint protects most emphatically the right of readers and listeners to receive ideas.

The Pentagon Papers Case demonstrates that the distinction between prior restraint and subsequent punishment is more than theoretical. The government sought injunctions against publication of a classified history of decision-making in Vietnam and of a document evaluating the Tonkin Gulf Incident. If the injunctions had become effective (rather than being ultimately rejected by the Supreme Court) the newspapers would probably have ceased publication of the documents, rather than defy the Supreme Court's order. The publishers were, however, willing to risk possible criminal sanctions should it be determined that disclosure of the documents was unlawful. In his concurring opinion, Justice White noted that he would "have no difficulty in sustaining convictions" under appropriate laws and on appropriate facts.30

30. "I would have no difficulty in sustaining convictions under these sections [of the Espionage Act] on facts that would not justify the intervention of equity and the
Subsequent criminal prosecutions would have been hampered by burden of proof problems, the presumption of innocence, and first amendment requirements. The government was aware of these difficulties; although it had pursued a civil injunctive action, it did not attempt to prosecute the newspapers. A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment—the expenditure of time, funds, energy and personnel that will be necessary. Constitutional norms thus protected the public against a prior restraint that would have eliminated the communications and provided the communicators appropriate post-publication protections.

The district court decision in the Snepp case acknowledged, without examination, that the injunction was a prior restraint. It is necessary to review why the Snepp injunction should be considered a prior restraint, since the question of justification of such a restraint is closely related to the reasons for imposing that label in the first place. Prior restraint is not self-defining. That term, properly and meaningfully used, refers only to closely related, distinctive methods of regulating free expression that have in common their own particular set of evils and problems. The Snepp injunction did not by its own force prevent publication of future writings; it simply required surrender for pre-publication review. We do not know whether the CIA would have demanded revisions after imposition of a prior restraint.” New York Times v. United States, 403 U.S. 713, 737 (1971).

31. Criminal charges were brought against Daniel Ellsberg and Anthony Russo as a result of the affair, but their cases were eventually dismissed. See Newsweek, May 21, 1973 at 25-26. See also Atlantic Monthly, Aug., 1973, at 6.


33. The omission of a detailed explanation of why the injunction was a prior restraint may have been due to the fact that an earlier case, United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied 409 U.S. 1063 (1972), had approved an injunction requiring a former CIA agent to submit his manuscripts to the agency 30 days prior to publication.

34. W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law, Cases - Comments - Questions, 916-17 (5th ed. 1980). In this regard, note the debate between Justice Powell and Justice Burger in Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). Justice Powell, speaking for the majority, contended that a commission's order to a newspaper that it not publish a certain type of advertisement was not a prior restraint, since the order was not self-enforcing. The Chief Justice argued that the practical effect of the order was the same as that of an order enforceable by contempt, therefore it should be condemned as presumptively invalid.
ter agency review,\textsuperscript{36} nor whether a court would have required Snepp to make such revisions. We do know that failure to submit future manuscripts for review would violate the order and would subject the author to punishment for contempt. Comparison with other prior restraint decisions will demonstrate the magnitude of the threat to communication posed by such an injunction.

The clearest American precedent condemning administrative prior restraint is \textit{Bantam Books, Inc. v. Sullivan.}\textsuperscript{36} In \textit{Bantam Books}, the State of Rhode Island had created a commission whose duty was "to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth . . . ." The commission had investigative authority but no direct enforcement power. Its practice was to send letters to distributors listing publications found to be objectionable and asking for their cooperation in stopping circulation of the material. The Supreme Court found this administrative review to be an unlawful prior restraint even though the Commission imposed no formal sanctions.

\[B]\text{ut though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.}\textsuperscript{37}

\textit{Snepp} involved a more extreme form of censorship than that invalidated in \textit{Bantam Books}. In \textit{Snepp} the author was re-

\begin{itemize}
\item \textsuperscript{35} The Secrecy Agreement did provide, however:
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.

\item 595 F.2d at 930 n.1.
\item 37. \textit{Id.} at 67 n.15.
\end{itemize}
required to submit the material prior to publication. In Bantam Books the commission was left to its own resources and inquiry after publication. Snepp was required to yield to the censor under immediate threat of contempt, while the commission in Bantam Books imposed no formal sanctions.

The Snepp injunction may be characterized as involving merely a delay in publication and might thus be considered de minimus. An examination of the Pentagon Papers Case, however, demonstrates that the Supreme Court has recognized that even a brief delay may be an unconstitutional prior restraint. By the time the case reached the Supreme Court one of the two newspapers involved, the New York Times, had been enjoined from publication of the material for nine days. This delay had been imposed by the lower courts only for the purpose of securing an orderly process of judicial review of the forty-seven volumes of classified documents to determine whether publication would pose a grave and immediate danger to the security of the United States. The per curiam opinion does not address whether the court considered the brief delay incident to judicial review to be a prior restraint. The train of events in the Court and the comments of several Justices, however, indicate that the Court regarded the pretrial delay as a substantial restraint in itself. The Court raced to a decision at a pace described by Justice Harlan as “almost irresponsibly feverish.” The Court heard argument only two days after the petition for certiorari had been filed and two hours after the briefs had been submitted. Justices Black and Douglas considered “every minute’s continuance of the injunction” violative of the first amendment. Chief Justice Burger, dissenting, stated: “The prompt setting of these cases reflects our abhorrence of prior restraint.” Thus, although the Justices differed on the issue of whether the injunction was justified, they seem to have agreed that mere delay in advance of judicial review is a substantial, not a de minimus,

39. 403 U.S. at 754.
40. Id. at 715.
41. Id. at 750.
To summarize, the Snepp injunction imposed a classical prior restraint—administrative review and supervision of authorship before publication. This entails direct intrusion into the creative process of the author and immediate prevention of the publication of unapproved work. The requirement of CIA review is virtually identical to the seventeenth century British censorship system, except that Snepp was bound by the immediate and summary force of contempt.43

**Was the Prior Restraint Justified?**

The exact scope of the prior restraint was not delineated in the Snepp opinion, but it may be gleaned from earlier litigation. In *United States v. Marchetti*, the Fourth Circuit sustained an injunction requiring the author to submit his manuscript concerning the CIA for prepublication review. The injunction was limited in several respects: the CIA was required to respond within thirty days of submission of the manuscript, and the Agency's discretion was limited to excision of classified information that had not been disclosed to the public.44 Nevertheless, in *Alfred A. Knopf, Inc. v. Colby*, the sequel to *Marchetti*, the Fourth Circuit sharply limited the impact of the requirement that only classified information be excised, by ruling that the government had sustained its burden of proof by showing that each item deleted was required to be classified and in fact bore a classification stamp. The court had ruled that the prior restraint was justified, because the prepublication requirement was embodied in a con-
tract, which the court determined served this security interest. Procedurally, the court imposed the burden of obtaining judicial review of deletions on the author, not the Agency.\textsuperscript{46} Once judicial review was obtained, the Agency would win, in effect, by simply proving that it had rubber stamped a document.

While the Supreme Court denied certiorari in both \textit{Marchetti} and \textit{Knopf},\textsuperscript{47} the per curiam opinion in \textit{Snepp} appears to have approved the resulting prior restraint.\textsuperscript{48} The \textit{Snepp} decision, however, gives little attention to the injunction.\textsuperscript{49} Also, the district court opinion did not specifically reiterate the pro-government procedure outlined in \textit{Marchetti}. In

\begin{itemize}
\item \textsuperscript{46} One interpretation of footnote 8 in the \textit{Snepp} per curiam opinion is that the Court believed the CIA would have the burden of obtaining further judicial review of deletions imposed after the prepublication review of the manuscript. A portion of the footnote reads:

If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against the publication.

444 U.S. at 513 n.8. It seems fair to interpret this comment as requiring that further review be initiated by the CIA. Since the court cited the \textit{Knopf} case in that footnote, it appears that the last sentence merely means that if there had been no contract requiring prepublication review, the Agency would have borne the initial burden of seeking an injunction against publication. It is this author's position that to be consistent with the first amendment the burden to obtain judicial review of deletions must be placed on the CIA.

47. 409 U.S. 1063 (1972) and 421 U.S. 992 (1975).

48. 444 U.S. 507, 509. The only direct reference to the injunction by the per curiam opinion is the following sentence: "Thus, the court upheld the injunction against future violations of Snepp's prepublication obligation." \textit{Id.} Justice Stevens's dissent criticizes the Court's unawareness "of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize the government." \textit{Id.} at 526. It appears, however, that Justice Stevens's comment and the accompanying footnote constitute a complaint that the majority has created a new type of prior restraint: enforcement of the contract by the new remedy of a constructive trust.

49. Snepp argued that the CIA was maintaining a classic system of prior restraint: "The would-be author must seek and obtain the censor's approval before he can publish." Petitioner's Brief for Certiorari, at 7, \textit{Snepp v. United States}, 444 U.S. 507 (1980). Additionally, Snepp pointed out that enforcement by injunction placed an intolerable burden on CIA employees, deprived the public of the right to receive information of great public concern, and, in prohibiting fictional and other works, had an overbroad sweep. One amicus curiae urged that such a broad injunction would have a chilling impact on freedom of speech and press, which would extend to third parties and subject them to contempt citations. Brief of Association of American Publishers, Inc., Radio Television News Directors Association, Society of Professional Journalists, Sigma Delta Chi, The Atlantic Monthly Company, New Oregon Publishers, Inc. D/B/A/ Oregon Magazine and Random House, Inc.
addition, a careful reassessment of the substance and procedure of *Marchetti* and *Knopf* shows that their approach is subject to strong constitutional objections. For these reasons, it appears that the courts may deal with such injunctions differently in the future.\(^6\)

The Supreme Court has allowed prior restraints only with respect to very narrowly drawn classes of information.\(^5\) "National security information" may be one such class, assuming it can be defined with sufficient precision.\(^5\) However national security information is defined, it is impossible to determine whether material should be suppressed under the standard until the work has been reviewed. The *Snepp* solution, pre-publication censorship, is one approach to this problem. The Supreme Court has rejected that approach in other cases and has required that carefully articulated judicial procedures accompany the imposition of restraints which are based on suppressible subject matter.

The first of these requirements is that "the burden of instituting judicial proceedings, and of proving that the material is unprotected [by the first amendment], must rest on the censor."\(^5\) In *Snepp*, neither burden was met as to future writings. The *Snepp* case was initiated by the government, but the injunction was not imposed on any particular material. The government relied on the preemptive effect of the contract as to all future manuscripts. The effect was to establish a court ordered censorship of all future writings on the bare allegation that they "concern" the CIA. An equivalent of this procedure would be an injunction requiring Norman Mailer to submit all of his future writings "concerning sex" to a national obscenity commission prior to publication. The CIA

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50. In *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980), the United States intervened in a freedom of information suit filed by Mr. Agee. The government sought all sums earned by former agent Agee from prior publications that violated his CIA secrecy agreement, and sought to enjoin him from further breaches of the agreement. The District Court denied the constructive trust, but did grant the injunction. The Court later amended the injunction upon the motion of Agee to conform with the safeguard procedures endorsed in the *Snepp* and *Marchetti* litigation. Thus, it was ordered that the agency review must be completed within 30 days of submission of material, and that approval for dissemination be withheld "only for information which the Central Intelligence Agency determines to be classified." *Id.* at 511.


52. Dictum in *Near v. Minnesota* suggested a standard for a narrowly drawn exception: when words approximate deeds—as in "the publication of sailing dates of (military) transports or the number and location of troops." 283 U.S. 697, 716 (1931).

need not establish that the item to be reviewed is particularly sensitive. Instead, all aspects of any manuscripts are subject to agency prepublication review. Even after initial censorship, it appears that the author will bear the burden of obtaining further judicial review: “Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA.”

The fact that the censorship is administrative makes it virtually impossible to determine whether the government will bear the burden of proving that the material is unprotected by the first amendment. Since the CIA controls the initial review proceedings, it would have to impose that burden on itself! In Marchetti, the court placed considerable confidence in the agency-controlled process, forecasting that there would be only “narrow areas of possible disagreement” between the author and agency. The prediction proved erroneous, as the CIA review of the manuscript resulted in 168 deletions which were disputed by the author. As to those, author Marchetti bore the burden of initiating proceedings and of proving publishability. Author Snepp faces the same prospect—administrative censorship that is presumed valid.

The majority in Snepp was concerned that a method be designed to “insure in advance, and by proper procedures, that information detrimental to national interest is not published.” That was precisely the problem in the Pentagon Papers Case as well, a major difference being that the publisher was attempting to publish complete classified documents. The answer, proper procedures, must lie within constitutional limits. Procedure that is effective, that properly allocates the burden of proof, and that least impinges on the rights of authorship can be designed to meet this problem.

55. 444 U.S. at 513 n.8 (emphasis in original).
56. As Professor Emerson has stated, “The major considerations underlying the doctrine of prior restraint . . . are matters of administration, techniques of enforcement, methods of operation, and their effect upon the basic objectives of the First Amendment.” Emerson, The Doctrine of Prior Restraint, 20 LAW AND CONTEMPORARY PROBLEMS 648 (1955).
57. This demand for precise procedure is consistent with the tenor of Justice Stevens' dissenting opinion. 444 U.S. at 526 and n.17. As the text of this article points out, the demand for precise procedure with respect to the prepublication injunction is consistent with the per curiam opinion. See 444 U.S. at 513 n.8.
What remains is to consider alternative approaches that avoid the constitutional snare of an improper prior restraint. Blanket enforcement of the contractual prepublication review requirement by means of injunction should be eliminated. The secrecy agreement was the foundation for the injunction in Snepp, yet it has virtually no impact on determining whether particular national security information will be compromised. The secrecy agreement by its terms would prevent Mr. Snepp from publishing an unreviewed magazine commentary concerning the time wasted by CIA personnel on coffee breaks. Certain sensitive information might be appropriate subject matter for an injunction requiring specific prepublication review. For example, the Supreme Court might very well have taken a different position in the Pentagon Papers Case if the issue had been the validity of an injunction ordering Daniel Ellsberg to refrain from delivering specified classified documents to a newspaper. Perhaps the Court would have approved such an injunction. But certainly the Court would not have enjoined Mr. Ellsberg from delivering anything he had written to the New York Times. The Agency should be denied any form of prior restraint, with respect to claims based on simple breach of a generalized contract like that signed by Snepp, but it should be free to pursue any remedies that do not violate constitutional rights. Those remedies may in appropriate circumstances include the powerful new deterrent of the constructive trust. In addition, the Agency may be able to pursue criminal penalties in some cases.

In the rare instances of necessity, the government need not be left without means of obtaining a prior restraint. The government, however, should bear the burden of articulating the need for such a remedy. In Snepp, the Court observed "[W]ithout a dependable prepublication review procedure, no intelligence agency or responsible government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world." The government can start a dependable process at the very time the agent leaves the CIA. During the checking-out or "debriefing" process, the agency can review the agent's assignments and his or her access to information, and can ask questions concerning sensitive areas. If desirable, an appendix may be added to the de-

58. 444 U.S. at513 n.8.
parture agreement which identifies areas of classified information that the agent is obliged not to publish or reveal. This appendix might also identify specific areas of nonclassified information that should not be disclosed absent prior consultation. By alerting the individual to sensitive areas, this procedure would help to prevent innocent but harmful disclosures. The agreement might also provide that the individual must give notice of intent to publish with respect to the identified areas. Based on these tailored arrangements with the employee, the government could initiate judicial proceedings bearing the proper burden in a prior restraint case—the burden of proving that particular information is not protected by the first amendment. There may be much in national security that is not apparent to either judge or citizen, but it is neither wise nor constitutional to confuse the post-employment authorship efforts of a former agent with the dangerous and disloyal activities of a spy.

59. On December 29th, 1980, the Department of Justice published “Guidelines for Litigation to Enforce Obligations to Submit Materials for Predissemination Review.” 45 Fed. Reg. 85529 (1980). These guidelines were established to guide the Department of Justice with respect to suits for enforcement of obligations to submit publications for prepublication review. The guidelines recognize that enforcement of such obligations is an extremely sensitive matter. Only the Attorney General may authorize the filing of suits to enforce such obligations. In determining whether to seek judicial enforcement the Attorney General is required to ignore the political point of view of the writer and hold all former government officials “to identical standards of trust as a result of their access to classified information.” Id. Other factors to be considered include whether the writer willfully failed to comply with prepublication requirements, whether the disclosure contains classifiable information and whether it appears that a disclosure is likely to inhibit the flow of intelligence information to the intelligence community from its lawful sources. Id. at 85529-30. The Attorney General is also required to consider whether the agency concerned has taken appropriate steps to inform the writer of the meaning of his obligation to submit for/to prepublication review. Id. at 85530. Before seeking an injunction against publication, Justice Department attorneys are required to consider among other things:

[W]hether the system of predissemination review adopted by the agency concerned provides adequate procedural safeguards to assure that the review will not impermissibly interfere with the dissemination of information other than that which is properly classifiable, including the articulation of standards for the imposition of any final restraints that are sufficiently precise to preclude arbitrary and inconsistent administrative action; and the requirement that the agency act within a specified brief period of time.

Id. at 85530.

APPROPRIATE LIMITATIONS ON THE CONSTRUCTIVE TRUST

Decent Interval was published in exactly the form that author Snepp and Random House agreed. The CIA did not enjoin publication, but asserted economic rights in the book after publication. Mr. Snepp had exercised his right to communicate, and the public had enjoyed its right to receive information. The remaining issue involved litigation over the rights to the profits from the book.

Snepp claimed a right to derive personal profit from a work that included information he gathered while employed by the CIA. The CIA claimed that such economic rights and information belonged to the government, which was entitled to compensation for a wrongful taking. The government’s principal motive, however, was probably to deter prospective authors from exposing government information to the public, rather than to add dollars to the treasury. The claim of a mere right to profit does not balance well against a government security claim, since it offers no particular communication benefit to society at large, except to the extent that it is a necessary incentive to communication. This latter argument has

60. The United States did not seek to enjoin publication of the book. 456 F. Supp. 177.

61. Snepp reportedly refused a government settlement offer because settlement for money could "portray him as a mercenary." Moody, Struggling Author Ex-CIA Officer Must Keep Writing to Pay Damages from First Book, San Jose Mercury, November 9, 1980, §G, at 1, col. 4. He was, however, an author who was apparently seeking to succeed financially, and therefore could not successfully sever his profit motive from his publication activities.

62. It certainly does appear that the government’s effort to obtain a monetary recovery from Snepp was for the purpose of deterrence. The court of appeals viewed its preferred remedy of punitive damages as having been imposed for the purpose of punishing Snepp and deterring others. United States v. Snepp, 595 F.2d at 937. The language of the Supreme Court per curiam opinion simply emphasized deterrence. The Court stated that the trust remedy “is tailored to deter those who would place sensitive information at risk.” 444 U.S. at 515.

The observation that future suits for constructive trusts are for the purpose of deterrence is reinforced by the Attorney General’s guidelines referred to in footnote 59 supra. Part III of the guidelines states that the constructive trust remedy “should be designed solely to promote compliance with lawful obligations to submit material for predissemination review.” 45 Fed. Reg. 85529-30 (1980). The guidelines also state that the Justice Department attorneys shall consider “the likelihood that a particular remedy will serve to deter other persons who may be considering similar unauthorized disclosures.” Id. at 85530.

63. Some economic activities may be essential to support freedom of the press, for example, one should be free to charge for a newspaper. In fact the United States Supreme Court has extended broad protection to economic activities that are intertwined with communication activities. See, e.g., Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Friedman v. Rogers, 440 U.S. 1 (1979)
some merit, but seems to founder on a starting premise: is it truly necessary to encourage communication of information, part of which does not belong to the communicator? The Supreme Court’s per curiam decision did not examine such a claim, and the dissent did not explain exactly how the claim to profit was linked to Snepp’s first amendment rights. Probably the simple answer is that the first amendment does not require protection of profit derived in part from someone else’s information.

This conclusion, however, does not end the inquiry. The litigation concerning damages and the constructive trust should have been governed by a careful inquiry into the ownership of the information, apportionment of profits, and the appropriateness of post employment restrictions. Since Snepp’s case has been resolved, these questions will be examined primarily as to their importance in future litigation.

Like others who wish to guard secrets, the government must engage in a kind of hide-and-seek with those who wish to expose the information. Two aspects, however, distinguish government information. First, the government has a claim that it keeps secrets for the benefit of the people as a whole. Second, once information leaves government control, the first amendment intervenes and makes it difficult to restrict its dissemination. As a result, it is extremely important to the government to control the release of information in the first instance.

Release of federal government information is largely controlled by the Freedom of Information Act (FOIA or Act). The Act established a general rule in favor of public access. Information held by a federal agency must be disclosed unless the information falls within one of the Act’s nine exemptions. The terms of the Act, however, do not govern situations where one already has information and wishes to use it—cases involving “escaped” information.

One approach to the escaped information cases is to allow use of the information to the extent that it would have been

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65. Escaped information is sometimes referred to as a “leak” or “leaked information”. The term “leak” may imply that the information has been improperly acquired, therefore, I avoid the use of that term.
subject to disclosure if requested under the FOIA. The context of national security, this would mean that the author could use the escaped information, unless it was classified. The Knopf case took this position with respect to information used by former CIA agent, Marchetti. The Snepp case, however, concluded that there was no right to derive a profit even from nonclassified information, if it had not been cleared for publication.

The conclusion in the Snepp case is based on the notion that the government holds a property right in its information, including certain kinds of nonclassified information. This claim is similar to the claim of the plaintiff in Zacchini v. Scripps-Howard Broadcasting Company. The Supreme Court held that Zacchini was entitled to protect the entertainment value of his human cannon ball act, through a damages claim against a broadcaster who appropriated the value of the act by broadcasting a videotape of the entire performance. The Court ruled that state law could protect Zacchini's economic value in the act consistent with the first amendment. The court stated:

[I]t is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.

The CIA claim is that it, too, has produced an economic value or property in intelligence information through its efforts. The Supreme Court has, in effect, accepted this approach. Although the government may have some claim to an economic right in nonclassified materials, it seems that a constructive trust should be confined to profit attributable to protectable government information. Initially, the govern-

66. This discussion relates to unauthorized disclosures. Authorized disclosures may be considered a waiver of FOIA exemption status. See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177 (8th Cir. 1978).
68. Marchetti should "not be denied the right to publish information which [he] could compel the CIA to produce, and after production, could publish." 509 F.2d at 1367. As noted, the practical effect of this ruling has been confined. See text accompanying, note 45 supra.
70. Id. at 578.
71. One approach would be to find that the government is permitted to claim a
ment should not be permitted to reclaim profit with respect to information that it has not protected with reasonable vigor.\textsuperscript{72} Such a requirement makes sense, because the government interest in secrecy per se has already been protected by the classification process. If the government does not act with some degree of care with respect to nonclassified information, in what sense is the information truly "property"? An analogy may be made to trade secrets, often described as "disappearing property," because if sufficient efforts to protect the information from disclosure are not made, the property right is lost.\textsuperscript{73} A requirement of reasonable vigor on the part of the government would coincide with the tenor of FOIA, that agency records are normally available to any person. The requirement also accords with a constitutional tendency favoring open critique of government. For example, in \textit{Sherill v. Knight},\textsuperscript{74} the court held that a presidential press conference pass could not be denied unless the President's press office created and adhered to meaningful standards governing such denials. The President is not required to have press conferences at all. If such conferences are held, the President does not have to answer questions. Finally, if questions are permitted, he can answer questions to the extent that he wishes. Thus the President retains firm control over the flow of information from his office. Yet, once he establishes conferences.
the first amendment interest in favor of news conditions the action of his officers. "Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering can be no more arduous than necessary."\textsuperscript{75}

Once the scope of the government’s proprietary information is appropriately narrowed, the manuscript should be examined with care to determine the proportion based upon that information. The constructive trust should be limited to proceeds attributable to that proportion which represents the government contribution. This is fully consistent with the Supreme Court’s reasoning in \textit{Snepp}:

[A constructive trust] deals with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent published unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk.\textsuperscript{76}

A requirement of apportionment is consistent with the basic premise of a constructive trust. As Professor Dobbs points out in his book, \textit{Remedies}, "Like other powerful rules [the constructive trust] is capable of abuse. Even a wrongdoer probably ought not be deprived of values added to property by his own wit, experience or hard work, unless the court makes a conscious decision to impose punitive damages."\textsuperscript{77} Apportionment of damages has been applied in copyright cases in which the plaintiff has a clear and definable basis for the property, and the defendant has intentionally infringed the copyright. In \textit{Sheldon v. Metro Goldwyn Meyer Pictures Corp.},\textsuperscript{78} the defendants deliberately plagiarized the plaintiff’s play. The Supreme Court affirmed a lower court decision awarding only one-fifth of the profits to the plaintiff based on an apportionment. The court of appeals imposed on the defendant the burden of disentangling the various factors contributing to the

\textsuperscript{75} Id. at 129-30.
\textsuperscript{76} 444 U.S. at 515.
\textsuperscript{77} D. Dobbs, Remedies 242-43 (1967).
\textsuperscript{78} 309 U.S. 390 (1939).
final work. Proper apportionment in a case like Snepp would tailor the remedy in accordance with the Supreme Court's pronouncement in Sheldon.80

THE POSTEMPLOYMENT COVENANT

Remaining for consideration is the contract which embodied the postemployment obligation not to publish without prior Agency review. The majority and the dissent were clearly divided on the overall validity of such a requirement. Justice Stevens, dissenting, saw the obligation as analogous to noncompetition covenants utilized in the private sector of the economy.81 As such, the enforceability of that contract should have been tested by the "rule of reason" which governs such covenants. The majority disagreed, finding that the law concerning covenants not to compete is a body of private law intended to preserve competition, and that it "simply has no bearing on a contract made by the Director of the CIA."82 I prefer the approach of the dissent on this issue and wish to explore limitations that might appropriately be imposed on such a postemployment covenant.

The government chose to control information flow by means of a contract. It then pursued remedies based strictly on contract and equity. Thus, the government implicated contract and equity doctrines in the case. Furthermore, we have seen that the government obtained a rarely applied remedy when it obtained the constructive trust. It seems decidedly unfair to apply only those common law and equity doctrines which favor one side. Finally, one important reason for judicial scrutiny of restraints on former employees is to assure that they cause no substantial injury to society.83

79. The burden of disentanglement is not insurmountable. Copyright and patent infringement cases have utilized apportionment of profits, and the separation of infringed and noninfringed material poses as difficult an allocation problem as Snepp would have presented. The courts have not required the defendant to produce evidence providing a mathematically precise basis of apportionment. The Justice Department guidelines referred to in note 59 supra, support the proposition that some apportionment should be made. Part II of those guidelines states that Justice Department attorneys shall take into account "[t]he extent to which the individual was unjustly enriched by the disclosure" 45 Fed. Reg. 85529-30 (1980) when choosing the appropriate relief to be sought in court.

80. See note 9 supra.
81. 444 U.S. at 518-19.
82. Id. at 514 n.9.
83. The interest of society has apparently taken a back seat in litigation in recent decades. One author notes that: "Today . . . the recognized method of decision is
Two new aspects of the public interest should be added to the traditional analysis of a noncompetition covenant in a case like Snepp's. Traditionally, litigation to determine the validity of such covenants involves a collision between two favored common law doctrines, economic liberty and the sanctity of contract.\textsuperscript{84} The resulting judicial compromise, the "rule of reason," has accommodated the demands of these competing doctrines, preserving parts but not the whole of each on a case-by-case basis. The accommodation sought in cases resembling Snepp should encompass a frank evaluation of the additional factors of freedom to communicate and the need for security.\textsuperscript{85} Given the need for some restraint upon the "sanctity of contract" in this area, courts should evaluate the validity of the scope and the enforceability of postemployment communication restraints.

If this evaluation is undertaken, contract enforceability should be evaluated by three criteria: (1) whether the contract distinguishes between confidential (or proprietary) information and nonconfidential information, (2) whether the government has restricted the use of such contracts to sensitive classes of employees, and (3) whether the covenant has been tailored to fit the circumstances of the particular employment.\textsuperscript{86}

The courts have had ample experience limiting application of postemployment covenants to confidential information that of balancing the employer's claims to protection against the burden on the employee. Once the judgment is made, almost never does the court proceed to consider possible injury to society as a separate matter." Blake, \textit{Employer Agreements Not to Compete}, 73 \textit{Harv. L. Rev.} 625, 626 (1960) [hereinafter cited as Blake]. The freedom of communication issues presented by the government's presence as a party to the contract in cases like Snepp restore public interest as a primary reason for judicial evaluation.

\textsuperscript{84} Validity of these covenants has been subjected to court challenge for approximately five centuries. During the past two centuries the focus of attention has been on the tension between economic liberty and the sanctity of contract. This is apparently due to the emergence of the importance of contract law during and after the industrial revolution. \textit{See} Blake at 631-39.

\textsuperscript{85} Justice Stevens, in his dissent, states: "The public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information." 444 U.S. at 520. It is uncertain whether the Supreme Court will again address this issue. The majority's treatment of this subject is so brief that it does not preclude lower court inquiry into the validity and scope of similar contracts in future cases.

\textsuperscript{86} Criteria (2) and (3) are adapted from an approach taken in Blake at 687-688.
tion. For example, *Electronic Data Systems Corp. v. Kinder* was an action by a computer programming firm against a former employee, Kinder, who had allegedly had access to what EDS claimed were superior programming methods. The court of appeals affirmed a very limited injunction against Kinder, requiring him to refrain from soliciting EDS's employees to work for his present employer. The court observed that, while EDS may have had a "highly prized, confidential system," there was no evidence that Kinder had disclosed any confidential information obtained during the course of his employment.

Distinguishing government confidential information from its nonconfidential information would normally appear to follow the lines drawn from the exceptions to the Freedom of Information Act. With respect to security information, it would be simplest if this line of demarcation were drawn at classified information. *Snepp* stands, however, for the proposition that certain additional information can be viewed as proprietary or protectable. It has been argued that this proprietary information should not extend beyond information which the government has exercised some vigor to protect. It would seem appropriate to apply the same approach in a situation where there is a specific contract between an employer and former employee. Professor Blake has stated the rationale for such an approach as follows:

[An implied term of all employment contracts is that the employee will not divulge any information which he knows is confidential during or after employment; thus an employer's giving access to such information to employees who have occasion to use it does not destroy its confidential nature. However, if the confidential nature of the information is to be the basis for restricting the freedom of an employee, the employer should be required to show that he has taken reasonable measures to protect its secrecy. The most persuasive proof possible that informa-
tion is worthy of legal protection is that the employer has taken every feasible step to protect it himself.\textsuperscript{91}

At a minimum, it appears that a government agency should take reasonable efforts to restrict access to important information and should give sufficient advice to employees with respect to the types of information likely to be deemed sensitive.\textsuperscript{92}

The enforcement of the broad prepublication covenant in \textit{Snepp} is particularly troubling. Snepp had not compromised specific classified information; nor does it appear that any particular sensitive, but not classified, information was exposed. Instead, the court accepted the proposition that the CIA's intelligence gathering ability was impaired because foreign sources feared that certain information would not remain secret. Admiral Turner, Director of the CIA, testified:

\begin{quote}
\textit{[W]e have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether or not they should continue exchanging information with us, for fear that it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us.}\textsuperscript{93}
\end{quote}

Concern by foreign sources is undoubtedly important to the CIA. Without specific guidelines for Agency employees, however, achievement of either the reality or the appearance of secrecy will be difficult.

Identification of certain classes of employees who deal with sensitive information should help to reassure both foreign sources and the employees themselves.\textsuperscript{94} Tailoring a restrictive postemployment covenant to fit the circumstances of the particular employment should also allow the CIA or other

\textsuperscript{91} Blake at 673-74 (footnote omitted).

\textsuperscript{92} In certain cases, confidentiality would constitute a specific element of the bargain, putting the employee on direct notice that he or she bears a continuous responsibility to ascertain whether information is confidential. The CIA secrecy agreement appears to have done this in part. It contained a clause stating, "I understand the burden is on me to ascertain whether or not information is classified and if so, who is authorized to receive it." Brief for the United States, App. D at 59a, \textit{Snepp v. The United States}, 444 U.S. 507 (1980).

\textsuperscript{93} 444 U.S. at 512-513.

\textsuperscript{94} If such a classification had been used in Snepp's situation, his position would probably have been labeled sensitive.
agencies to achieve their goals. In sum, a well tailored postemployment contract can serve the agency goals without needlessly burdening the employee. Contracts not meeting these requirements should not be enforced.

In addition, contracts like Snepp's should be subject to court-imposed duration requirements. An author should not be restrained for long periods of time with respect to a broad range of information. The confidentiality of information alters with time; an employer "should not be unwilling to renegotiate the terms of a covenant with an employee when the conditions change if this can be done on the facts of the individual case without loss of reasonable protection and without disruption of personnel relations." The government, like any other employer, should be guided by this standard of reasonableness.

**Conclusion**

A former government employee, such as Frank W. Snepp, III, may have participated in important events and may possess a great deal of information about government activities. Consequently, he or she may have an unusual capacity to be an informed commentator on the government. The greater the access to important affairs and decisions, the greater the likelihood that the former employee will have something important to share. It may be appropriate for the government to protect its secrets, but it should not be permitted to silence commentators whose ideas and observations are based on direct experience. To achieve both goals, protection of secrets and comment on government, the court should adhere to rules that strike a proper balance. With respect to prior restraints, such as the Snepp injunction, this balance should compel the government to bear the burden of proving necessity at every stage of the proceeding. The government was not required to do so in Snepp, and thus I have concluded that the injunction requiring prepublication review should not have been imposed.

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96. Blake at 688.
97. The renegotiation gambit should prove to be a valuable one for the practitioner. In the future counsel should attempt to reduce the burden posed by a postemployment agreement with the government. If reasonable efforts to renegotiate are refused, this may be the needed entree to judicial review of the entire covenant.
With respect to claims for profit from writings, it appears that former government employees should enjoy procedural and substantive protections, which derive from common law and equity doctrines, fortified by the public policy in favor of free communication.98 These doctrines should allow the former employee to publish and retain profit for any information that is not shown to be the property of the government. These protections should include the right to litigate the ownership of the information, the right to fair apportionment of profits, and the right to obtain modification of unreasonable postemployment restraints.

98. A recent case dealing with the problem of enforceability of postemployment covenants noted that “public policy” is an “unruly horse.” Briggs v. R. R. Donnelley & Sons Co., 589 F.2d 39, 40 (1st Cir. 1978). By invoking public policy in this conclusion I do not mean to “ride” an unruly horse. The public policy to which I refer derives from enduring concepts in the constitution and from legislation such as the Freedom of Information Act.