

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided – Democratic Rights

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

Frank W. Snepp III served as an agent for the Central Intelligence Agencies in South Vietnam. Based on those experiences, Snepp wrote a book on CIA activities in that country and published the book without going through the prepublication clearance required by his employment contract with the CIA. That specified that he would not divulge any classified information and would obtain approval from the Agency before publishing any information about the Agency or its activities. The government sued Snepp in federal district court seeking an injunction against future publications and the imposition of a constructive trust that would turn over all profits from the book to the Agency. The district court agreed with the Agency. On appeal, a divided circuit court upheld the injunction against future publication but held that Snepp had not violated his fiduciary trust with the Agency by publishing a book containing non-classified information and thus did not have to turn over his profits. The Agency was free to try to win damages for the contractual violation in a jury trial. In a 6–3 decision, the U.S. Supreme Court reversed on the Court of Appeals on the issue of the constructive trust.

Although the case turned on the appropriate remedies to a violation of an employment contract, the decision implicated both national security concerns and the First Amendment. The government, and the Court's majority, doubted the effectiveness of suits for damages as a remedy for rogue CIA officers who might divulge harmful information, but alternative remedies were not clear in the existing law and the First Amendment suggested skepticism about restrictions on an individual's right to publish.

Should fiduciary obligations to the CIA be treated in the same way as obligations to private employers? Does the difficulty of initiating suits for damages to national security in open court justify more restrictive limits on the right to publish? Should the court engage in creative solutions to such breaches of duty to the government, or should such solutions be left to Congress?

PER CURIAM

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Both the District Court and the Court of Appeals found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published information is unclassified. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA -- with its broader understanding of what may expose classified information and confidential sources -- could have identified as harmful. . . .

Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties. Admiral Turner, Director of the CIA, testified without contradiction that Snepp's book and others like it have seriously impaired the effectiveness of American intelligence operations. . . .

The decision of the Court of Appeals denies the Government the most appropriate remedy for Snepp's acknowledged wrong. Indeed, as a practical matter, the decision may well leave the Government with no reliable deterrent against similar breaches of security. No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow

alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain.

A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust. It deals fairly 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 publishes 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. And since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain. . . . We therefore reverse the judgment of the Court of Appeals

JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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The rule of law the Court announces today is not supported by statute, by the contract, or by the common law. Although Congress has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information, it has not seen fit to authorize the constructive trust remedy the Court creates today. Nor does either of the contracts Snepp signed with the Agency provide for any such remedy in the event of a breach. . . .

. . . . Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty, imposed in aid of the basic duty to maintain confidentiality, to obtain prepublication clearance. In order to justify the imposition of a constructive trust, the majority attempts to equate this contractual duty with Snepp's duty not to disclose, labeling them both as "fiduciary." I find nothing in the common law to support such an approach.

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The Court has not persuaded me that a rule of reason analysis should not be applied to Snepp's covenant to submit to prepublication review. Like an ordinary employer, the CIA has a vital interest in protecting certain types of information; at the same time, the CIA employee has a countervailing interest in preserving a wide range of work opportunities (including work as an author) and in protecting his 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. When the Government seeks to enforce a harsh restriction on the employee's freedom, despite its admission that the interest the agreement was designed to protect -- the confidentiality of classified information -- has not been compromised, an equity court might well be persuaded that the case is not one in which the covenant should be enforced.

. . . .
Despite the fact that Snepp has not caused the Government the type of harm that would ordinarily be remedied by the imposition of a constructive trust, the Court attempts to justify a constructive trust remedy on the ground that the Government has suffered *some* harm. . . . I do not believe, however, that the Agency has any authority to censor its employees' publication of unclassified information on the basis of its opinion that publication may be "detrimental to vital national interests" or otherwise "identified as harmful." The CIA never attempted to assert such power over Snepp in either of the contracts he signed; rather, the Agency itself limited its censorship power to preventing the disclosure of "classified" information. Moreover, even if such a wide-ranging prior restraint would be good national security policy, I would have great difficulty reconciling it with the demands of the First Amendment.

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