IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-1651

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK W. SNEPP, III,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

In Support of Appellant

Law Student Researchers:

Jeffrey Tobias
National Law Center
George Washington University

Jack Gillman
Stanford University Law School

JACK C. LANDAU, ESQ.
GORDON F. BARRINGTON, ESQ.
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae

CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

Table of Contents

Table of Cases

Table of Statutes

Table of Other Authorities

I. INTRODUCTION

This is a most important case for the public, the press and present or former government employees who wish to inform the public and the press about the operation of their government.

Essentially, this case asks the question of whether, as a condition of government employment, the government may assert the most extreme sanction available to it to limit the First Amendment -- the sanction of prior restraints on publication, without any showing that any facts in the publication sought to be suppressed pose a clear and present danger to the national security of the United States.

The attempt of the government -- to suppress publications critical of it but containing no information damaging to it -- is the most ancient form of censorship and has as its historical basis the prior restraints imposed by the Colonial governors by licensing the press under the civil laws or by prosecuting the press under the Crown Sedition Acts.

It is the contention of the Amicus that the government is attempting in this case, through the rubric of a "fiduciary duty", to impose precisely the type of prior restraints on information about the government which the First Amendment was specifically designed to prohibit.

Furthermore, because this case involves a former government employee, it is the contention of the Amicus

that the government is attempting to assert the repeatedly discredited theory of government ownership of government information, or a theory of Crown (or in this case Government) Copyright which has been rejected by both the courts and the Congress.

It is the conclusion of this Amicus that if this so-called "contract" and the remedies sought to enforce it are upheld by this Court, this Court will have fashioned a civil "Official Secrets Act" doctrine which may be imposed by "contract" on any government employee and will result in the most severe censorship of government information.

II. STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and Freedom of Information interests of the public to know about the operation of all forms of government, through its press.

The interest of The Reporters Committee in the constitutionality of orders restricting public information about the government is well known to this Court, the Committee having previously appeared before this Court challenging restrictions on the collection and publication of government information, including the following cases:

In re The Washington Post Company, No. 76-1695 (4th Cir., July 19, 1976) (slip op.);

United States v. Steelhammer, 539 F.2d 373 (4th Cir. 1976), en banc, 561 F.2d 539 (1977); and

South Carolina Chapter, Society of Professional Journalists v. Martin, 556 F.2d 706 (4th Cir. 1977).

The Committee is primarily supported by press donations and relies heavily on volunteer efforts to conduct its activities -- such as this brief.

The Reporters Committee for Freedom of the Press submits this brief amicus curiae in support of the Petitioner Snepp with the consent of the Petitioner and Respondents. (Amicus' Appendix at B; hereinafter referred to as App.).

III. QUESTIONS PRESENTED

1. May the United States impose a prior restraint upon publications by a former employee without any evidence that a single fact in a previous publication has posed a clear and present danger to the national security of the United States?

2. May the United States assert by contract a proprietary interest in government information -- enforceable by a prior restraint and damages -- in view of the Congressional prohibition against government information ownership contained in both the Government Copyright prohibition of the 1976 Copyright Act and in the First Amendment?

3. May the government, consistent with the First Amendment, impose limitations on the fundamental rights of freedom of speech and of the press as a condition of public employment?

IV. STATEMENT OF THE CASE

Author Frank W. Snepp III obtained employment with the Central Intelligence Agency on September 16, 1968. (Joint Appendix, Vol. I, p. 108; hereinafter referred to as Jt. App.). Prior to the commencement of his employment, and as a condition of such employment, the author was required to sign a secrecy agreement with the Agency which he duly signed on September 16, 1968. (Jt. App., Vol. I, p. 108).

Paragraph 8 of the 1968 agreement provides:

> 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, 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. (Emphasis supplied) (Jt. App., Vol. I, p. 16).

Mr. Snepp's employment with the Agency continued until January 23, 1976, the effective date of his resignation. During the period of his employment, Snepp served two tours of duty in South Vietnam, from June 2, 1969 to June 21, 1971 and from October 4, 1972 to April 29, 1975. (Jt. App., Vol. I, p. 108).

Upon resignation, Mr. Snepp signed another secrecy agreement which differed in its terms from the 1968 document. The 1976 agreement provided only that Snepp would not divulge "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA "without the Agency's written consent. (Jt. App., Vol. I, p. 17).

In November, 1977, Random House, Inc. published a book written by Mr. Snepp, entitled Decent Interval, which related to the author's experiences and observations while in South Vietnam and was highly critical of the government's action. The manuscript of Decent Interval

was not submitted to the CIA for approval prior to publication. (Jt. App., Vol. I, p. 125).

The government thereafter brought suit against Mr. Snepp in the U.S. District Court for the Eastern District of Virginia. The District Court interpreted the complaint to allege the author's "breach of his contractual and fiduciary duties caused by his failure to submit to the CIA for its initial review all manuscripts which contain information gained by him as a result of his CIA employment." (Jt. App., Vol. I, p. 122). The government further alleged in its complaint that "[a]s a result of defendant Snepp's breaches of his contractual and/or fiduciary duties, the United States has been damaged, inter alia, by the undermining of confidence and trust in the Agency, thereby hampering the ability of the Agency and of the Director of Central Intelligence to perform their respective statutory duties ...." (Jt. App., Vol. I, p. 11).

In its prayer for relief, the Government requested, inter alia, that "Snepp be ordered to account for all gains, profits, royalties and other advantages derived by the defendant from the sale, serialization, republication rights, in any form, movie rights or other distribution for profit of the book entitled Decent Interval"

and that Snepp relinquish the proceeds accounted for to the Government. (Jt. App., Vol. I, p. 12).

During pretrial discovery, the Government conceded that Decent Interval revealed no classified information, no information concerning the intelligence activities of the CIA that had not previously been made public by the Agency, (Jt. App., Vol. I, p. 71), and therefore nothing in the book posed a danger to the national security.

At trial, the author asserted, among other defenses, that the First Amendment does not permit the enforcement of the prior restraint agreements in question. (Jt. App., Vol I, p. 19, 122).

On July 7, 1978, following trial the District Court found that Mr. Snepp deliberately breached his fiduciary and contractual obligations to the CIA; that he published Decent Interval for personal financial gain; and "that the publication of Mr. Snepp's book, 'Decent Interval,' absent CIA pre-publication review has caused the United States irreparable harm and loss. It has impaired CIA's ability to gather and protect intelligence relating to the security of the United States of America." (Jt. App., Vol. I, p. 129). It was also determined that the author's First Amendment defenses lacked sufficient legal support. (Jt. App., Vol. I, p. 12

Judgment was entered in favor of the Government and the District Court imposed on the author a constructive trust over, and an accounting of, any and "all revenues, gains, profits, royalties and other advantages derived from the sale,

serialization, republication rights in any form, movie rights or other distribution for profit of the work Decent Interval." (Jt. App., Vol. I, p. 136-37).

The District Court further enjoined Mr. Snepp from publishing without prior CIA review "any manuscript which the defendant authors which concerns the Central Intelligence Agency, its activities or intelligence activities generally which the defendant gained during the course of or as a result of his employment with the agency." (Emphasis supplied; Jt. App., Vol. I, p. 134).

It is from this judgment and order that defendant appeals.

V. SUMMARY OF THE ARGUMENT.

1. This is not a national security case because the government has conceded that not a single sentence in the book has damaged the national security. Therefore Mr. Snepp's rights to publish government information must be viewed in the same light as any other former government employee.

Even if this case has some national security overtones, the government has failed to allege or show that any information in the book poses a clear and present danger to the national security or even that any information is classified. It has relied on self-serving conclusions unsupported by any facts to justify its request for a prior restraint.

2. The contractual basis of this case -- for unjust enrichment and violation of fiduciary duty -- is in fact a cause of action asserting a Government Copyright and is based upon a claim by the government of a proprietary interest in government information.

Therefore, the contract and the enforcement claim is specifically barred by the prohibition against Government Copyright in the 1976 Copyright Act and the First Amendment right of government employees -- recognized by the 1976 Act -- to publish information about the government.

3. The rights protected by the First Amendment are fundamental rights of all citizens including public employees. The Supreme Court has specifically said that limitations

on fundamental rights, especially the right to publicly criticize the conduct of government affairs, can not be made conditions of public employment.

A. A limitation upon the right of free speech can not be made a condition of public employment.

B. Any attempt, as in this case, to acquire such a waiver as a condition of employment is coercive and therefore it is void and unenforceable.

4. The Marchetti decision is inapplicable to this case.

VI. ARGUMENT

1. THIS IS NOT A NATIONAL SECURITY CASE.

This is not a national security case for two separate reasons. First, the government has not alleged that information published (or to be published) has harmed or will harm the national security. Secondly, the allegations of any implied danger to the national security are too vague.

A. The government has not alleged in its complaint that any information previously published (or to be published in the future) has caused or will cause any damage to the "national security" -- in fact, the words "national security" are not contained any place in the government's complaint.

Furthermore, while the government alleges that Mr. Snepp violated his duty "to protect intelligence sources and methods from unauthorized disclosure", in fact there is no allegation in the complaint that he did not protect "intelligence sources and methods".

This is an employment contract action "arising from the breach of the terms and conditions of an agreement" between Mr. Snepp and the CIA. The total damage therefore claimed in this action arises from the breach of the contract itself and not from any information disclosed by Mr. Snepp.

Having chosen to litigate an employment contract, the government has attempted to give it a "national

security" gloss without any allegations that a single fact in the book has threatened the national security of the United States.

B. Even assuming that this case has some "national security" overtones, they are too vague and unspecific for this court to take judicial notice of, certainly not as a justification for a prior restraint.

The government has conceded that no information in Mr. Snepp's book is classified. It has conceded that not a single sentence in the book poses a danger to the national security and that no paragraphs or specific sections of the book constitute a "clear and present danger" to the national security of the United States. It is the government's contention that the mere refusal to submit to a prior restraint in and of itself -- he has "flaunted the basic system of control" -- constitutes a grave and irreparable injury sufficient to warrant a restraint on future publications. The only evidence submitted by the government to support its claim of harm to the national security are the vague and self-serving conclusions of the Director of the Central Intelligence Agency that confidential sources have dried up as a result of the book's publication, and that other potential sources had never "germinated." (Jt. App., Vol. II, p. 133).

This is the only witness for the government upon which it relies to sustain the extreme sanction of a

prior restraint. It is these bare conclusions -- unsupported by any facts -- upon which the government relies to prove the "direct, immediate, and irreparable damage to our Nation or its people" in seeking to restrain Mr. Snepp's freedoms of speech and press. New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

It is respectfully submitted that this is precisely that type of national security "surmise or conjecture that untoward consequences may result" upon which a prior restraint may never be predicated. Id. at 725-26 (Brennan, J., concurring). "In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." Id. at 727 (Brennan, J., concurring).

Not only is there no factual basis to indicate that the potential loss of some unidentified intelligence sources fulfills that strict standard, but there is no evidence that Mr. Snepp's publication was the proximate cause of any such loss.

It is clear that the government has failed to meet any burden to support any restrictions on Mr. Snepp's First Amendment rights. This is true whether this Court accepts the standard urged by The New York Times and The Washington Post that "publication must inevitably, directly, and immediately cause the occurrence of an

event kindred to imperiling the safety of a transport at sea" or other similar disaster (Id. at 726-27, Brennan, J., concurring); or alternatively, accepts the test urged by the government in The New York Times case that it need only prove "grave and immediate" harm to the national security. Brief of the United States to the United States Supreme Court, New York Times Co. v. United States, 403 U.S. 713 (1971), p. 12.

In fact, the government is attempting to do in this case precisely what it unsuccessfully attempted to do in the Times case: support its prior restraint request on bare allegations and conclusions of danger to the national security. The government's affidavits show the similarity quite clearly.

The government affidavits in the New York Times case were given by Leonard Niederlehner, Deputy General Counsel of the Department of Defense, and Thomas M. Constant, Deputy Director of the Vietnam Task Force, Office of the Assistant Secretary of Defense, International Security Affairs, Department of Defense. Both made the identical verbatim statement:

> Publication of the said excerpts has prejudiced the defense interests of the United States and publication of additional excerpts from the aforesaid study would further prejudice the defense interests of the United States and result in irreparable injury to the national security. (App. C-1, C-2).

In the case now before the Court, the United States alleges even less damage -- that there has been an"undermining of confidence and trust in the Agency, thereby hampering the ability of the Agency and of the Director to perform their ... duties." (Jt. App., Vol. I, p. 11).

Because the government has failed to produce any evidence that Mr. Snepp's conduct caused any identifiable injury to or even remotely threatens the national security, Mr. Snepp must be accorded the same status as any other public employee with respect to his right to speak about the government. To hold otherwise without any proof of a clear and present danger to the national security would allow any government agency to impose the type of prior restraint that the government is attempting to enforce against Mr. Snepp. This would clearly result in the destruction of "[t]he dominant purpose of the First Amendment [which] was to prohibit the widespread practice of governmental suppression of embarrassing information." New York Times Co. v. United States, supra, at 723-24 (Douglas, J., concurring).

2. THE CONTRACT IN THIS CASE -- AND THE CAUSE OF ACTION TO ENFORCE IT -- ARE IN REALITY EFFORTS BY THE GOVERNMENT TO ASSERT A GOVERNMENT COPYRIGHT ON MR. SNEPP'S WORKS BY ALLEGING GOVERNMENT OWNERSHIP OR PROPRIETARY INTEREST IN GOVERNMENT INFORMATION.

AMICUS AND THE CHIEF LEGISLATIVE ARCHITECT OF THE 1976 COPYRIGHT ACT BELIEVE THAT BOTH THE CONTRACT AND THE ENFORCEMENT EFFORT ARE BARRED BY THE 1976 ACT WHICH PROHIBITS GOVERNMENT COPYRIGHT ACTIONS, AND BY THE FIRST AMENDMENT.

The cause of action in this case -- for injunctive relief and royalties -- is essentially an action in copyright masquerading under the name of a "fiduciary relationship;" and Congress has prohibited the federal government from restraining a publication based on any concept of government proprietary interest, common law or statutory copyright.

Because there is no proof sufficient to support a finding that Mr. Snepp's book threatens the national security, the government has conceded that it must rely on its alleged contract right to support the prior restraint on publication.

While the cause of action asserted by the government alleges violation of "fiduciary duties," (Jt. App., Vol. I, p. 11, ¶22) and unjust enrichment, (Id. at ¶21) in reality

what the government has alleged and is seeking under an equity claim is the precise equivalent of a common law or statutory copyright interest.

In fact, unjust enrichment and conversion in violation of the fiduciary relationship are the common law grounds which were the foundations for common law and later statutory copyright protection.

The underlying assumption of common law and statutory copyright is that one party, in this case the United States government, may assert a proprietary interest in the information sought to be restrained. It is clear from the contract that the government asserts a proprietary interest because it states that one of the conditions of Mr. Snepp's employment was "being granted access to classified information" in the possession of the Central Intelligence Agency. (Jt. App., Vol. I, p. 8).

Further evidence that this is an attempt by the United States government to avoid the prohibitions against Government Copyright are the remedies sought, which are damages based on "all gains, profits, royalties and other advantages derived by the defendant from the sale, serialization, republication rights, in any form, movie rights or other distribution for profit of the work entitled Decent Interval." (Jt. App., Vol. I, p. 12).

These are precisely the remedies that are available to plaintiffs in copyright actions. 17 U.S.C. §502(a), §504(b) (1976).

Therefore, it seems clear that this cause of action alleged by the government, the relief sought by the government and the relief granted by the District Court are based on the theory that the government may assert a proprietary interest in the information obtained by an employee during the course of his employment, and that this proprietary interest is sufficient to uphold a cause of action in copyright -- a cause of action specifically denied to the United States by the Congress in both the 1909 and 1976 Copyright Acts.

Further evidence of this attempt to illegally assert a Government Copyright claim is given by the Hon. Robert Kastenmeier, the chief legislative architect of the 1976 Act, in a letter to this Amicus. (See App. A).

Rep. Kastenmeier states: "I would suggest that this complaint is <u>in fact a cause of action to enforce a Government Copyright</u> on the publication of government information, a cause of action which is clearly prohibited by the 1976 Copyright Act." (App. A).

The 1909 Copyright Act states: "No copyright shall subsist in ... any publication of the United States government." 17 U.S.C. §8 (1970).

This hostility to the assertion of a proprietary interest in government information and reports was expanded in the 1976 Copyright Act which says: "Copyright protection under this title is not available for any work of the United States Government...." 17 U.S.C. §105 (1976).

The legislative history of the Act makes clear Congress' view on the matter. It states that under the Act "a government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involved the government work or professional field of the official or employee." (H.R. Rep. No. 1476, 94th Cong., 2d Sess. p. 58, reprinted in [1976] U.S. Code Cong. & Ad. News 5659, 5671.

The legislative history further states that "the effect of" the prohibition against Government Copyright "is intended to place all works of the United States Government published or unpublished in the public domain....[I]t also means that as far as the copyright law is concerned, the government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term 'work of the United States government' does not mean that a work falling within the definition of that term is the property of the U.S. government." (Emphasis supplied.) Id. at 59.

Rep. Kastenmeier states:

> "The Congress, when it considered the Act, carefully studied the question of whether the government should be permitted to assert any proprietary interest in its own information; and to enforce this proprietary interest through Government Copyright by having injunctive relief and an accounting of royalties and other equitable remedies -- precisely the relief requested in this case.
>
> The conclusion of the Congress, as expressed in the Act and in the voluminous legislative history, was that the principles of the First Amendment and the 1909 Copyright Act give to the people of this country the right to have information about their government; and that therefore, government employees have the right to publish information obtained during the course of government employment free from any prior restraints or post-publication equitable relief based on any theory of government ownership.
>
> The Act makes clear that Congress was not merely neutral in this debate but with great specificity prohibited the United States from asserting or enforcing any proprietary interest in government information." (App. A).

The reasons for the long-term Congressional opposition to government assertions of a proprietary interest in its own information is grounded in First Amendment considerations. In Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), vacated on other grounds, 369 U.S. 111 (1962), the U.S. Court of Appeals for the District of Columbia discussed the purpose of the predecessor statute to the current Section 105 and stated: "It is designed to achieve in a democracy that depends upon

accurate public knowledge the broadest publicity for matters of government." Id. at 268. It is apparent that the inclusion of this section in the copyright law was an attempt by Congress, consistent with the premise of the First Amendment, to prohibit any assertion by the government of a proprietary interest in any information in its possession because Congress feared that it could be used to restrict the free flow of information that is vital to keep the public informed about the operation of its government.

To permit the government to assert a proprietary interest and Government Copyright remedies against government employees writing about their government is precisely the type of self-serving censorship which the Copyright Act and the First Amendment were designed to prohibit. Quite obviously, as the evidence in Mr. Snepp's trial has shown, the CIA gives publication permission to present and former employees whose writings show the CIA in a favorable light. Certainly the CIA cannot be trusted to, at its discretion, approve publications which cast the CIA in a highly unfavorable light or perhaps even, as recent history has shown us, demonstrate that officials of the CIA are violating the Constitution and laws of the United States.

Suppose, for example, Mr. Snepp knows something about the CIA involvement in Watergate. Can this Court leave to the discretion of the CIA the decision as to whether the public is to be told of this information?

The concept that the government, at its discretion, may penalize its own critics regardless of the source of their information, is a concept that was laid to rest in 1803 with the expiration of the Alien and Sedition Act. See generally, New York Times v. Sullivan, 376 U.S. 254 (1964). The entire development of the First Amendment and the inter-related development of Congressional encouragement for government employees to write about government in the Copyright Acts would be completely voided by the enforcement of this contract which gives to the United States Government in the civil courts the same discretionary censorship powers which the Alien and Sedition Acts granted to the government in the criminal courts. In fact, the Supreme Court has said that an unconstitutional criminal statute, penalizing publication under the First Amendment, e.g., Roth v. U.S., 354 U.S. 476 (1957), is as much a prior restraint as an unconstitutional civil statute such as the one attempted to be used in Near v. Minnesota, 283 U.S. 697 (1931).

Therefore, it is the contention of the Amicus that this Court has several alternatives open to it. It could

order the District Court to dismiss this action on the grounds it is a clear violation of the First Amendment and Congress' intent to further public information about government through the Copyright Act; or it could never reach the First Amendment question and merely hold that the Government is attempting to do indirectly -- under the rubric of a violation of a fiduciary duty -- what Congress has consistently and specifically prohibited the government from doing in both the 1909 and 1976 Copyright Acts.

If Congress has prohibited the government from asserting a proprietary interest in its own information by statute, the CIA lacked the authority to impose as a condition of government employment a requirement which the Congress has told the CIA it may not impose.

Or, as Rep. Kastenmeier states:

> It may be fairly concluded that the United States, through the Central Intelligence Agency, imposed a "contract" prohibited by law; is seeking a cause of action and remedies prohibited by law; and has obtained a ruling from the United States District Court which the Court has been told by the Congress it is without authority to issue.
>
> Furthermore, the "contract" cause of action advanced by the government and lower court decision - if upheld - may threaten the Congressional prohibition against Government Copyright; and that any agency in the government will then be free to require their employees to sign such a "contract", negating the right given to him by the Congress to publish government information based on government employment.

> It is my view this effort by the United States - to suppress criticism of itself - is precisely the type of information specifically protected by the 1976 Act and the First Amendment; and the decision of the District Court is false to the language of the 1976 Act, false to its intent and false to its goals. (App. A)

Background note on the government's previously unsuccessful efforts to assert a proprietary interest in government information.

Since 1971, the federal government has made a series of unsuccessful efforts in Congress seeking both criminal and civil sanctions for the unauthorized use of government information based on the argument -- now being made in this case -- that the government has an enforceable proprietary interest in its own information.

Congress specifically rejected the claim twice in the criminal law -- first, in S. 1400, introduced by the Nixon Administration, and again in S. 1, supported by the Ford Administration. In the civil law, Congress rejected the government's claim of a proprietary interest by inserting a government copyright prohibition in the 1976 Copyright Act.

In order to understand the bad faith being exercised by the Department of Justice in this case, it would be helpful for this Court to go back to the 1971 dispute over the Pentagon Papers.

In 1971, it indicted Anthony Russo and Daniel Ellsberg on charges of conspiring to receive, and conversion of government property -- "studies, reports, memoranda and communications, which were things of value to the United States

of a value in excess of $100." In addition, that indictment accused the defendants of an equally novel crime -- "to defraud the United States ... by impairing, obstructing and defeating its lawful government function of controlling the dissemination of ... government studies, reports, memoranda and communications." United States v. Russo, Crim. No. 9373 (D.C. Cal. 1971); Indictment at p. 2, filed December 29, 1971.

The government's trial brief in the Ellsberg case said succinctly, "both the documents and contents are the property of the United States and remain its property ... until they are released by the government. The content of ... such...documents is itself government property quite apart from the government's ownership of the sheets of paper on which is is recorded." Id., Brief for Prosecution at p. 29, 33.

The Ellsberg case was dismissed for other reasons and so the government in the original S. 1400 added a new definition of government property to clearly assert government ownership of government information. It did this by defining government property as "intellectual property or information by whatever means preserved." S. 1400, Sec. 111, 93rd Cong., 1st Sess. (1973).

The press, including this Amicus, appeared before the Subcommittee and protested. We said that by including intellectual property as property of the United States, the Justice

Department was clearly attempting to lay the foundation to prosecute both the news media and government employees in order to get around the problems it faced in the Ellsberg prosecution. (Statement of The Reporters Committee for Freedom of the Press before the Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, May 2, 1973.)

When S. 1 was reintroduced, the Justice Department again made an effort to assert a proprietary interest in government information, enforced by the criminal laws, by supporting a provision which stated that a member of the press or a government employee would be accused of "theft" if in any way he "uses" ... records or other documents owned by, or under the care, custody or control of "the United States ... regardless of its monetary value." S. 1, Sec. 1731, 94th Cong., 1st Sess. (1975).

Again, this Amicus appeared before the Senate subcommittee and protested that the government was trying to revive the unconstitutional theory asserted in the original S. 1400 of a proprietary interest in government information. (Statement of The Reporters Committee for Freedom of the Press before the Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, April 17, 1975.)

As justification for its legal efforts to assert an enforceable proprietary interest in government information, the Justice Department in the past has relied on Haas v. Henkel, 216 U.S. 462 (1910), a case in which three cotton speculators were accused of bribing a Department of Agriculture employee in order to arrange for false cotton future information to be given out in such a way as to defraud the public.

The case against Mr. Snepp has no implications of fraud. And furthermore, Haas v. Henkel, supra, was severely restricted in the unanimous opinion by Chief Justice Taft in Hammerschmidt v. United States, 265 U.S. 182 (1924). The Chief Justice said that fraud against the government could be used to prosecute non-government employees who use false government reports in a conspiracy involving trickery, bribery of an official, deceit and false pretenses. Id.

In short, Haas v. Henkel, supra, Dennis v. United States, 384 U.S. 855 (1966), United States v. Lambert, 446 F.Supp. 890 (D.C. Conn. 1978) and other cases in this field recognize a proprietary interest in honest and impartial government administration in the delivery of goods and services.

In fact, that is precisely what Mr. Snepp is attempting to do -- to deliver to the people their own information about the operation of their government, in this case the Central Intelligence Agency.

After two unsuccessful efforts in Congress to enforce this non-existent proprietary interest in government information, the government made one last attempt through the civil laws in the proposed revision of the 1909 Copyright Act.

Again, the government was rebuffed by the Congress in the 1976 Act. So now we find that under the transparent rubric of "violating fiduciary duties," the Justice Department is once again attempting to resurrect the rejected doctrine that the government has an ownership interest in its own information.

In fact, the whole common law doctrine of "unjust enrichment" and violation of "fiduciary duties" rests on the assumption of misuse of property owned by another. The alleged owner who is bringing this action is the United States Government. Its ownership claim has been repeatedly made in the past and it has been repeatedly rejected by the Congress.

3. THE RIGHTS PROTECTED BY THE FIRST AMENDMENT ARE FUNDAMENTAL RIGHTS OF ALL CITIZENS, INCLUDING PUBLIC EMPLOYEES. THE SUPREME COURT HAS SAID THAT LIMITATIONS ON FUNDAMENTAL RIGHTS, ESPECIALLY THE RIGHT TO PUBLICLY CRITICIZE THE GOVERNMENT, CAN NOT BE MADE CONDITIONS OF PUBLIC EMPLOYMENT. THEREFORE, ANY ASSERTED WAIVER OF THESE FIRST AMENDMENT RIGHTS IS VOID AND UNENFORCEABLE.

A. The government may not require, as a condition of public employment, that a public employee waive his fundamental constitutional rights. This is especially true with respect to his First Amendment right of free speech which includes at its core the right to report on and publicly criticize the operation of the government itself. Time after time, the Supreme Court has ruled against the impositions of such conditions. Most recently, in Elrod v. Burns, 427 U.S. 347 (1976), a case involving a challenge to the political

patronage system of non-civil service public jobs, in response to the government's argument that public employment is a privilege, not a right, the Court declared:

> That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. Perry, however, emphasized that "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." (Citation omitted.) Perry and Keyishian properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. "'[T]he theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected.'" (Citation omitted.) "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (Citation omitted.) (Emphasis supplied.) Id. at 360-61.

The examination of the public employment cases that follows illustrates the uniformity with which the Court has applied the above principle with respect to the conditioning of public employment upon infringements of First Amendment rights.

In Shelton v. Tucker, 364 U.S. 479 (1960), the Court invalidated an Arkansas statute that required public school teachers to file affidavits annually that disclosed every organization to which they belonged or regularly contributed during the previous five years.

Although it recognized that the state had a substantial interest in inquiring into the teacher's fitness and competence, the Court stated that "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Id. at 488.

In Torcaso v. Watkins, 367 U.S. 488 (1961), a Maryland state constitutional provision which required a declaration of a belief in God as a prerequisite to public office was invalidated on the ground that it violated the First Amendment's freedom of belief and religion clauses.

An oath that was required as a condition of employment as a teacher in the State of Washington was invalidated on the grounds of vagueness in Baggett v. Bullitt, 377 U.S. 360 (1965), Mr. Justice White speaking for the majority outlined the protected activities improperly proscribed by the oath:

> It would not be unreasonable for the serious-minded oath-taker to conclude that he should dispense with lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United States. He could find it questionable under this language to ally himself with any interest group dedicated to opposing any current public policy or law of the Federal Government, for if he did, he might well be accused of placing loyalty to the group above allegiance to the United States. (Emphasis supplied.) Id. at 371-72.

The publication of Mr. Snepp's book is precisely within the bounds that Justice White used to illustrate the type of activities that cannot be proscribed: criticism of governmental policies and the manner in which those policies are executed.

In Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Court once again examined an oath requirement imposed upon teachers by the statutes and administrative regulations of the State of New York as a condition of their employment. In responding to the now familiar right-privilege defense, the Court declared:

> But constitutional doctrine which has emerged since that decision [Referring to Adler v. Board of Education, 342 U.S. 485 (1952).] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Id. at 605.

That case resulted again in a finding that the condition impermissibly violated the employees' First Amendment rights.

An even stronger decision in support of Mr. Snepp's position can be found in Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering exercised his right of free speech precisely as Mr. Snepp has done; he publicly criticized a policy of his employer based upon information available to him in the course of his employment. The Court clearly defined government employees' rights:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. Id. at 568.

The Court did imply that in certain instances the exercise of free speech by the employee could interfere with the employee's relationship with his immediate supervisor and that his employment could possibly be terminated. But there is no indication that damages or prior restraints would be proper remedies. These exceptions would not result in court-imposed punishment for the statement, as the District Court has done here, but rather would result only in a termination of the relationship. This is quite obviously inapplicable to the instant case because Mr. Snepp, recognizing this, had previously and voluntarily terminated his employment with the CIA to write this book in the public interest.

In addition, the Court in Pickering also recognized that, in many instances, it is the insider -- the public employee with his first-hand knowledge -- who is often in the best position to counter the official version of the issues at hand. It declared: "Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." Id. at 572.

In companion cases, Gardner v. Broderick, 392 U.S. 273 (1968), and Uniformed Sanitation Men Assn. v. Comm. of Sanitation, 392 U.S. 280 (1968), the Supreme Court reviewed the dismissals of municipal employees pursuant to a provision in the New York City Charter. It provided for dismissal from their positions if an employee was summoned to appear before any investigatory body and refused to answer questions related to his/her employment or waive immunity from prosecution. In Gardner, the police officer involved was summoned before a grand jury investigating bribery and corruption of police officers. He refused to sign the waiver and was dismissed for that refusal. A similar situation was also involved in Uniformed Sanitation Men Assn.

In both cases, the Court found the provision of the City Charter unconstitutional because it required the public employees to choose between their jobs and the exercise of one of their constitutional rights. The Supreme Court again reiterated the now familiar principle: "Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination." Uniformed Sanitation Men Assn., 392 U.S. at 284-85.

Although Cole v. Richardson, 405 U.S. 676 (1972), resulted in a finding that the loyalty oath required of Massachusetts state employees was valid, it again

affirmed the principles previously applied with regard to the placing of unconstitutional conditions upon public employment: "Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government...." (Emphasis supplied.) Id. at 680.

Call the document that Mr. Snepp was forced to sign a "secrecy agreement", a "contract", or an "oath", it is essentially the type of document which the Court once again clearly indicates is invalid on its face.

In summary, then, the government may not require, as a condition of public employment, that the employee relinquish his fundamental constitutional right of free speech. In fact, as the Court pointed out in Pickering, because of his unique vantage point, the public employee is essential to the full and robust discussion of public issues that the First Amendment is intended to insure in a democracy.

B. There was no waiver of rights. The government should not be heard to say that Mr. Snepp voluntarily waived his right of free speech.

In Keyishian, supra, the employees had been required to sign a certificate stating that they had not been members of the Communist Party, inter alia. Later, when the procedure came under attack, the procedure

was changed from requiring the employees to actually sign the certificates to simply notifying them of the anti-communist prohibitions contained in the statutes and regulations. The employees were also notified that the requirements were to be considered part of their employment contracts. This change of procedure, deleting the signed "waiver" requirement, did not affect the judgment of the Court: "The substance of the statutory and regulatory complex remains, and from the outset appellant's basic claim has been, that they are aggrieved by its application." 385 U.S. at 596.

It is clear, therefore, that whether there is a signed waiver or whether another procedure is used, the focus of judicial scrutiny should be whether the goal of the procedure is to restrict the exercise of a fundamental right.

Also, in Garrity v. New Jersey, 385 U.S. 493 (1967), a waiver of a policeman's Fifth Amendment right against self-incrimination was obtained by informing him that if he refused to agree to the waiver, his employment would be terminated. The Court found the waiver invalid because the threat of loss of employment was coercive and, therefore, the waiver was not voluntary. The Court declared: "There are rights of constitutional stature whose exercise a state may not condition by the exaction

of a price....Assertion of a First Amendment right is still another. (Citation omitted.)" Id. at 500.

Perhaps an even stronger example that First Amendment rights cannot be waived can be found in the case of Elrod v. Burns, 427 U.S. 347 (1967). In Elrod, employees about to be discharged because of their political party affiliation claimed a violation of their First Amendment right of association, even though they had received their public positions several years earlier through the exercise of the same political patronage procedure they now were challenging.

Mr. Justice Powell noted in his dissent that they apparently accepted patronage jobs knowingly and willingly, while fully familiar with the "...'tenure' practices long prevailing...." Id. at 380. In spite of this awareness, purporting to amount to a knowing waiver of their right to challenge the constitutionality of the practice, the Court held that the First Amendment was violated because it resulted in conditioning public employment upon a restriction of the employees' right of association.

In conclusion, not only is it beyond the constitutional authority of government to require a waiver of fundamental rights as a condition of public employment, but if such a waiver is obtained, it is void and unenforceable.

4. THIS COURT'S DECISION IN THE UNITED STATES v. MARCHETTI CASE SHOULD NOT BE CONTROLLING.

To the extent that United States v. Marchetti, 446 F.2d 1309 (4th Cir. 1972), cert. denied, 409 U.S. 1063 (1972), held that the government could not restrain unclassified information, Id. at 1317, Amicus believes this Court could rely on that portion of Marchetti to reverse the District Court because there is no classified information in Mr. Snepp's book.

To the extent that the Marchetti case held that the government could restrain classified information not posing a clear and present danger to the national security, this Court should modify Marchetti if it should find that there is some minimal danger to the national security.

However, neither Marchetti nor this case posed the Government Copyright argument although both cases were clearly based on a claim by the government that it owns government information. This Court could therefore decide this case on the Government Copyright prohibition issue, avoiding any further amplification of Marchetti or any ruling on the First Amendment prior restraint issue.

VII. CONCLUSION

The judgment of the District Court should be reversed as violative of the First Amendment; and/or violative of the restriction on government claims of a proprietary interest in government information as contained in the 1976 Copyright Act.

Respectfully submitted,

Jack C. Landau, Esq.

Gordon F. Barrington, Esq.

Attorneys for Amicus Curiae,

The Reporters Committee for
Freedom of the Press