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NOTES AND COMMENTS

Intelligence Agents as Authors: A Comparison of the British Courts' Position on *Attorney-General v. Heinemann Publishers* and the United States Supreme Court Decision of *Snepp v. United States*

I. INTRODUCTION

In 1976, Peter Wright retired from a twenty-one year career with the British Security Service.¹ Throughout his career, Wright had gained access to virtually all classified information concerning British intelligence and the intelligence of other major world powers.² Upon his retirement, Wright signed an agreement³ stating that he would remain bound by the Official Secrets Act⁴ and would not communicate any information gained through his position as an agent, unless given prior written approval.⁵

After leaving the British Security Service, Wright stated many times that the Service had been penetrated by Soviet agents.⁶ In order

1. *Attorney-General v. Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another*, 1 W.L.R. 1248, 1254 (1987), [hereinafter *Guardian Newspapers*, 1 W.L.R. 1248, Chancery Division, July 1987].

2. P. WRIGHT, *SPYCATCHER* (1987).

3. *Her Majesty's Attorney-General In and For the United Kingdom v. Heinemann Publishers Australia Pty. & Another*, Supreme Court of New South Wales, Equity Division, proceeding no. 4382 of 1985, 13 Mar. 1987, at 57. On interlibrary loan from the Library of the Embassy of Australia, Washington, D.C. [hereinafter *Heinemann Publishers*, Supreme Court of New South Wales, Equity Division, Mar. 1987].

4. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28 [hereinafter Official Secrets Act].

5. *Attorney-General v. Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another*, 1 W.L.R. 1248, 1293-94 (1987), *per* Lord Templeman [hereinafter *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987].

6. Wright initially submitted to the House of Commons a memorandum outlining his allegations that the Service had been penetrated by Soviet agents. *Id.* at 1301, *per* Lord Ackner. Later, Wright made both radio and television broadcasts on the subject. London Times, Mar. 25, 1986, at 7, col. a. *Heinemann Publishers*, Supreme Court of New South Wales, Equity Division, Mar. 1987, at 127, 129-31, *supra* note 3.

to publicize these allegations, and in spite of his secrecy agreement, Wright wrote the memoirs of his experiences as an MI5 agent in the book *Spycatcher*.⁷ Rather than writing and publishing his book in England where the British court could immediately cite him for breach of confidentiality and violation of the Official Secrets Act,⁸ Wright moved to Australia where *Spycatcher* was to be published by Heinemann Publishers.⁹ The British government was able to delay the publication of *Spycatcher* in Australia with a grant of interim relief by the Supreme Court of New South Wales.¹⁰ However, Wright easily managed to have a United States company publish his book.¹¹

In response, senior judges in the House of Lords in England denounced the United States legal system for allowing the unauthorized publication of government secrets.¹² The judges were primarily concerned that the First Amendment always mandates that the right to free speech trump national security interests.¹³ In an opinion concerning the Wright case in which British newspapers were enjoined from reprinting material from "bootlegged" copies of *Spycatcher* in the daily papers, Lord Ackner stated:

Mr. Wright appears to have 'got away with it' altogether. . . . If the publication of this book in America is to have, for all practical purposes, the effect of nullifying the jurisdiction of the English courts to enforce compliance with the duty of confidence [owed by an intelligence agent] . . . then, English law would have surrendered to the American Constitution. There, the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the Law¹⁴

7. P. WRIGHT, *SPYCATCHER* (1987).

8. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28.

9. *Guardian Newspapers*, 1 W.L.R. 1248, 1301, House of Lords, Aug. 1987, *per* Lord Ackner, *supra* note 5.

10. London Times, Sept. 17, 1985, at 6, col. d. The Supreme Court of New South Wales is a trial court in Australia. The interim relief granted was a temporary injunction, barring publication of Wright's manuscript in Australia until the full investigation of the Attorney-General's claims at the March 1987 trial. *Attorney-General v. Guardian Newspapers and Others* (No. 2), *Observer, Ltd. and Others, Times Newspapers and Another*, 2 W.L.R. 805, 815 (1987-1988) [hereinafter *Guardian Newspapers* (No. 2), 2 W.L.R. 805, Chancery Division, Dec. 1987].

11. The Attorney-General did not pursue a claim for injunction in the United States. See *infra* note 43 and accompanying text.

12. *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *supra* note 5.

13. *Id.* at 1286, 1306.

14. *Id.* at 1306, *per* Lord Ackner.

Relative to other countries, England and the United States share a common history and similar legal systems. Yet, in the area of freedom of expression, the two countries differ in one significant aspect: while the United States has inscribed on parchment the right to freedom of expression, England does not. As a result, English jurists, such as Lord Ackner have apparently been given the impression that the First Amendment has forced United States courts to defer to the press in all cases.¹⁵

To determine the precise impact of the First Amendment in the case of a former agent who publishes government secrets, this Comment compares the British courts' position on the case of Peter Wright, hereinafter referred to as *Wright*,¹⁶ with a similar case in the United States, *Snepp v. United States*,¹⁷ in which former intelligence agent Frank Snepp published a book entitled *Decent Interval* which divulged the details of covert operations in Vietnam.¹⁸ Comparing how the United States legal system, one with a free speech amendment, deals with the former agent who publishes government secrets, with how the British legal system, one with no such constitutional amendment, treats the same issue, enables a determination of whether, and in what ways, the First Amendment influences consideration of national security interests. The British legal system is used in this comparative model because there are historical and legal constants between England and the United States. Comparing the United States with a country other than England would make it difficult to draw conclusions about the impact of the First Amendment,

15. There is currently a strong movement in England, drawing support from politicians and laypersons, to adopt a version similar to the First Amendment to the United States Constitution. Such a law in England would be detailed in form to restrict specific types of speech, such as the dissemination of government secrets. Discussion with Professor Maurice Cranston, London School of Economics and University of California, San Diego, in La Jolla, California (June 14, 1988). See JACCONNELLI, ENACTING A BILL OF RIGHTS (1980).

16. See *infra* note 37 and accompanying text. See also *infra* note 47.

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

18. Over ten years ago, the issue of divulging government secrets was presented with the emergence of the Pentagon Papers case in the United States and the *Frank's Report* in England. *New York Times v. United States*, 403 U.S. 713 (1971). For a discussion of the *Frank's Report*, see B. DeSmith, *The Right to Information About the Activities of the Government*, in *FUNDAMENTAL RIGHTS: ESSAYS FROM THE LAW SCHOOL IN EXETER* 137 (1973). The *Frank's Report* was issued by a committee for the Crown to compare the espionage laws of foreign countries with the Official Secrets Act. *Id.* Now, the *Wright* and *Snepp* cases provide an opportunity to reexamine this same broad issue of divulging government secrets. However, this Comment addresses only the issue of publication of government information by former government agents, and not the issue of publication by newspapers.

since other variables may contribute to the courts' disparate treatment of the legal issue.

Following a presentation of the facts and holdings of *Snepp* and of the British position on the *Wright* case, this Comment compares how each country treats a former agent who publishes intelligence information. The comparison is divided into four parts: (A) a comparison of the use of secrecy contracts; (B) a comparison of the use of statutory law; (C) a comparison of how each court presents and balances the competing secrecy and freedom of speech interests; and (D) a comparison of the remedies imposed. Each part of the comparison considers whether Lord Ackner's conception that the First Amendment precludes consideration of national security concerns is true. Further, the comparisons focus on how each court does and should deal with the opposing national security and freedom of speech interests. In conclusion, this Comment proposes which legal system best fosters the interests of national security while maintaining consistency with the values of freedom of expression.

II. SUMMARY OF THE *Wright* and *Snepp* Decisions

A. *The Wright Case*

1. Facts of *Wright*

On September 1, 1955, Peter Wright began his employment with the British Security Service.¹⁹ At that time, Wright signed an agreement binding him to follow the Official Secrets Act of 1911.²⁰ He agreed not to communicate information obtained by virtue of his employment in the Service to "any person, other than a person to whom he is authorized to communicate it, or a person to whom it is in the interest of the State his duty to communicate [it]."²¹

Wright was assigned a position in MI5, the counter-intelligence

19. *Heinemann Publishers*, Supreme Court of New South Wales, Equity Division, Mar. 1987, at 18, *supra* note 3.

20. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28.

21. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28, § 2, sched. 1 states in relevant part: If any person having in his possession or control any . . . information which . . . has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of his Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract,—(a) communicates the . . . information to any person, other than a person to whom he is authorized to communicate it, or a person to whom it is in the interest of the State his duty to communicate it . . . that person shall be guilty of a misdemeanor.

branch of the British Security Service, to research, track, and develop counter-intelligence devices.²² He also developed and carried out a series of counter-espionage schemes.²³ Performing these duties required Wright to have knowledge of a great deal of sensitive intelligence information.²⁴ Just prior to his retirement from MI5 on January 31, 1976,²⁵ Wright signed an acknowledgement that he would remain bound by his initial secrecy agreement and maintain his duty of confidence owed the Security Service.²⁶ As stated above, Wright chose to violate his duty of confidence by writing the memoirs of his experiences as an MI5 agent in the book *Spycatcher*. In *Spycatcher*, Wright provides a thorough account of covert operations in which he took part, detailing the types of devices used, dates, and names of agents involved.²⁷

In September of 1985, the British government attempted to prevent publication of *Spycatcher* by suing for an injunction against Wright and his publisher, the Australian branch of Heinemann Publishers.²⁸ The government contended that Wright was bound by the Official Secrets Act to maintain the confidence of all information he received while an MI5 agent.²⁹ The government supported its position by presenting the agreements that Wright signed at the time of his employment and at the time of his retirement.³⁰ Wright re-

22. *Heinemann Publishers*, Supreme Court of New South Wales, Equity Division, Mar. 1987, at 1-3, 6, 12-14, *supra* note 3; P. WRIGHT, *SPYCATCHER*, chs. 1-5 (1987).

23. *Id.*

24. P. WRIGHT, *SPYCATCHER* chs. 1-5 (1987).

25. *Guardian Newspapers*, 1 W.L.R. 1248, 1254, Chancery Division, July 1987, *supra* note 1.

26. [T]he Official Secrets Act applied to him after his appointment had ceased, that he was fully aware that serious consequences might follow any breach of the provisions of those Acts, and that he understood "that I am liable to be prosecuted if either in the United Kingdom or abroad I communicate, either orally or in writing, including publication in a speech, lecture, radio or television broadcast, or in the press or in book form or otherwise, to any unauthorised [sic] person any information acquired by me as a result of my appointment . . . unless I have previously obtained the official sanction in writing of the department by which I was appointed." In addition to the obligations of secrecy expressly acknowledged by Mr. Wright, he was also under an obligation arising out of his employment by the Security Service and enforceable in equity not to divulge any information which he obtained in the course of his employment.

Guardian Newspapers, 1 W.L.R. 1248, 1293, House of Lords, Aug. 1987, *per* Lord Templeman, *supra* note 5.

27. P. WRIGHT, *SPYCATCHER* (1987).

28. The action was brought as proceeding No. 4382 in the Supreme Court of New South Wales. See *London Times*, Sept. 17, 1985, at 6, col. d.

29. *London Times*, Mar. 25, 1986, at 7, col. a.

30. *Id.*

sponded that he had divulged no classified information or information which would seriously harm the national security.³¹ The court granted interim relief which prevented publication only within Australia, and only until conclusion of the New South Wales trial.³² Subsequently, the Australian Heinemann Publishers granted publication rights of *Spycatcher* to Viking Penguin, Inc., a United States subsidiary of the English Pearson Group, an English publishing company.³³

As the trial in New South Wales commenced in 1986, and temporary injunctions over Wright's manuscript were still in effect, English newspapers began reporting on the trial and on allegations made in the manuscript form of *Spycatcher*.³⁴ Injunctions, in effect until trial or further order, were issued by Millet J. against the newspapers.³⁵ The Millet injunctions "restrained the newspapers from publishing or disclosing any information obtained by Mr. Wright in his capacity as a member of M.I.5."³⁶ The newspaper reports and consequent injunctions generated a great deal of litigation [hereinafter "the newspaper cases"], much of which is still pending in United Kingdom courts.³⁷

In March of 1987, the Supreme Court of New South Wales handed down its decision dismissing the injunction restricting publication of *Spycatcher*.³⁸ The Court stated that Wright owed a duty of

31. London Times, Mar. 25, 1986, at 7, col. b. *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *supra* note 5.

32. The House of Lords stated, "Interim relief obtained in New South Wales apparently did not prevent Mr. Wright and the Australian Heinemanns from publishing outside Australia." *Guardian Newspapers*, 1 W.L.R. 1248, 1295, House of Lords, Aug. 1987, *per* Lord Templeman, *supra* note 5. *Wright* presents an interesting jurisdictional issue as to why the New South Wales court was unable to enjoin worldwide publication of *Spycatcher* and what other legal alternatives the Attorney-General could have pursued to prevent such publication; however, this Comment focuses on comparing the substantive law of the United Kingdom and the United States which concerns publication of intelligence information by former government agents.

33. *Id.*

34. *Guardian Newspapers (No. 2)*, 2 W.L.R. 805, 815, Chancery Division, Dec. 1987, *supra* note 10.

35. *Id.*

36. *Id.*

37. In chronological order, these cases are: *Attorney-General v. Newspaper Publishing plc and Others*, 3 All E.R. 276 (1987); *Attorney-General v. Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another*, 1 W.L.R. 1248 (1987); *Attorney-General v. Observer, Ltd. and Another*, 1 All E.R. 385 (1987); *Attorney-General v. Guardian Newspapers and Others (No.2), Observer, Ltd. and Others, Times Newspapers and Another*, 2 W.L.R. 805 (1987-1988).

38. *Heinemann Publishers*, Supreme Court of New South Wales, Equity Division, Mar. 1987, at 274, *supra* note 3.

confidentiality to the Security Service.³⁹ However, the court felt compelled to dismiss the injunction, due to the fact that by the time of trial, Wright had already made public most of the sensitive information contained in the *Spycatcher* manuscript through television and radio broadcasts.⁴⁰ As for other material in the manuscript to which the Crown objected, the court stated that a great deal of it had been divulged in years past by other agents' books.⁴¹

In May 1987, Viking Penguin in New York announced its intention to publish *Spycatcher*.⁴² Assuming the First Amendment would render a claim for an injunction to prevent publication a futile effort, the Attorney-General for the United Kingdom failed to bring suit against Wright or Viking Penguin in the United States courts.⁴³ Viking Penguin began printing *Spycatcher* in July of 1987.⁴⁴ Since then, over one million copies have sold throughout the world.⁴⁵

In September 1987, the Attorney-General appealed the Supreme Court of New South Wales' decision to allow publication of *Spycatcher* in Australia.⁴⁶ Both the appeal to the Supreme Court of New South Wales, Court of Appeal⁴⁷ and the appeals to the High Court of Australia⁴⁸ were unsuccessful. Each time the Attorney-General appealed, the deciding court refused to take jurisdiction over any claims.⁴⁹

39. *Id.* at 261.

40. *Id.* at 130-32.

41. *Id.* at 258.

42. *Guardian Newspapers*, 1 W.L.R. 1248, 1295, House of Lords, Aug. 1987, *per* Lord Templeman, *supra* note 5.

43. *Id.*

44. *Id.*

45. *Guardian Newspapers (No. 2)*, 2 W.L.R. 805, 818-19, Chancery Division, Dec. 1987, *supra* note 10.

46. *Id.* at 819-20.

47. *Attorney-General (U.K.) v. Heinemann Publishers Australia Pty. and Another*, Supreme Court of New South Wales, Court of Appeal, 75 A.L.R. 353 (1987).

48. *Attorney-General (U.K.) v. Heinemann Publishers Australia Pty. and Another*, High Court of Australia, 75 A.L.R. 449, 461 (1987); *Attorney-General (U.K.) v. Heinemann Publishers Australia Pty. and Another*, High Court of Australia, 78 A.L.R. 449 (1988).

49. One major reason that the courts refused to take jurisdiction was that the Attorney-General's claims were based on the public interest of United Kingdom citizens, and not of Australian citizens. As stated by the court of appeal,

It is against Australia's interests for Australian courts to determine the public interest of a foreign country in a suit brought in Australia by a foreign government. Australian courts determine the public interest of Australia, not of foreign countries, so the claim [against Wright and Heinemann Publishers] for breach of an equitable obligation of confidence [of government secrets] fails because it is not justiciable . . . Australian courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State,

However, the Attorney-General has one final legal avenue. He could appeal to the Privy Council in England, which hears appeals from countries throughout the United Kingdom and Commonwealth of Nations.⁵⁰ Since Australia is a part of the Commonwealth of Nations, cases from the High Court in Australia may be appealed to the Privy Council.⁵¹

In the newspaper cases, the English courts considered all issues concerning Wright's publication. In order to decide whether the newspapers should be allowed to publish excerpts and summaries of *Spycatcher*, the courts had to determine whether Wright had the right to publish intelligence information gained by means of his employment. The courts also needed to form an opinion about Wright's actions in order to answer the Attorney-General's most recent demands that the courts impose future-oriented restrictions on Wright and any other agents who publish confidential government information. The position of the English courts, particularly that of the highest court, the House of Lords,⁵² and that of the judges deciding the most recent newspapers case in late 1987 and early 1988,⁵³ will be used throughout this Comment to relate England's legal approach and reasoning on the issue of former agents who publish intelligence information. This Comment follows the litigation concerning *Wright* through September of 1988.⁵⁴

2. The Position of the British Courts

The British courts unanimously opposed the publication of *Spycatcher*. The House of Lords based its opposition on the fact that Wright had breached a duty to maintain the confidence and trust of

and Australian courts will not make a judgment on the public interest of a foreign state.

Attorney-General (U.K.) v. Heinemann Publishers Australia Pty. and Another, 75 A.L.R. 353 (1987). This reason for refusing jurisdiction reflects the international law principle of sovereign immunity. Thus the issue is raised whether the Supreme Court of New South Wales' decision should be vacated on the basis that exercising jurisdiction infringed upon England's sovereign immunity.

50. 9 THE NEW ENCYCLOPEDIA BRITANNICA *Micropedia*, at 713 (1988).

51. 1 THE WORLD BOOK ENCYCLOPEDIA, at 872 (1972).

52. Attorney-General v. Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another, 1 W.L.R. 1248 (1987).

53. Attorney-General v. Guardian Newspapers and Others (No. 2), Observer, Ltd. and Others, Times Newspapers and Another, 2 W.L.R. 805 (1987-1988).

54. Unfortunately, continuing litigation on the *Wright* case makes it impossible to ensure that the cases cited herein are the most current as of the date on which this Comment is published.

the Security Service which arose out of his employment.⁵⁵ The court placed great importance on the permanent nature of the confidential relationship between an agent, former or present, and the agency for which he worked and from which he gained privileged access to intelligence information. The court asserted that this duty of confidentiality persists independently of the existence of any secrecy contract signed by Wright.⁵⁶ Publication of *Spycatcher* would be a plain breach of that duty.⁵⁷ The Chancery Division stated:

It is not in dispute that Mr. Wright was under a duty of confidence by reason of his employment in M.I.5; nor is it in dispute that his duty continued after his resignation. The duty, if not contractual, is a duty recognized and imposed by equity, co-extensive with the duty that would have been imposed by implied term had the relationship been contractual.⁵⁸

Thus, although the secrecy agreement was not crucial to prove Wright's breach of confidence, it was helpful to show Wright's express consent to such a relationship.

The House of Lords argued that a series of government interests were harmed by the breach of confidence resulting from the publication of *Spycatcher*.⁵⁹ These interests included: (1) the interest of the government to maintain the secrecy of its sensitive information, so that other foreign security services will not lose confidence in the British Service's ability to protect their shared secrets; (2) the interest of the government to prevent future breaches of the duty of confidence by other agents; and (3) the interest of the government to protect present and future agents from public scrutiny in areas which, if exposed, would lead to the divulgence of classified information.⁶⁰ The British courts viewed these government interests, together, as a "pub-

55. *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *per* Lord Brandon of Oakbrook, Lord Templeman, and Lord Ackner, *supra* note 5.

56. *Id.* at 1294, *per* Lord Templeman.

57. *Id.*

58. *Guardian Newspapers (No.2)*, 2 W.L.R. 805, 840, Chancery Division, Dec. 1987, *supra* note 10.

59. *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *supra* note 5.

60. The court explained:

It is likely that any [even unclassified] disclosures of facts relating to the Security Service by Mr. Wright would . . . endanger the effective discharge by the service of its current and future responsibilities, and as a consequence be of value for a foreign power and highly detrimental to the public interest of the United Kingdom as well as causing harm to individual officers, former officers, their families and other persons who might be identified by or as a consequence of such disclosures.

Id. at 1294, *per* Lord Templeman (quoting the Cabinet Secretary).

lic interest in a leak-proof, reliable and efficient Security Service.”⁶¹

To the British courts, Wright’s breach of confidence and the consequent harm to national security interests required the publication of *Spycatcher* to be enjoined. The *Guardian Newspapers* opinions evidence that the House of Lords conceives the freedom of expression as a limited right, which can be curtailed to protect national security. In support of the Millet injunctions, those against the newspapers which reprinted portions of *Spycatcher*, the House of Lords stated that the injunctions would not violate the principle of freedom of press stated in Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the United Kingdom adheres.⁶²

The House of Lords justified the imposition of an injunction over *Spycatcher* by considering national security interests an exception to the right to freedom of expression. Further, they maintained that the confidentiality between an agent and the Secret Service is crucial in protecting the national security. The judges maintained this position, despite the fact that it contained no officially classified information.

B. *The Snepp Case*

1. Facts of *Snepp*

The facts of *Snepp v. United States*⁶³ are markedly similar to the facts of *Wright*. In 1968, Frank W. Snepp III was employed by the Central Intelligence Agency (“CIA”).⁶⁴ At that time, Snepp signed a secrecy agreement which required: first, that he must have specific approval to publish any matter involving CIA intelligence activities; and second, that he must not divulge any classified information without the CIA Director’s consent.⁶⁵

After resigning from the CIA, Snepp published a nonfiction book entitled *Decent Interval* in which he criticized the CIA operations in

61. Attorney-General v. Guardian Newspapers and Others (No. 2), Observer, Ltd. and Others, Times Newspapers and Another, 2 W.L.R. 805, 901 (1988) [hereinafter *Guardian Newspapers (No. 2)*, 2 W.L.R. 805, Court of Appeal, Feb. 1988]. See also *Guardian Newspapers (No. 2)*, 2 W.L.R. 805, 836, Chancery Division, Dec. 1987, *supra* note 10.

62. *Guardian Newspapers*, 1 W.L.R. 1248, 1288, House of Lords, Aug. 1987, *per* Lord Brandon of Oakbrook, *supra* note 5.

63. 444 U.S. 507 (1980).

64. *Id.*

65. *Id.* at 508.

which he was involved during the close of the Vietnam War.⁶⁶ Similarly to Peter Wright, Snapp did not divulge any information that was labeled classified. In addition, Snapp did not submit his book for CIA approval prior to publication.⁶⁷

The United States government filed suit against Snapp in the United States District Court, Eastern District of Virginia. The government sought three orders: (1) a declaration that Snapp breached a contract with the CIA; (2) an injunction preventing publication of future writings by Snapp until he submitted the material for pre-publication review; and (3) an order imposing a constructive trust⁶⁸ on any profits Snapp earned from the sale of *Decent Interval*.⁶⁹

Finding that Snapp breached his secrecy agreement to submit his book for pre-publication review, and that publication of *Decent Interval* had caused irreparable harm to intelligence activities vital to the national security, the district court granted all three orders.⁷⁰ The appellate court affirmed in part, yet reversed the order to impose a

66. F. SNEPP, *DECENT INTERVAL* (1977). See Note, *Government Secrecy Agreements and the First Amendment*, 28 AM. U.L. REV. 400, n.29.

67. *Snapp*, 444 U.S. at 507-11.

68. A constructive trust is a specific type of restitutional remedy arising from the theory of equity. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 4.1, at 222-23, § 4.3, at 240-41 (1973). Concerned with maintaining equity between the parties, the constructive trust is aimed at preventing the defendant's unjust enrichment. *Id.* To accomplish this, the constructive trust "force[s] a restitution to the plaintiff of something that in equity and good conscience did not belong to the defendant." *Id.* at § 4.3, at 241. In *Remedies*, Dobbs presents the clearest example of when the constructive trust is appropriately used, as the case of a defendant who, by fraud, induces the plaintiff to convey a parcel of real property to him. *Id.* The court can then declare the defendant to be a constructive trustee, holding the property in constructive trust until transfer to the plaintiff, named as the beneficiary. *Id.* Furthermore, the constructive trust can not only be placed over the principal property deemed to rightfully be plaintiff's, but also over the "product" of the property; in this way, the plaintiff can obtain the profit defendant made from the property while it was wrongfully in his possession. *Id.* at § 4.3, at 242-43.

Although the courts which reviewed Snapp's case never explicitly outlined the method used to impose a constructive trust as a remedy, the application of the remedy in the present case can be described in the following terms. The information concerning CIA operations which was included in *Decent Interval* is the property of the United States government, particularly the intelligence unit of the executive branch, the CIA. Once Snapp breached his secrecy contract not to divulge CIA information by publishing the information in a book, Snapp became the wrongful possessor of the information. The direct product from wrongful possession of that government information is the profits earned from the sale of the book to the public. By placing a constructive trust over those profits from book sales, the district court, and later the Supreme Court, in effect declared Snapp the trustee of the profits, and obligated him to transfer the profits to the United States government, as the beneficiary of the profits and rightful owner of the principal property, the CIA information.

69. *Snapp*, 444 U.S. at 508.

70. *United States v. Snapp*, 456 F. Supp. 176, 180-82 (E.D. Va. 1978).

trust over profits.⁷¹ The United States Supreme Court, in a per curiam opinion, reinstated the entire district court decision.⁷² Thus, the Court upheld the imposition of an injunction on Snepp's future work until it passed the CIA pre-publication review process, and re-imposed the constructive trust over the profits from *Decent Interval*.⁷³

2. Reasoning of the Supreme Court

The United States Supreme Court based its decision to reinstate the constructive trust over profits on Snepp's breach of contractual and fiduciary duties as a CIA agent.⁷⁴ The Court asserted that the secrecy contract, which stated that Snepp agreed to "undertak[e] a position of trust"⁷⁵ with the CIA, bound Snepp to a "trust relationship"⁷⁶ with that agency. The Court stated that by not submitting his manuscript of *Decent Interval* for pre-publication review and by publishing the government information disclosed to him in confidence, Snepp violated his contractual and fiduciary obligations to the CIA.

In order to determine whether or not to reinstate the constructive trust over profits from the book, the Court considered evidence that the publication of *Decent Interval* caused irreparable harm to the security interests of the United States. Evidence introduced through the testimony of Admiral Turner, then Director of the CIA, intended to show the effects of *Decent Interval* on foreign relations.⁷⁷ Admiral Turner testified that with the publication of a book which contained information about details of the CIA and its operations, "a number of foreign intelligence services with whom we conduct liaison, . . . have questioned whether they should continue exchanging information with us, for fear it will not remain secret. . . . [P]eople were unwilling to enter into business with us."⁷⁸ With this and other evidence, the Court found that disallowing pre-publication review by not enforcing Snepp's secrecy agreements would cause "irreparably harm[ful]" results for national security.⁷⁹

The Court found the constructive trust to be an appropriate rem-

71. United States v. Snepp, 595 F.2d 926, 935-36 (4th Cir. 1979).

72. Snepp v. United States, 444 U.S. 507, 516 (1980).

73. *Id.*

74. *Id.* at 510-12, 515-16.

75. *Id.* at 510 n.5.

76. *Id.* at 510.

77. *Id.* at 512-13.

78. *Id.*

79. *Id.*

edy⁸⁰ for two reasons. First, the Court stated that the alternative remedy of punitive damages offered by the Court of Appeals, was not feasible, since the government would be forced to "disclose some of the very confidences that Snepp promised to protect"⁸¹ in order to prove a case for punitive damages.⁸² Second, the Court asserted that imposing damages which included a constructive trust over profits, would deter other agents from publishing, without approval, information gained by virtue of their privileged access to CIA materials.⁸³

III. COMPARISON AND ANALYSIS

The facts of *Wright* and *Snepp* are similar in most significant aspects. Both involve a retired agent who published unclassified information critical of the government agency for which he worked. This section of the Comment compares these two cases and determines whether there are significant differences in each country's approach to the issue of restricting the publication of information gained by intelligence agents in their employment; and, if there are differences, whether these differences are attributable to the existence of the First Amendment in the United States and the lack of such an amendment in the United Kingdom.

The laws of the United Kingdom do not contain an express freedom of speech principle which would protect publications. "The liberties of the [British] subject are not expressly defined in any law or code."⁸⁴ Although there is no codification of the "fundamental liberties of citizens, two codes have influenced English law."⁸⁵ They are the United Nations Declaration on Human Rights⁸⁶ and the European Convention for Protection of Human Rights and Fundamental Fairness.⁸⁷ These declarations contain express provisions for the freedom of the press.

There are four major areas of law, or legal policy, discussed in both *Wright* and *Snepp* which afford valuable comparison. These are: (A) a comparison of the use of secrecy contracts; (B) a comparison of

80. The constructive trust was reinstated, in addition to the other damages already set by the district court and not appealed to the Supreme Court. *Id.* at 516.

81. *Snepp v. United States*, 444 U.S. 507, 514 (1980).

82. *Id.* at 514-15.

83. *Id.* at 515-16.

84. Halsbury's. VIII at 548-49, para. 828 (1974).

85. *Id.* at 551, para. 828, n. 2.

86. United Nations Universal Declaration on Human Rights, Cmnd. 7662 (1948).

87. Cmnd. 8969.

the use of statutory law; (C) a comparison of how each court presents and balances the opposing secrecy and freedom of speech interests; and (D) a comparison of the remedies imposed.

A. Comparison of the Use of Secrecy Contracts

Traditionally in England, the "gentleman's agreement" ensured that one who learned of confidential information by virtue of his professional position would not publicize that knowledge.⁸⁸ A gentleman's agreement is an unwritten agreement, which arises more from moral obligation than from a bargained for commodity.⁸⁹ Thus, a former government agent would keep a confidence, because the success of a security agency mandated some degree of secrecy, and not merely because he was paid as an employee to do so.⁹⁰ However, as evidenced recently by the *Wright* and *Snepp* cases, the gentleman's agreement is no longer honored. The result has been the development of the written secrecy contract.

The secrecy agreements between *Wright* and the British Security Service, and *Snepp* and the CIA, are nearly identical in their form and language. First, the agreements provide that the agent may never publish government information concerning the agency for which he worked, unless his material has undergone the pre-publication review and approval by the appropriate official.⁹¹ In both agents' contracts the pre-publication/prior approval requirement applies to all information, classified or unclassified. Second, the agreement binds the agent to an oath of secrecy.⁹² The oath states that the agent is in a relation-

88. Interview with Maurice Cranston, Professor, London School of Economics and University of California, San Diego, in La Jolla, California (June 14, 1988).

89. *Id.*

90. *Id.*

91. As an express condition of his employment with the CIA . . . *Snepp* had executed an agreement promising that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency."

Snepp v. United States, 444 U.S. 507, 508 (1980). Similarly, *Wright's* secrecy agreement stated:

that I am liable to be prosecuted if either in the United Kingdom or abroad I communicate, either orally or in writing, including publication in a speech . . . or in the press or in book form or otherwise, to any unauthorised [sic] person any information acquired by me as a result of my appointment . . . unless I have previously obtained the official sanction in writing of the department by which I was appointed.

Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another, 1 W.L.R. 1248, House of Lords, Aug. 1987, *per* Lord Oakbrook, *supra* note 5.

92. For example, *Snepp's* agreement stated, "I, Frank W. *Snepp*, III, understand that upon entering duty with the Central Intelligence Agency I am undertaking a position of trust

ship of trust and confidentiality with the employer government.⁹³ Consequently, the secrecy oath gives rise to a fiduciary duty owed to the government, to further the security goals of the agency.

In finding Wright and his publisher sanctionable for publication of *Spycatcher* in the United Kingdom, the House of Lords did not place great emphasis on the pre-publication review clause or the secrecy contract in general. This suggests that Wright was bound by an unwritten, moral duty to maintain the confidences of the Security Service. The court found Wright in violation of an unwritten secrecy oath, regardless of whether a written contract existed between him and the British Security Service.⁹⁴ Thus, a requirement of pre-publication review may help the case against Wright, but such a clause is not crucial to the government's case. Also, the remedy of injunction was available through statutory law. The Official Secrets Act, paragraph 2, in effect, codifies the importance of the confidential relationship between the Security Service and agent.

Just as paragraph 2 of the Official Secrets Act reflects the importance of confidentiality owed to the intelligence service by an agent, the secrecy agreement reflects this element in United States law. As stated above, pre-publication review under United States law requires that the agent submit the material which he plans to publish to the Director of the CIA. Congress originally codified this review process in the National Security Act of 1947. The Act states in pertinent part:

(d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency . . . (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government. . . . And provided further, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.⁹⁵

in that Agency of the Government" *Snepp v. United States*, 444 U.S. 507, 510 n.5 (1980) (citing App. to Pet. for Cert. in No. 78-1871, p. 58a).

93. The House of Lords analogizes the agent's duty of confidence with the agency to the duty to keep confident a trade or business secret. The court quotes from *Seager v. Copydex* (1967) 2 All E.R. 415, (1967) 1 W.L.R. 923 at 931, which states that "he who has received information in confidence shall not take unfair advantage of it. He must not use it to the prejudice of he who gave it." In *Seager v. Copydex* an inventor won damages from a company to which he had told of his invention in confidence, and which divulged this information to gain an advantage over competitors.

94. *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, see *supra* note 5.

95. National Security Act of 1947, 50 U.S.C. § 403 (1982).

This statute allows the CIA Director to both determine the sensitivity of information by categorizing it into groups such as "highly classified" and "classified" information and allows the Director to restrict the publication of such information.⁹⁶

The Freedom of Information Act⁹⁷ presents a potential obstacle to the Director's authority. This statute provides that certain information concerning the government and its employees must be available to the public. However, exemption 3 of the statute states that the National Security Act⁹⁸ is an exception to the protections afforded by the Freedom of Information Act.⁹⁹

In the National Security Act and the Freedom of Information Act exception, it is evident that the CIA Director has broad discretion to prevent the dissemination of intelligence information.¹⁰⁰ The "Secrecy Agreement" and the National Security Act of 1947 allow the government to restrict an agent from disseminating information which concerns the government. The Supreme Court currently holds that these restrictions comport with the protections of the First Amendment.¹⁰¹

In *United States v. Marchetti*,¹⁰² ("*Marchetti*") the court was confronted with classified information used in an intelligence agent's book *The Rope Dancer*.¹⁰³ In that case the two clauses of the secrecy contract, one agreeing to pre-publication review and the other an oath of secrecy, were separate. In holding that pre-publication review was constitutionally valid, the court granted the injunction to suppress the classified information.¹⁰⁴ The law is clear that the CIA Director can prevent any type of classified information from being disseminated.¹⁰⁵

However, the law is less clear where information gathered by an

96. *Id.*

97. Freedom of Information Act, 5 U.S.C. § 552 (1974).

98. National Security Act of 1947, 50 U.S.C. § 403 (1982).

99. The exemption states "Th[e] section providing that Director of Central Intelligence Agency shall be responsible for protecting intelligence sources and methods from unauthorized disclosure [50 U.S.C. § 403] is exempting statute for purposes of Freedom of Information Act exemption." *Id.*

100. *CIA v. Sims*, 471 U.S. 159, 168-69 (1985).

101. The National Security Act delegates authority to limit freedom of speech to the CIA Director, an official under the Executive department. Thus, the statute is not unconstitutional under the First Amendment which states only that "Congress shall make no law" abridging the freedom of speech. *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972).

102. 466 F.2d 1309 (4th Cir. 1972).

103. *Id.* at 1313.

104. *Id.* at 1318.

105. *Id.* at 1316.

agent is not classified, although harmful to national security. In *Marchetti*, the court found that it is unconstitutional, according to the First Amendment, to use the secrecy oath to prevent disclosure of unclassified information. This decision, however, means only that a breach of the oath will not result in an injunction.¹⁰⁶ Thus, a breach may authorize a damages remedy or other remedy which is not an injunction.

In Snapp's contract the secrecy oath and agreement to pre-publication review were incorporated together in paragraphs throughout the contract. The oath and agreement did not comprise two separate contracts, as in the *Marchetti* case. This unique feature of Snapp's contract allowed the Court to consider the oath and agreement as interrelated. The Court held that by failing to submit *Decent Interval* for pre-publication review, Snapp violated his specific agreement not to publish material without approval; and more importantly, the Court added that this specific agreement merely reinforced Snapp's broader commitment to maintain a position of secrecy and trust with the CIA.¹⁰⁷ Consequently, rather than finding the agreement for pre-publication review constitutional and secrecy oath unconstitutional for certain purposes, such as imposing injunction, the Court implicitly held the entire contract a valid government effort to protect its national security interest. The Court found that Snapp should have submitted his work to the CIA Director both because of the agreement to do so and because he owed a duty of trust to the CIA.¹⁰⁸

The *Snapp* agreement for pre-publication review and secrecy oath were not acknowledged as separate agreements, as they were in *Marchetti*. By enforcing the importance of the confidential relationship between an agent and the intelligence service through the secrecy oath, *Snapp* makes clear that sanctions are constitutionally valid against the disclosure of unclassified information. Thus, the *Snapp* Court carried the enforcement of the secrecy contract a step beyond the *Marchetti* holding. This does not yet justify injunction, but it does allow the Court to impose damages plus a constructive trust over profits of a book which divulges government information. The impact of the *Snapp* Court's holding on the damages issue is discussed in detail in the following section of this Comment.

Despite the existence of the first amendment, the United States

106. *Id.* at 1317.

107. *Snapp v. United States*, 444 U.S. 507, 510-15 (1980).

108. *Id.*

can to some extent "control its press," contrary to Lord Ackner's opinion as seen above in the Introduction to this Comment. Pre-publication review is a form of prior restraint,¹⁰⁹ as it may mean that an agent's material is not published due to its content. Coincidentally, pre-publication review of materials written by former agents about the intelligence service fits exactly into a very small class of cases which justify imposition of prior restraints. In *American Constitutional Law*, Tribe has identified this class of cases as those which first, "the government prove[s] the unprotected character of the particular speech with certainty," and second, "harm . . . would occur if a pre-publication restraint were not imposed."¹¹⁰

The secrecy oath, mixed into the pre-publication review agreement, evidences a value for an agent's duty of confidentiality which, if breached, authorizes sanctions. Through a secrecy agreement which combines pre-publication review with a secrecy oath, the United States has developed a device similar to the United Kingdom's Official Secrets Act, discussed below.¹¹¹ Both the secrecy contract in the United States and the Official Secrets Act in the United Kingdom reflect the idea that the courts of both countries are willing to impose restraints on the dissemination of intelligence information by agents,

109. "[T]he doctrine of prior restraint has been used to invalidate . . . a variety of restrictions on speech." The restraint can either be "prior to a communication's dissemination, or prior to an adequate determination that [the expression] is not protected by the First Amendment." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1040-42 (1988).

110. *Id.* at 1051.

American and English essays of the eighteenth and nineteenth centuries argued against prior restraints, such as the licensing system directed by the English monarchy and church during that time. *Id.* at 1039. However, even the greatest advocates of freedom of speech shared the concept of a limited right of free speech. In *Commentaries on Laws of England*, Blackstone wrote: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." BLACKSTONE, *COMMENTARIES ON LAWS OF ENGLAND* Vol. IV, para. 152 (1822). Further reading of Blackstone shows that he considered "criminal matter" to be that which should not be allowed in the "public forum," such as matter which is "illegal . . . dangerous or offensive." Vol. IV, para. 152. Although *The Federalist Papers* do not explicitly outline a theory of freedom of the press as do Blackstone's works, *The Federalist Papers* as a whole reflect Blackstone's theory of an important free speech right, but one which can be limited for the sake of maintaining security and order. See *THE FEDERALIST* No. 84 (A. Hamilton) and *THE FEDERALIST* No. 3 (J. Jay). These early writings evidence that the First Amendment was intended to encourage as much public knowledge and debate as possible, without encouraging offensive or dangerous speech. Thus, the idea of having prior restraints was not nullified by the existence of the First Amendment; and, prior restraints have remained a part of United States law.

111. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28.

because the agent's duty of confidentiality is important to national security.

B. Comparison of Statutes

Both the United Kingdom and the United States have criminal statutes that restrict the dissemination of government information. In the United Kingdom this statute is the Official Secrets Act¹¹² and in the United States this statute is section 798 of the espionage statutes, the Disclosure of Classified Information Act.¹¹³ However, while the House of Lords partially based its support for an injunction over publication on Wright's violation of the Official Secrets Act, the Supreme Court never applied the Disclosure of Classified Information Act to Snapp.¹¹⁴ This difference is attributable to the greater pervasiveness of the Official Secrets Act's application and the United States' hesitance to expand the application of its espionage statutes in the face of the First Amendment.

The language of the Official Secrets Act is somewhat less restrictive than that of the Disclosure of Classified Information Act. The Official Secrets Act contains two main paragraphs. First, it makes any person who divulges information with the purpose of harming the safety or interests of the State guilty of a felony.¹¹⁵ Second, and more applicable to the case in issue, the Official Secrets Act prohibits any officer of the government, "entrusted in confidence" with information obtained from his position in the government, from divulging any of that information.¹¹⁶ The latter has no qualification for information which is unclassified or found not immediately or greatly harmful to the interests or safety of the nation. While the Disclosure of Classified Information Act closely resembles section 1 of the Official Secrets Act, it criminalizes only the communication by any person of only classified information. Thus, the Disclosure of Classified Information Act allows more forms of speech than the Official Secrets Act.

In the criminal context, it makes sense to limit punishable acts to the purposeful dissemination of classified information or information which is indirectly harmful to national security. An agent who unin-

112. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28.

113. 18 U.S.C. § 798 (1982) [hereinafter "The Disclosure of Classified Information Act"].

114. *Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *supra* note 5; *Snapp v. United States*, 444 U.S. 507 (1980).

115. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28, § 1.

116. *Id.* at § 2, sched. (1).

entionally publishes information harmful to the national security cannot be deterred from publishing that information by means of a criminal statute. The criminal penalties of the espionage statutes act as deterrence measures against anyone who knowingly communicates classified information, or information which he knows will harm the security interests of the nation. If an agent believes his information to be unclassified or not harmful to the national security, then he will not consider the statute to apply to him, and so will not be deterred from publishing his material. However, authors such as Wright and Snapp aim not to damage national security, but rather to criticize the operations of the intelligence agencies for which they worked and to incite reform of the internal problems. Thus, the purposeful intent to harm national security that is required to impose criminal penalties is absent in these cases.

However, the absence of criminal, purposeful intent does not obviate the need to restrict the disclosure of information which is unclassified but damaging to national security for the reasons stated below.¹¹⁷ Although criminal sanctions have deterrence value, they are inadequate as applied to the instant cases. Criminal sanctions only penalize publication after the damage has been done; they cannot directly prevent publication.

The United Kingdom courts can prevent publication of intelligence information through the imposition of an injunction justified by breach of the Official Secrets Act. The House of Lords focused its support for injunction over *Spycatcher* on the fact that Wright violated his oath to abide by the Official Secrets Act.¹¹⁸ Attention was drawn to the clause stating that an officer of the government must not betray the "confidence entrusted" in him by virtue of his employment. The court did not use this violation to voice support for imposing the misdemeanor penalty prescribed by the Official Secrets Act. Rather, the court found that a violation of one of the key purposes of the Official Secrets Act, to protect the confidences entrusted to government agents, required an injunction. This would solve the problems posed by publication, by discouraging future agents from trying to

117. The reasons to restrict the disclosure of intelligence information discussed in section II, C. are: (1) to maintain the secrecy of its sensitive information, so that other foreign security services will not lose confidence in the nation's own intelligence agency; (2) to prevent future breaches of the duty of confidence by other agents; and (3) to protect present and future agents from public scrutiny in areas which, if exposed would lead to the divulgence of classified information.

118. *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *supra* note 5.

publish memoirs, ensuring that no information which could be dangerous to security was divulged, and finally, by maintaining foreign confidence that government information entrusted to agents is kept confident. The *Wright* court thus used a criminal statute to impose what appears to be in this case a civil remedy, the remedy of injunction. In this way, the court has reinforced the overarching purposes of the Official Secrets Act, which embodies the importance of national security interests.

In contrast, the Disclosure of Classified Information Act plays no express role in *Snepp*. As noted in Justice Stevens' dissent, the statute could apply to *Snepp* had his book contained classified information.¹¹⁹ However, the government did not claim that *Decent Interval* contained classified information.¹²⁰ The Disclosure of Classified Information Act is nearly identical to paragraph 1 of the Official Secrets Act, but has no equivalent to paragraph 2, which restricts officials or employees from divulging any government information entrusted to them in confidence.¹²¹ The Supreme Court has no authority under an espionage statute to restrict the publication of *Spy-catcher*, since it contains only unclassified information.

The United States has not interpreted its statutes to apply as pervasively as the Official Secrets Act. The espionage statutes such as the Disclosure of Classified Information Act impose only criminal penalties. Such sanctions would be of little use as safeguards against the dissemination of any intelligence information. Before a former agent's book is published,¹²² the Disclosure of Classified Information Act is inapplicable. Therefore, the only preventive element in the criminal penalty is deterrence against future violations by the same or other agents. This is useful, but not as effective in the case of intelligence agents as would be injunctions, which are allowed by the Official Secrets Act.

Another alternative in the United States would be to have Con-

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

120. *Id.* at 508-11.

121. The Disclosure of Classified Information Act, 18 U.S.C. § 798 (1982), criminally sanctions "[w]hoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information." *Id.* § 798 (a).

122. The term "published" is not defined by statute, or by the secrecy contracts between employees and the CIA. Arguably, the CIA can consider "publish" to mean either printed by a publishing company, or simply made known by the employee to persons without security clearance.

gress create a specific law modeled on the second paragraph of the Official Secrets Act, prohibiting an agent from divulging any information obtained by means of his position with the government. However, such a law must not infringe on the protections of the First Amendment.¹²³ The Supreme Court has established that the First Amendment does not protect speech which poses "irreparable harm" to national security.¹²⁴ Therefore, in a case such as *Snepp* where the government proved irreparable harm, a law modeled on the Official Secrets Act could constitutionally bar the divulgence of information. However, such a law would be unconstitutional under the First Amendment because of its language which may bar the publication of information that did not irreparably harm the interests and safety of the nation. Finally, because the different Justices of the Supreme Court over time offer such varied interpretations of the irreparable harm standard, it would be difficult to predict when a law modeled on the Official Secrets Act would even constitutionally bar dissemination of intelligence information.¹²⁵

The United Kingdom has not interpreted its freedom of expression principle into a standard of irreparable or immediate harm. Rather, free speech interests stand as factors to be balanced against the interests of suppression, and against the Official Secrets Act. Like all acts of Parliament in England, the Official Secrets Act cannot be declared invalid, as a congressional act can be declared unconstitutional by the United States.¹²⁶ There is no judicial review of legislation in England, only judicial interpretation.¹²⁷

The United States' inability to enact a statute resembling the second paragraph of the Official Secrets Act makes it impossible to prevent the publication of a former agent's memoirs with an injunction, if those memoirs contain unclassified information which is proven to irreparably harm national security interests. In the absence of a statu-

123. *Near v. Minnesota*, 283 U.S. 697 (1931). For a general discussion see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at 785-861, 1045-55 (1988).

124. *Id.* *New York Times v. United States*, 403 U.S. 713 (1971).

125. For example, in the *Pentagon Papers* case, *New York Times v. United States*, 403 U.S. 713 (1971), the Court held that publishing classified intelligence information concerning CIA activities in Vietnam would not irreparably harm the security of the United States, thus the publication of the information was necessary to enforce the newspaper's First Amendment rights. On the other hand, the *Snepp* Court found that the publication of unclassified information concerning the same type of CIA activities in Vietnam had irreparably harmed the security of the United States. *Snepp v. United States*, 444 U.S. 507 (1980).

126. H.G. HANBURY & D.C.M. YARDLEY, *ENGLISH COURTS OF LAW* 9-10 (1979).

127. *Id.*

tory means by which to enjoin the publication of unclassified information by an intelligence agent, the United States has relied on the secrecy contract to protect the confidentiality of government information.

C. *Comparison of the Courts' Treatment of Competing Secrecy and Free Speech Interests*

The Supreme Court and the House of Lords outline similar concerns underlying the national security interest in maintaining the secrecy of intelligence information. First, the courts argue that although the books contain unclassified information, the publication of a former intelligence agent's book concerning his intelligence activities is still harmful to security. The Supreme Court explained that, "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."¹²⁸ Similarly, Lord Templeman stated:

These [dangers of divulging information which is 'of value for a foreign power and . . . causing harm to individual officers . . . and their families,'] could arise notwithstanding that the information disclosed was unclassified and is on its face and in isolation apparently innocuous. Such information may take on a wider significance if put together with other information in possession of other persons and thereby, for example, enable them to check the veracity of their sources of information. Furthermore, information which appears to be innocuous at a particular date or to a particular officer may at a later date become significant.¹²⁹

The facts of a recent United States case, *Haig, Secretary of State v. Agee*,¹³⁰ support the above arguments by the Supreme Court and Lord Templeman. In that case, Agee, a former CIA agent, in an effort to drive CIA agents out of foreign countries, disclosed the classified names and activities of several agents.¹³¹ Many of those agents were murdered soon thereafter.¹³² The Court found that due to irreparable harm caused by Agee's disclosures, sanctions against Agee did

128. *Snepp v. United States*, 444 U.S. 507, 512 (1980).

129. *Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another*, 1 W.L.R. 1248, House of Lords, Aug. 1987 *per* Lord Templeman, *supra* note 5.

130. 453 U.S. 280 (1981).

131. *Id.* at 285-286, n.7; 308-09.

132. *Id.*

not violate his First Amendment right to criticize the government.¹³³

The courts asserted that national security was damaged because the publication of intelligence information by former agents sends the message to foreign countries, allies and non-allies, that the agency lacks the power to maintain confidentiality. The *Snepp* court stated that the "CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents."¹³⁴ In *Wright*, the court made a similar argument, and Lord Templeman concurred, that not only does publication of the books undermine foreign confidence in the intelligence agency, but it also undermines the confidence of agents who still work in the Service and expect the Attorney-General to protect the public reputation of the Service.¹³⁵

Both courts acknowledge the problem posed by national security concerns to freedom of expression and freedom of the press.¹³⁶ The House of Lords saw two competing public interests: the public interest in preserving the national security, and the public interest in preserving the freedom of the press. The British courts seemed to favor a balancing test to determine if the risks to national security outweighed any need to disseminate intelligence information.¹³⁷ The court cited support for limiting the right to freedom of expression in an exception for national security, in Article 10(2) of the European Convention on Human Rights.¹³⁸ The court considered freedom of the press an im-

133. *Id.* at 308-09.

134. *United States v. Snepp*, 444 U.S. 507, 512 (1980). *Cf.* Justice Stevens' dissenting opinion, *Snepp*, 444 U.S. at 520.

135. *Guardian Newspapers and Others, Observer, Ltd. and Others, Times Newspapers and Another*, 1 W.L.R. 1248, Aug. 1987, House of Lords, *per* Lord Templeman, *supra* note 5.

136. Neither court elaborates on the details of these interests. For a general discussion of all interests involved in these types of cases, see A. Katz, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108 (1976).

137. *Attorney-General v. Guardian Newspapers and Others (No. 2), Observer, Ltd. and Others, Times Newspapers and Another*, 2 W.L.R. 805, 846, Chancery Division (Dec. 1987). See *Guardian Newspapers*, 1 W.L.R. 1248, House of Lords, Aug. 1987, *supra* note 5.

138. The court states:

Article 10(2) provides qualifications and exceptions to which the exercise of free expression may be made subject. They include such conditions: "as are prescribed by Law and are necessary in a democratic society in the interests of National Security . . . for the protection of the . . . rights of others, for preventing the disclosure of information received in confidence."

Guardian Newspapers, 1 W.L.R. 1248, House of Lords, *per* Lord Ackner, *supra* note 5.

portant but limited right, and one which could be subordinated to national security interests.

Despite the First Amendment, the United States Supreme Court in *Snepp* accepted this same principle of a limited right of free expression. Although the *Snepp* Court ended up favoring national security interests over those of free speech, the Court did not use a strict balancing test to reach its decision. Rather than viewing the problem as one of two competing public interests, the Supreme Court reasoned that the importance of *Snepp's* secrecy contract to national security, and the consequent irreparable harm to security that resulted from *Snepp's* breach of the contract, took *Snepp's* actions outside of the scope of the free speech protections of the first amendment. Impliedly, since the breach did not trigger first amendment protections, the Court did not reach the stage of balancing the national security interests with the freedom of speech interests. Thus, the Supreme Court in *Snepp* achieved the same result as the *Wright* court, favoring national security; however the Supreme Court avoided having to consider the nature and weight of first amendment concerns.

Although this section of the Comment considers only the specific question of how the courts in the two present cases have dealt with the competing national security and free speech interests, it is important at this stage of the analysis to fit the *Snepp* decision into a scheme of current First Amendment law. A comprehensive schematic of First Amendment law, and a useful characterization of where cases like *Snepp* fit into the schematic appears in *American Constitutional Law* by Laurence Tribe.¹³⁹

Tribe divides laws restricting speech into two categories, "Content-Based Abridgments" and "Facially-Neutral Abridgments."¹⁴⁰ *Snepp* involved, in part, a content-based restriction; the government sought to restrict *Snepp* from writing about intelligence information gained by virtue of his position as a CIA agent, and not merely to restrict him from writing books about any other subject. In this category of content-based restrictions, Tribe includes speech restricted because it presents a "clear and present danger."¹⁴¹

The clear and present danger test was applied to the dissemination of confidential information in *Landmark Communications v. Vir-*

139. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 12 (1988).

140. *Id.* at 785-804.

141. *Id.* at 841; *Schenck v. United States*, 249 U.S. 47 (1919).

ginia.¹⁴² In that case, the Court held that once confidential information concerning judicial proceedings had been leaked to a newspaper, that newspaper could be penalized only if the state demonstrated that the article posed a clear and present danger to the administration of justice, and thus mandated secrecy.¹⁴³

*New York Times v. United States*¹⁴⁴ presented the issue of whether the clear and present danger doctrine would apply to confidential information concerning government secrets. In a per curiam decision, consisting of nine separate opinions, the Court held that the newspapers' publications of leaked intelligence information concerning CIA activities in Vietnam would not irreparably harm the national security interests of the United States. The Court stated that injunctions would issue only if "disclosure . . . will surely result in direct, immediate and irreparable damage to our Nation and its people."¹⁴⁵

The district court, and later the Supreme Court, found that publication of "*Decent Interval* caused the United States irreparable harm and loss."¹⁴⁶ Thus, the Court in *Snepp* applied the part of the clear and present danger doctrine which concerns government information leaks, to reach a decision which favors national security interests.

Tribe fits *Snepp* into a group of cases in which the Court considers the magnitude and quality of the harm, in order to justify imposition of a prior restraint; he calls these restrictions on speech, "Constitutionally Permissible Prior Restraints."¹⁴⁷ Whereas prior restraints are traditionally thought of as presumptively invalid, a series of cases allowing such restraints have developed and been given precedential effect. The Court in *Snepp* uses an element of the content-based category, the clear and present danger doctrine, not only to justify a restriction on *Decent Interval* after publication, but also to justify the use of a *pre*-publication restriction, the secrecy contract. Thus, the extension of the clear and present danger doctrine to confidential information leaks, where proof of the danger justifies imposition of a prior restraint, has contributed to the group of "constitutionally permissible prior restraints," and eroded prior restraint doctrine as it had developed during the 1960's and 1970's, par-

142. 435 U.S. 829 (1978).

143. *Id.* at 843-44.

144. 403 U.S. 713 (1971).

145. *New York Times v. United States*, 403 U.S. 713, 730 (1971).

146. *United States v. Snepp*, 456 F. Supp. 176, 180 (1978).

147. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1045 (1988).

ticularly with the decision of *New York Times Co. v. United States*.¹⁴⁸

As in *Landmark Communications v. Virginia*, the *New York Times* Court was faced not with the source who initially leaked the information, but with the newspaper which published the information. In *Snepp*, the Court heavily relied on the fact that Snepp was not only the source of the initial disclosure of confidential information, but was a source who, as a government agent, maintained a relationship of confidentiality with the government. Thus, *Snepp* presents different considerations than the newspaper cases. As stated above, the Court must look at the magnitude and quality of the harm, in the case of a foreign agent who divulges information entrusted to him, to determine if the prior restraint on publication is constitutionally permissible.

As illustrated by *Haig, Secretary of State v. Agee*,¹⁴⁹ and the government interests outlined by the *Wright* and *Snepp* courts, the degree and high risk of harm inherent in the disclosure of classified information by former agents is great. Although classified disclosures may not have been intended by Wright or Snepp, such disclosures can result from publication of their books. Even the dissenting opinion in *Snepp* acknowledged the reality that such disclosures are harmful to national security.¹⁵⁰ The risk of harm from disclosure of intelligence information is so great as to outweigh the author's desire to criticize the government and the public's "right to know"¹⁵¹ of such information.

This does not diminish the importance of the freedom of speech. The freedom of speech interests at stake when the government seeks to suppress information are carefully outlined in "Government Information Leaks and the First Amendment," by Alan M. Katz.¹⁵² Katz presents three freedom of speech interests which are harmed by government suppression.¹⁵³ They are: the freedom to publish without government interference in order to prevent a chilling effect on all speech,¹⁵⁴ the right of the press to gather information,¹⁵⁵ and the

148. 403 U.S. 713 (1971).

149. *Haig, Secretary of State v. Agee*, 453 U.S. 280 (1981).

150. *United States v. Snepp*, 444 U.S. 507, 520-21 (1980).

151. See Henkin, *The Right to Know and the Duty to Withhold*, 120 U. PENN. L. REV. 271 (1972).

152. Katz, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108 (1976).

153. *Id.*

154. *Id.* at 115.

155. *Id.* at 116.

desire of a government employee to impart his special knowledge and perspective to society, in an effort to better the government.¹⁵⁶ The first interest is an issue in any case concerning speech, no matter how erroneous or dangerous the speech. However, the policy against establishing rules which will have a chilling effect on freedom of speech has, at many points in first amendment law, been overridden by the competing interests of safety or privacy.¹⁵⁷ The second interest, concerning the right to gather information, is not as relevant in the case of a former intelligence agent publishing a book as it may be in the case of a newspaper publishing leaked information.

Finally, the third interest is perhaps the most compelling when applied to the issue at hand. This interest concerns the desire of the employee to divulge government information in the hopes of encouraging government reform. This concern argues strongly against government control over information. Who better than someone intimately involved in a particular government agency to present a detailed and learned perspective on that agency, to offer criticism, and to advocate effective reforms? However, the argument assumes first, that the published information is accurate, and second, that the author's goal is governmental reform and not profit. If these assumptions are true, then the government agent is in the best position to advocate reforms. On the other hand, if these assumptions are false, then the government agent is in the best position to harm the government. In either case, the government's interest in maintaining the confidence of countries through an apparently secret information network is harmed. Moreover, the confidence between an agent and his government is devalued. Therefore, when the risk of harm to security is great, such as in the special case of a former agent who discloses intelligence information gained by means of his employment, the freedom of speech principle should be subordinate to the concerns of national security.

Both the British courts and the United States Supreme Court reached the decision to subordinate free speech rights to the interests of national security. Thus, the First Amendment apparently does not compromise the Supreme Court's ability to favor security interests. Nevertheless, the First Amendment does affect the way each court

156. *Id.*

157. See *supra* text accompanying notes 139-45 for cases where speech is prohibited because it presents a clear and present danger. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) for an example of where speech is restricted because it infringes on the privacy of its subject.

enforces the idea of limiting free speech rights to minimize harm to national security.

D. Comparison of Remedies

The secrecy contract allows the Supreme Court some control over the publications produced by former agents, just as the unwritten duty of secrecy, as embodied in the Official Secrets Act, allows the United Kingdom courts control over such publications. However, there remains a significant difference between United States and British courts with respect to the power and extent of this control. This difference is attributable to the different sanctions that the courts of each country are able to impose.

For example, the British courts concluded that an injunction should be issued against the publication of *Spycatcher*. The justification for such an injunction arises out of the agent's duty to keep secret the intelligence information gained by virtue of his employment, according to the Official Secrets Act. However, in the United States it is certain only that an injunction is constitutionally allowable over classified matter¹⁵⁸ and that some type of remedy may be imposed upon the divulgence of unclassified matter unauthorized by the CIA Director for disclosure.¹⁵⁹ The *Snepp* Court did not directly address the question of whether or not *Snepp* could have initially been enjoined from publishing *Decent Interval* without prior authorization. Since the book was later held to have irreparably harmed national security interests, it is likely that the CIA Director would not have authorized the manuscript for publication, in the event that he had known about the book. The Court, however, was only concerned with the aftermath of publication.

Imposing a constructive trust over the profits of *Snepp's* book was a major step toward gaining increased control over these types of publications. This step has the force of deterring other agents from similar actions, because they will be denied any profits from book sales. In this respect, the result is similar to an injunction, which would command performance and thus discourage breaches.¹⁶⁰ How-

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

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

160. The remedy of injunction stands in contrast to the damages remedy, which grants monetary damages to the plaintiff. While the damages remedy allows the breaching defendant to choose whether to breach the contract and pay damages or to not breach the contract and avoid paying damages, the injunction offers no choice. The injunction demands performance of the contract. See D. DOBBS, *REMEDIES* ch. 2 (1973), for a discussion of the injunction.

ever, the constructive trust remedy is not likely to deter agents who publish motivated by the desire for governmental reform rather than profits.

The constructive trust remedy is similar to punitive damages in two respects. First, a constructive trust can be placed over profits, if "the defendant acted as a conscious wrongdoer . . ." ¹⁶¹ By imposing a constructive trust over the profits from *Decent Interval*, the Court in effect brands Snapp's conduct as both intentional and wrong. Similar to the constructive trust over profits, punitive damages aim to punish the defendant for wrongful conduct and deter future breaches.¹⁶² Thus, the court of appeals' decision to reverse the district court's order to impose a constructive trust over profits and to grant the government punitive damages fits logically into the scheme of available remedies.¹⁶³ In spite of this, the Supreme Court reinstated the constructive trust and denied punitive damages. The Court's reasoning for denying punitive damages was based on the practical problem due to the practical problem of forcing the government to prove such damages while maintaining the secrecy of certain facts necessary to prove its case.¹⁶⁴

A constructive trust was possible only by the Court's extending the concept of the duty of confidentiality owed by the former agent to the intelligence agency. Stressing the importance of this duty of confidentiality provided the equitable consideration on which the imposition of a constructive trust was justified.

However, the imposition of a trust still falls short of the greater degree of control inherent in the injunction.¹⁶⁵ It remains unclear in the United States whether the CIA Director and Court can retain ultimate control over the dissemination of unclassified but harmful intelligence by former agents, or rather, whether injunctions will be allowed over such material. In order to achieve this control, the Court must continue to place a higher premium on the concept of an agent's duty of confidentiality, expressed in the secrecy oath, even further than did the Court in *Snapp*. In this way, a breach of that oath

161. *Id.* at § 4.3, at 244. Dobbs notes two requirements for imposing a constructive trust over profits: "that defendant is a conscious wrongdoer," and that "no part of the increase in value is clearly attributable to the defendant's own laborers." *Id.*

162. D. DOBBS, REMEDIES § 3.9, at 204 (1973).

163. *United States v. Snapp*, 595 F.2d 926, 936-38 (1979).

164. *Snapp v. United States*, 444 U.S. 507, 514-16 (1980).

165. For example, if the goal of the author in publishing his book is not financial profit, then the constructive trust over profits would not be much of a deterrent measure.

and corresponding duty of confidence would justify an imposition of an injunction.

IV. CONCLUSION

The United States and the United Kingdom have developed nearly identical secrecy contracts to prevent the divulgence of government information by intelligence agency employees. The existence of the First Amendment has not prevented the United States Supreme Court from holding the secrecy contract constitutional. However, while the United States Supreme Court subjects the agent who breached the contract to only a post-publication penalty, a constructive trust, British courts advocate the use of a pre-publication restraint, the injunction. As discussed above, the pre-publication restraint affords the government more control over the dissemination of its secrets.

There is one fundamental difference between the United States and British courts which accounts for the disparity in control over the publication of secrets. The British courts place a higher premium on the duty of confidentiality. Only the fact that an agent breaches that duty justifies imposition of the most effective device to preserve confidentiality, the injunction. The secrecy contract merely provides evidence that a trust relationship existed between an agent and the government. In contrast, a United States court has little control over an agent who intends to publish unclassified government information without the secrecy contract. Even with the contract, the *Snepp* Court only imposed a constructive trust, and not an injunction.

The espionage statutes in the United States do not give agencies a great deal of pre-publication control because they are construed only as criminal statutes. In contrast, finding that Wright violated the Official Secrets Act allowed the House of Lords to support the imposition of the civil remedy of an injunction. The court considered the Official Secrets Act merely a representation of the value for the duty of confidentiality. Again, a breach of that duty justified an injunction against publication.

In some ways Lord Ackner's observation that United States courts are "powerless to control the press was correct."¹⁶⁶ The Supreme Court has not yet used the injunction to restrain unclassified material from being published by former intelligence agents, however

166. See *supra* note 14 and accompanying text.

harmful the dissemination of such information is to security interests. However, the development of the secrecy contract and its key role in binding an agent to maintain the confidences, to which he has had privileged access as a government agent, has helped to compensate for this limited control over government information in the United States. The next step for the United States Supreme Court is to expand the application of the secrecy oath to allow for injunctions over the publication of any intelligence information which poses irreparable harm to national security interests.

Nancy Alyce Jerian