Policy Analysis

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Frederick W. Whatley

Frederick W. Whatley is an attorney with the Cleveland law firm of Walter, Haverfield, Buescher & Chockley. He is the author of "Case Comment: Snepp v. United States," *Cleveland State Law Review* 30 (1981).

Executive Summary

During the brutal winter of 1983-84, water pipes froze and burst in many houses. Leaks followed. A sensible way to repair such leaks is to fix the leaking pipes. An equally efficient, albeit drastic, way to stop the leaks would be to shut off the main water supply to each house.

Leaks of classified information or of unclassified information known only within the cloistered halls of government have been occurring for years. Much of this information has been useful to the citizenry. It has included cost overruns on Defense Department boondoggles, the revelations published as The Pentagon Papers, and exposure of the peccadilloes, large and small, of government agencies and government officials. However, some of the information leaked has been geniunely damaging to national security. Such information has ranged from the top secret plans of Defense Department weaponry to the names of covert agents of the Central Intelligence Agency (CIA).

How do we repair the dangerous leaks without shutting off the useful ones? Traditionally, government has taken a prudent and restrained course of action. For action to be considered, the Constitution and court decisions require that the existence of a leak be established and that the leak be shown to be extremely dangerous to the "house," threatening to undermine its foundation. Only after these requirements have been met may we very carefully remove the particular portion of leaking pipe, examine it closely, and repair it. In doing so, we must make sure that the repairs do not cause a blockage in our flow of information.

The Reagan administration, with the encouragement of the Supreme Court of the United States, has embarked on a different approach. The administration officials have driven up to the front of our house, put on their work clothes, gotten out of their truck (license plate NSDD 84), unearthed the valve to our main, and begun closing the valve. Clenched firmly in their hands and being used as the wrench to close the valve is the Supreme Court's decision in Snepp v. United States.

Employment Contracts and Censorship Oaths from Marchetti to Snepp

The United States has traditionally plugged its leaks by using the deterrent effect of criminal prosecutions. Successful criminal prosecutions require the government to overcome the plethora of procedural and substantive hurdles of a criminal trial by proving (1) that there is intent or reason to believe that the information will be used to injure the United States,[l] (2) that the information disseminated is prejudicial to the safety or interest of the United States, or (3) that the information will be used for the benefit of a foreign government to the detriment of the United States.[2]

These points are not easily proved, and thus the government has long searched for a more expedient way in which to deal with alleged security leaks. One of those ways has been to use employment contracts.

The CIA pioneered the use of employment contracts to protect secrecy. The leading case in interpreting such employment contracts is United States v. Marchetti.[3] Upon entering the CIA, Victor Marchetti signed a so-called entry agreement which provided, in pertinent part, that he would not divulge, publish, or reveal any classified information, intelligence, or knowledge. On leaving the CIA in September 1969, Marchetti signed a termination agreement in which he promised never to divulge any infor- mation relating to national defense or national security. Subsequently, he published a novel and several articles. He then submitted to the CIA an outline of a book he was writing about his intelligence experiences. Marchetti, the government believed, had previously disclosed classified information and was planning to do so again.[4] The CIA sought an injunction enjoining Marchetti from publishing any writing relating to the CIA without prepublication approval from the director of the CIA. The U.S. Court of Appeals for the Fourth Circuit upheld the injunction, in United States v. Marchetti, which later became known as Marchetti I. The Court limited the order, however, so that it applied only to classified information.

Marchetti and his coauthor, John Marks, thereafter turned the book, The CIA and the Cult of Intelligence, over to Knopf, Inc. for publication. Knopf then submitted the book to the CIA for prepublication review. Initially, the CIA attempted to delete 339 items from the book. Knopf then took the CIA to court in the case of Alfred A. Knopf, Inc. v. United States,[5] which is often referred to as Marchetti II. At trial, the CIA defended its deletion of only 168 items. The Fourth Circuit Court of Appeals held that in order for the CIA to delete information, the information must be both classifiable and classified.

The CIA, however, had suffered leaks prior to both Marchetti I and Marchetti II. In 1968, for example, a book was published in East Germany listing the names of scores of covert CIA agents. The CIA continued to have problems after the Marchetti cases. In December 1975, for instance, Richard S. Welch, then CIA chief of station in Athens, Greece, was murdered. William E. Colby, then director of the CIA, stated that the naming of Welch in the previous edition of the leftist magazine Counterspy had contributed to the murder.[6]

The most notorious of all "leakers" was Philip Agee. In February 1980, Agee was seeking to market a second book critical of the CIA. Advertisements for the book promised that it would expose hundreds of covert CIA agents. The government, in legal battles to block publication of the book, argued that Agee had already disclosed the names of approximately 1,000 CIA agents.[7]

Information leaks have also occurred in recent years at, of all places, the Supreme Court of the United States. The Supreme Court had traditionally escaped public scrutiny of its behindclosed-doors deliberations. However, some Supreme Court law clerks, who serve as confidential aides to the justices, apparently handed over reams of confidential documents to reporters Bob Woodward and Scott Armstrong. In the latter part of 1979, rather unflattering revelations about the Court were published in Woodward and Armstrong's book, The Brethren. [8]

On February 19, 1980, the Supreme Court of the United States surprised the legal community when it handed down its decision in another case involving national security and the CIA, Snepp v. United States.[9] Ex-agent Frank Snepp was being sued by the government for publishing his book, Decent Interval, without submitting it to the CIA for prepublication review. The Court based its decision solely on the petitions for jurisdiction filed by Snepp and the government and did not allow briefs or oral arguments on the merits of the case. It is evident that, in this case, the Court did not adhere to applicable legal principles, and did not follow the precedents of similar cases. Why? Some observers believe that the ease with which security can be breached had been brought home dramatically to the Court by the publishing of The Brethren and that this realization was foremost in the minds of the justices when they rendered the Snepp decision.

When Snepp entered the CIA, he signed a secrecy agreement in which he promised not to publish any information or material relating to the agency without prepublication approval. When he left the CIA, he signed a termination agreement in which he promised not to publish any classified information or any information concerning intelligence or the CIA that had not been made public by the CIA without his first obtaining prepublication approval. During pretrial discovery, the government admitted that there was no material in Decent Interval that contained classified

information or information concerning intelligence or the CIA that had not been made public by the CIA.[10]

During the trial, none of the government's witnesses could quantify the harm done to the CIA because of the publication of Decent Interval. Nor could they estimate how much of the unquantifiable harm was attributable to the publication of the book. CIA Director Stansfield Turner and ex-director William E. Colby testified that subsequent to the publication of Snepp's book, numerous sources had become apprehensive about working with the CIA or had complained about the CIA's lack of control over secrecy.

The government asserted that, as a result of Snepp's publication of his book without prepublication approval, the CIA appeared to have little or no control over information disclosed by former agents. This appearance of a lack of control allegedly caused apprehension on t e part of CIA operatives or sources. Therefore, the operatives or sources might lessen or discontinue their relationship with the CIA. If this happened, the CIA would find it more difficult to gather the information necessary to maintain national security. Given that Snepp's book did not contain any classified information or any information about the CIA that had not been made public previously by the CIA, what apparently triggered this chain of events was not the content of the book, but the mere fact of its publication without CIA approval.

The Supreme Court upheld an injunction enjoining Snepp from publishing any work concerning the CIA or its activities without prepublication review by the CIA. Furthermore, the Court found that Snepp had breached a fiduciary duty to the government, and it imposed a "constructive trust" on the proceeds of his book. Thus, all the profits Frank Snepp received from publishing his book were to be turned over to the federal government.

NSDD 84 and Current Employment/Censorship Agreements

In March 1983, the Reagan administration issued National Security Decision Directive 84 (NSDD 84) concerning censorship oaths to be taken by federal employees. This directive was to apply to all executive branch agencies and would affect between 100,000[11] and 127,500[12] government employees. It would make mandatory a lifetime censorship oath[13] so that all officials who have access to sensitive information would be subject to lifetime censorship of their writings and speeches on subjects that may relate to such information. The directive widened the scope of the use of the polygraphs in investigating leaks from the large intelligence agencies to all executive branch agencies. It provided for the adoption of policies to govern contact between agency personnel and the media. It also provided for an increased role for the Federal Bureau of Investigation in the investigation of leaks.

Although NSDD 84 was issued in March 1983, details were not made available until August 25, 1983. The Senate Governmental Affairs Committee held a hearing on September 13, 1983, concerning this directive, and delayed its implementation until April 15, 1984.[14] However, on March 20, 1984, White House national security adviser Robert McFarlane wrote to Rep. Patricia Schroeder (D-Colo.) that the White House would abandon its plans "for the duration of this session of Congress" and would give 90 days' notice of any future action to deter leaks.[15] Congress is currently considering H.R. 4681, introduced by Rep. Jack Brooks (D-Tex.). This bill, if passed, would become the Federal Polygraph Limitation and Anti-Censorship Act of 1984, and it would prohibit any widening of the government's use of polygraphs and nondisclosure agreements.

One executive branch agency, the Department of Justice, has responded to NSDD 84 by issuing Order DOJ 2620.8. Based on the directive, DOJ 2620.8 provides that all Department of Justice employees authorized to have access to "sensitive compartmented information" (SCI) will be required to sign nondisclosure agreements containing a provision for prepublication review of books, newspaper columns, magazine articles, letters to the editor, book reviews, pamphlets, and scholarly papers. Any fictional articles based upon or reflecting upon information described as SCI will also be subject to prepublication review. Furthermore, if a person makes oral statements based upon written materials, such as in using an outline of the statements, the outline will also have to be presented for prepublication review. According to the Department of Justice, however, the provisions of DOJ 2620.8 corresponding to the polygraph and nondisclosure sections of NSDD 84 will not be enforced during the current period of rescission.

Both NSDD 84 and DOJ 2620.8 are based squarely upon Snepp v. United States (cited twice in the body of DOJ 2620.8, for instance), and they constitute a dangerous expansion of one of the more petulant, ill-considered opinions in constitutional history.

In the Snepp case, the government had serious legal problems regarding what contractual duties Snepp owed to the government. As noted above, when Snepp entered the CIA in 1968, he signed a broad agreement, promising not to publish "any information or material relating to the Agency...without specific approval by the Agency." Yet in 1976, when Snepp quit the CIA, he signed a more narrow termination agreement that only required him not to reveal "any classified information, or any information concerning Intelligence or CIA that has not been made Public by CIA." Obviously, the first contract signed by Snepp covered a great deal more information than the second. During pretrial discovery, Snepp's attorneys submitted an interrogatory to the government that exactly mirrored the language of the second agreement: "Do you contend that Decent Interval contains classified information or any information concerning Intelligence or CIA that has not been made public by CIA?" The government said that it did not, thereby admitting that Frank Snepp had not breached the second, more limited agreement.

A second problem with Snepp's contracts was whether his first agreement, which purported to deal with any information concerning the CIA, was constitutional. As noted above, the Marchetti case stood for the proposition that while a court would uphold secrecy agreements, those agreements would have to be strictly limited so as not to infringe upon an individual's First Amendment rights. The U.S. court of appeals clearly stated in Marchetti I that such agreements only could cover classified information.

Incredibly, the Supreme Court was silent as to the constitutionality of Snepp's agreements. While it relied on Marchetti to uphold the terms of Snepp's agreements and found that Snepp had breached them, the Court completely ignored the portion of the Marchetti decision that distinguished between Marchetti's two agreements to classified information. Moreover, it must be remembered that in the Marchetti case, Marchetti had published classi- fied information previously and was intending to do so at the time of the publication of his new book. Snepp, in contrast, had never published such material and had no intention of doing so.

Had the Supreme Court followed the Marchetti decision, the government would not be able to control such people as Snepp and the information, albeit unclassified, they disclose. The Supreme Court obviously opted for control of all information.

The Supreme Court never analyzed the differences in the two agreements signed by Snepp. In comparing the two agreements, the Court implied that the 1976 termination agreement was merely a reaffirmation of the 1968 entry agreement. The holding of the Court was exactly what the government contended in its brief -- that is, that the two agreements were basically the same and that the 1976 agreement continued in effect the broad prepublication review requirements of the 1968 agreement.[16]

The two agreements, on their face, are exactly alike as they relate to the process of submitting material for prepublication review. There is one important difference, however, which the Supreme Court deliberately chose to ignore: The second agreement changed the material itself covered by the agreements and limited it to classified information. Under traditional contract law, if there was "consideration" (a quid pro quo) given by Snepp for the second agreement, then the second agreement should be enforced. A derivative issue never analyzed by the Supreme Court was whether or not Frank Snepp gave anything in return for a less restrictive secrecy agreement. The answer is that he did. As Snepp's lawyers argued to the U.S. court of appeals:

The CIA obtained at least three fresh promises from Mr. Snepp under the 1976 agreement. In paragraph 5 he agreed to notify the CIA in writing of any future action he might take to obtain satisfaction of any monetary claims against the Agency. He also promised to pursue any claim "in accordance with such security advice as CIA (sic) will furnish me." Id. At paragraph 7, he promised to report without delay any attempt by an unauthorized person to solicit classified information. Finally, in paragraph 8, he promised to notify the CIA of any attempt by other branches of the Government to secure his testimony. He further promises to advise such investigators of his secrecy commitments and to request that the Government establish his obligation to testify.[17]

It is apparent from the CIA's actions that it intended Snepp's 1976 agreement to be less restrictive than his 1968 agreement. Snepp signed his entry agreement in 1968, and Marchetti signed his termination agreement in 1969; both of those agreements covered any material. Three years later, in 1972, such agreements were limited to classified material

by the Marchetti decision. The type of termination agreement signed by Frank Snepp in 1976 was first used by the CIA in 1973.[18] That type of agreement covered only classified information or information not made public by the CIA. Quite clearly, the second Snepp agreement was used in response to, and was an attempt to comply with, the Marchetti decision. Equally clear is the fact that the second Snepp agreement was meant to be more limited, in the scope of material it could cover, than the earlier agreements formulated prior to the Marchetti decision.

Thus, the inconsistencies of the two agreements signed by Snepp would not allow them to stand together. The 1976 agreement operated as a substituted contract, and it discharged the parties from the first agreement insofar as there were any inconsistencies between the two agreements. As stated in the Restatement of Contracts: "A substituted contract is one that is itself accepted by the obligee as satisfaction of the original duty and thereby discharges it. A common type of substituted contract is one that contains a term that is inconsistent with a term of any earlier contract between two parties."[19] In its unseemly, almost undignified, haste to render a decision in Snepp, the Supreme Court never addressed this basic principle of contract law.

NSDD 84 will not result in the kinds of contract problems that have existed with the two Snepp agreements. NSDD 84 agreements will be for a person's lifetime. DOJ 2620.8, for instance, provides that "Employees with access to SCI will be required to sign agreements providing for prepublication review of certain material." These agreements will cover such material prepared during, or subsequent to, employment with the Department of Justice. Therefore, as a condition for employment in the government, a person will have to sign a lifetime censorship agreement. The Snepp decision implicitly condones such a prior restraint. Under the Marchetti decision, such an agreement would be unconstitutional.

Types of Information Subject to Review under NSDD 84

The statutory basis for the CIA's protection of information is extremely vague. The Supreme Court held in Snepp that 50 U.S.C. 403 (d) (3) provides the necessary legislative authority for the prior restraints and employment contracts used by the CIA in the Snepp case. The statutory authority cited by the Supreme Court vests power in the CIA director to 'be responsible for protecting Intelligence sources and methods from unauthorized disclosure."

Although the statutory authority for the CIA to control publication of information appears to be limited to only sources and methods of gathering information, there is actually no limitation. Any information communicated could reflect, however minimally, its source and the method of gathering. As the government already has criminal penalties for disclosing classified information,[20] a significant question arises as to the judicial interpretation of what the government's limits are in relation to civil actions enforcing employment/censorship contracts.

In Marchetti, the court of appeals cited the statutory authority of 50 U.S.C. 403 (d) (3) and then stated that Marchetti's secrecy agreement was a reasonable means of protecting classified information from unauthorized disclosure.[21] Thus the phrase "sources and materials" was held to include classified information. In Snepp, the Supreme Court went even further and, in so doing, opened the door for NSDD 84. After citing the code provision, the Court stated that the CIA could have acted without the secrecy agreement to protect the "compelling interest" of both the "secrecy of information important to our national security and the appearance of confidentiality...."[22] What these terms mean is anybody's guess. Obviously the Court went beyond the strict interpretation of Marchetti, where it was held that these agreements could control only classified information. The Court added that efforts would have to be made to delete "sensitive material," including unclassified information, that would lead to "harmful disclosures."[23]

Trying to synthesize the Court's vague terms into a comprehensible standard is most difficult. Nevertheless, the standard the Court seems to have enunciated is as follows: The CIA may control sensitive material in order to protect the compelling state interests of (1) the secrecy of information important to our national security, whether it be classified or not; and (2) the appearance of confidentiality of our intelligence agencies.

Some later cases citing the Snepp decision appear to infer that this case deals only with the unauthorized disclosure of classified information.[24] However, this inference is simply not correct. And no group realizes this better than the Reagan administration. Under Executive Order 12356, issued on April 2, 1982,[25] there are three types of classified information: (1) Top Secret, (2) Secret, and (3) Confidential. The information the Reagan administration now seeks to be made subject to prepublication censorship, however, goes well beyond these three types of classified information. Under DOJ 2620.8, an employee will have to sign a lifetime censorship agreement, promising not to publish any

information that contains (1) any SCI (sensitive compartmented information), any description of activities that produce or relate to SCI, or any information derived from SCI; (2) any classified information from intelligence reports or estimates; or (3) any information concerning intelligence activities, sources, or methods.

DOJ 2620.8 defines SCI as being not only classified information but also material subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods. Moreover, as noted above, the order uses the phrase, "any information," the same phrase that was held unconstitutional in Marchetti, but was upheld in the Snepp decision. Thus, DOJ 2620.8 sets up three categories of information that may be deleted by the government censors prior to publication: (1) classified information (2) SCI and (3) any information concerning intelligence activities, sources or methods. Indeed, DOJ 2620.8 goes on to point out that "In this regard, it should be noted that failure to submit such material for prepublication review constitutes a breach of the obligation and exposes the author to remedial action even in cases where the published material does not actually contain SCI or classified information. (See Snepp v. United States, supra.)" Thus, the Reagan administration is taking full advantage of the shoddy standards set by Snepp.

Enforcement of Employment Censorship Oaths: Prior Restraint or Subsequent Punishment

Under Marchetti, prepublication review was allowed only upon allegations that the defendant was intending to publish classified material. The Snepp decision and the proposals by the Reagan administration, however, allow for prepublication review of any material relating to intelligence activities, sources, or methods, and SCI. The government need no longer bear the burden of alleging and proving that the publication of classified material is imminent. Therefore, the boundaries of permissible prepublication review have been enormously expanded. By doing this, the Reagan administration has emasculated one overriding constitutional standard: the historical presumption against prior restraint.

The term "prior restraint" has a meaning separate and distinct from the term "subsequent punishment." The concept of prior restraint deals with official government restrictions upon expression prior to publication. The concept of subsequent punishment deals with penalties imposed after publication.

During the course of the eighteenth century, after the lapse of the English licensing laws on publication, freedom of the press from licensing rose to the level of common or natural law.[26] Blackstone summarized this, as well as the dichotomy between prior restraint and subsequent punishment, in the following passage:

The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publication, and not in freedom from censure for criminal matter when punished. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[27]

The underlying purpose of the First Amendment was to preclude such prior restraints on publication.[28]

Snepp's employment contract and the Reagan administration's proposed censorship oaths require government employees to turn over to the government for review any material they plan to publish that in any way deals with the proscribed information. A government censor would then review this material and delete any or all of the material the government wishes deleted.

In discussing the nature of prior restraint, Thomas I. Emerson has stated: "[T]he clearest form of prior restraint arises in those situations where the Government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official."[29] This is exactly the situation Frank Snepp now finds himself in, and what is proposed for government employees by the Reagan administration. The contract enforced in Snepp and the proposed Reagan regulations are classic prior restriants.

Governments invariably favor prior restraint. A free society should not. The reasons are many: First, material brought under government scrutiny by prior restraint is almost always far more extensive than material subject to subsequent punishment. The system of prior restraint upheld in the Snepp decision included any material relating to the CIA.

Subsequent punishment, in light of the current laws, could deal only with classified material.

Second, prior restraint either withholds the information altogether or creates a serious delay in publication until the issue of its release is settled. A good example is the Marchetti II case, which took over three years for final litigation regarding what could or could not be published. In DOJ 2620.8, the Department of Justice has provided for a system of prior restraint wherein the Council for Intelligence Policy will review the submitted material within thirty working days -- that is six weeks. Should the applicant not be satisfied with the council's deletions, the applicant can then appeal to the deputy attorney general. This appeal is supposed to be processed within fifteen working days (three weeks). Thereafter, should the author still be dissatisfied, he will have to obtain judicial review either by filing an action for declaratory relief or by giving the department notice and a reasonable opportunity (thirty working days) to file a civil action seeking a court order prohibiting disclosure. This delay of three to four months is just the beginning. The DOJ order goes on to state: "Of course, until any civil action is resolved in court, employees remain under an obligation not to disclose or publish information determined by the Government to be classified."

Third, a system of prior restraint is much easier to implement than subsequent punishment. Once material has been published, the decisions regarding prosecutions are much harder to make than are decisions of whether to allow publication. A single bureaucrat can institute prior restraint by a "stroke of the pen,"[30] while a phalanx of lawyers may be necessary to prosecute someone subsequent to publication. This point is also illustrated by Marchetti II, where there were originally 339 items deleted while only 168 were litigated.

Fourth, prior restraint allows faceless bureaucrats to arbitrarily determine whether something shall be published. Under subsequent punishment, the criminal court system prevails with a public trial, not a bureaucrat's star chamber.

Fifth, prior restraint encourages the worst instincts of government employees. As Emerson notes, "[P]erhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration."[31] This point is illustrated by Marchetti II and the review standards of the CIA. The following are some of the 171 allegedly "classified" items that the CIA initially deleted from Marchetti's book, The CIA and the Cult of Intelligence, (and then subsequently agreed could be published):

> "The Chilean election was scheduled for the following September, and Allende, a declared Marxist, was one of the principal candidates";
>
> "Henry Kissinger, the single most powerful man at the 40 Committee meeting on Chile";
>
> "On occasion, the agency will sponsor the training of foreign officials at the facilities of another government agency";
>
> "As incredible as it may seem in retrospect, some of the CIA's economic analysts (and many other officials in Washington) were in the early 1960's still inclined to accept much of Peking's propaganda as to the success of Mao's economic experiment";
>
> "[Referring to a National Security Council briefing by Richard Helms], [H]is otherwise flawless performance was marred only by his mispronunciation of 'Malagasy' (formerly Madagascar) when referring to the young Republic"; and
>
> "Prepared by the Pentagon's National Reconnaissance Office, the Joint reconnaissance schedule is always several inches thick and filled with hundreds of pages of highly technical data and maps."[32]

Sixth, an individual may be more certain as to what he may publish under a system of prior restraint, thereby reducing his risk of punishment, but the societal interest in free expression far outweighs such certainty. Indeed, the philosophy of prepublication approval for certainty's sake implies a timidity in expressing controversial ideas that is at odds with the essence of a free society. An especially chilling paragraph of DOJ 2620.8 provides as follows:

Therefore, present or former employees are encouraged voluntarily to submit material for prepublication review if they

believe that such material may contain classified information even if such submission is not required by a prepublication review agreement. Where there is any doubt, present and former employees are urged to err on the side of prepublication review to avoid unauthorized disclosure and for their own protection. (Emphasis added)

The Supreme Court could not have said it any more plainly. While the Court in the Snepp decision chose to ignore the issue, it is obvious that the enforcement of Snepp's contract used a classic prior restraint. The Court's tolerance of such a system is completely at odds with the traditional First Amendment doctrine opposing prior restraints. And what the Court's tolerance has led to, NSDD 84 and DOJ 2620.8, provide for the most farreaching peacetime censorship boards ever seen in the United States.

Is There a Better Way?

The lack of one governmental agency sets our country apart from almost all others. This lack is a blessing bestowed on this country by the libertarian heritage of its founders, and it is a cornerstone of a free society. The agency we lack? A government censorship agency.

The Reagan administration proposes to remedy this deficiency and clearly contemplates either one large censorship board or several smaller boards contained within the various governmental units. One "trial balloon," put forward by Assistant Attorney General Richard K. Willard, proposed that penalties up to $5,000 plus an unlimited amount for damages be meted out to those who leak classified information. These penalties and/or damages would be determined by administrative officers rather than judges. Moreover, such an officer would hold a closed hearing to which even the lawyer for the alleged "leaker" could not gain entry unless he had been cleared to receive classified information.[33] The Reagan administration apparently has no more regard for the Sixth Amendment right to counsel than it does for the First Amendment freedoms.

Is there a better way, an alternative to trashing the First and Sixth Amendments? The answer is yes. Recently, Congress enacted Public Law 97-200, which provides for criminal penalties for knowingly identifying covert agents. It is a classic example of subsequent punishment, which is the only approach that should be taken for plugging dangerous leaks. Subsequent punishment, as opposed to prepublication censorship, has long been this country's approach to the problem of leaks, and it is an approach that has served us well. P.L. 97-200 is the type of prophylactic criminal statute that should be used to plug leaks. If the leaks that prompted issuance of NSDD 84 are so dangerous that the Reagan administration believes the First Amendment must be cast aside to plug them, why not throw the perpetrators in jail?

The Reagan administration has not substantiated any of its proposals with an analysis of what it hopes to accomplish with NSDD 84. We now have criminal penalties for disclosing classified information or the identity of covert agents. One should pause and reflect on what additional information NSDD 84 will really censor. If Philip Agee and his ilk are not deterred by criminal penalties, are we to believe that now they will be deterred because they will have violated a secrecy oath? If spies, "moles," and/or others with treasonous intent give away and/or sell critical defense-related material to foreign governments under threat of imprisonment, are we now to believe that they will be struck down with fear because of NSDD 84? Of course not. They will continue to ply their trade. What will be affected is the flow of information most vital to a free society: Those bits of information leaked to the media by conscientious government employees concerning cost overruns, embarrassing blunders by officials, and outright "official" lies.

Obviously, the leaks that so trouble the Reagan administration are not the dangerous leaks, for those can be more effectively plugged by stiff criminal penalties. What has upset the administration is its own inability to formulate and carry out its policies in total and complete secrecy. What Congress must determine is whether this administration, and following administrations, should be allowed to function in such secrecy.

The Reagan administration's leap to censorship not only includes proposed censorship panels controlling classified and unclassified information but also affects the manner in which information is classified and/or declassified. Executive Order No. 12,065, Section 3-303, 3 CFR 190, 197 (1979) mandated the declassification