

Tape 14

Side A, 1/8 - 1/4

3 JUN 1980

NOTE FOR: Gary

FROM: DCI

I made some semi-commitments to Mr. John J.D. Owen of Amherst, a classmate and friend, that I'd see him if he came to Washington and called; and to President Ed Mortola of Pace University who is on some Presidential Commission for Education.

*Cy : Trip file*

*Xerox cys to Gary + trip file*

# Snepp: The Case for Judicial Restraint

by Anthony Lewis

Guest  
Point of  
View

The Warren Court was often chided by conservatives for failing to exercise self-restraint—for reaching out to decide issues instead of leaving them, at least in the first instance, to the political branches of government. Given the great power of the Supreme Court, it *should* be wary of overreaching. But the caution should apply whether a novel decision is being made in the interests of the individual or of the state.

In the case of Frank Snepp, the Court reached out for novel doctrine that greatly enlarges the state's power to suppress what it defines as official secrets. The Court acted without explicit congressional guidelines, in an area where Congress has done much legislating, and it acted in a summary manner that violated its own traditions. The result is to give this country the first elements of an Official Secrets Act: the statute that in Britain has been condemned by repeated studies as an unjustified obstacle to informed democratic control of government.

Snepp was a Central Intelligence Agency man in Vietnam. After leaving the agency in 1976 he wrote a book, *Decent Interval*, that criticized the performance of Secretary of State Kissinger, Ambassador Graham Martin, and CIA officials in the final days—criticized them in particular for leaving behind, when the Americans pulled out in 1975, many Vietnamese who had worked for the CIA and other U.S. agencies.

Like all CIA employees, Snepp on joining the Agency had signed an agreement not to publish anything about it without its prior approval. In the earlier case of Victor Marchetti, the U.S. Court of Appeals for the Fourth Circuit had decided (and the Supreme Court declined to review the decision) that that promise was a legally-binding contract, enforceable by injunction. But *Decent Interval* appeared before officials knew about it: too late for an injunction against publication. The government instead sought to penalize Snepp financially, to discourage others from following his example.

Damages are the usual remedy for breach of contract; but in suing, the Government sought something more: a "constructive trust" that would take all of Snepp's profits from the book and give them to the Government. It won that from the trial judge, but the Fourth Circuit said the proper remedy was punitive damages, fixed by a jury. Snepp asked the Supreme Court to review the whole theory that his promise was an enforceable "contract."

The Government opposed review, saying that it was content with the Fourth Circuit decision. But if the Supreme Court heard the case, it said, it would argue for the constructive trust remedy.

The Supreme Court took the case and decided it summarily, without hearing argument. A 6-3 majority, in an unsigned opinion, found that Snepp had violated both his "contract" and a "trust inherent in his position." The Court imposed a constructive trust on Snepp, requiring him "to disgorge the benefits of his faithlessness."

The manner of the decision was extraordinary. Because the government had only conditionally raised the question of the remedy, saying it was satisfied with what it had won in the Court of Appeals, Snepp's lawyers had not briefed the legal issue of constructive trusts—much less had an opportunity to argue it orally. Justice Stevens, in the dissenting opinion, said he had been able to find no precedent for the Supreme Court thus reaching out to decide a question without giving counsel some chance to discuss it.

The matter—the substance of what was decided—was even more remarkable. For the Court did not stop at holding that CIA employees who sign formal secrecy undertakings are legally bound by them. It did not stop at affirming that those persons may be enjoined from writing or speaking about the agency's secret work, as Victor Marchetti was, or may be financially punished for publishing without prior clearance. The Court raised the possibility that those draconian devices may be applied to anyone in government who has access to significant classified material.

"Quite apart from the plain language of the [secrecy] agreement," the Supreme Court said, "the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship." Elsewhere the opinion implied that Snepp's position not only could but did create "a fiduciary obligation" not to say anything without his superiors' approval.

Thousands of people in the Defense and State Departments and elsewhere have access to material as secret as that known to Frank Snepp, who was not a high CIA official. Potentially, therefore, any one of those persons can be enjoined from speaking about abuses in his agency or deprived of his royalties for publishing without approval a book critical of agency policy. In effect the Court has given the government the outlines of a broad new secrecy law, which future judicial decisions can fill in.

# Letters

C T O T H E E D I T O R



## The Experience of Breast Cancer

The articles on breast cancer are a tribute to enlightened journalism ("Reducing the Trauma of Breast Cancer" by Maya Pines and "The Best Years of My Life" by Betty Rollin, April 6).

I recently underwent a double mastectomy, and I find the sentiments expressed by the authors very honest and thorough. Thank you for helping me and, I imagine, countless others. It is a difficult ordeal to go through, and we need support systems from many—most of all the physicians involved.

PEM DONEGAN WORMER  
Farmington, Conn.

Maya Pines's otherwise good article contained a few factual errors. A modified radical mastectomy is not the same as a total mastectomy, nor was the modified radical compared with other surgery in the National Surgical Adjuvant breast study. Actually, the modified radical mastectomy was recommended as the surgical procedure of choice by the National Cancer Institute consensus committee even though there has never been a randomized trial to compare it directly with other types of surgery.

Random trials are not always necessary to demonstrate the effectiveness of certain treatments. Evidence accumulating from many centers all over the world shows that the procedure of local excision and radiation therapy yields results just as good as mastectomy despite the non-random nature of most of these studies. Women should be made aware that this option of treatment exists, and have

the opportunity to discuss it with a qualified radiation therapist prior to surgery.

LEONARD R. PROSNITZ, M.D.  
Professor of Therapeutic Radiology  
School of Medicine  
Yale University  
New Haven

The two-step procedure will enrich surgeons, anesthesiologists and hospitals, but at what benefit to patients? I find it hard to believe that Dr. Kelley really distrusts her pathologists, or that the extensive testing called for is cost-effective, either. The fact is that an abundant body of literature exists demonstrating that pathologists are quite accurate, and that, for example, scanning is overutilized in the majority of early cases.

JOSEPH E. BARRIE, M.D.  
Concord, Mass.

I wish to add one point about the psychological benefit to the patient of the two-step process. I had a biopsy and "lumpectomy" in the ambulatory-surgery program at Norwalk Hospital. When I awoke, my surgeon told me the biopsy showed a malignancy. He said I should get dressed and go home and come to his office on Monday. At that point, I thought my only options were just how radical a mastectomy I would undergo. To my astonishment and relief, the surgeon recommended radiation—painless and, we now believe, successful in my case.

The days between the surgeon's personal diagnosis and the biopsy were infinitely more difficult for me than the days between the biopsy and the appointment to discuss the options. The earlier period found my husband and me drawn together in enormous tension.

We went through all of our fears before the biopsy. But once we actually heard the dreaded news, we found we could cope. Divorcing some of the emotional strain from the necessary physical ones is truly a blessing for the patient and her family.

PHYLLIS S. MCGRATH  
Weston, Conn.

Happy fifth anniversary, Betty Rollin! How wonderful it is that this person is really

alive and really happy to be alive; how sad, that it took such a close call before she was able to see and understand what was going on in her life and to make some rather drastic changes for herself.

A paradox indeed that Betty Rollin had to have a part of the whole taken away before she became whole. I sincerely hope other people can learn from her painful experience. Many thanks to Miss Rollin for sharing so openly her own personal experience. Obviously, she gained much more from her mastectomy than she lost. We all can learn a lesson in living from her. I hope she sees and feels many more anniversaries.

BARBARA-ANN KLIE  
Rochester

## Accountability of The C.I.A.

Tad Szulc argues that leaks concerning C.I.A. covert operations from Capitol Hill sources are no problem and asserts that Director of Central Intelligence Stansfield Turner "has admitted that he knows of no examples of such leaks from Capitol Hill sources" ("Putting Back the Bite in the C.I.A.," April 6).

If Admiral Turner's admission was correct as of the time it was made, he now needs to look no farther than Mr. Szulc's own article to find a leak on a sensitive C.I.A. matter from Capitol Hill sources. The article describes a meeting in S-407, "the most secure room in all of Congress," to review C.I.A. plans for covert, paramilitary operations in Afghanistan. In view of the detailed description of the discussion and decisions made at a secret meeting attended only



members of the Senate, C.I.A. representatives and the staff directors of the Select Committee, how can it be maintained that there are no leaks from Senate sources on matters of national interest?

CHARLES A. BANE  
Chicago

As the wife of a C.I.A. operative, I find the prospect of a less accountable C.I.A. threatening indeed.

I'm also puzzled by the claim of some that had the C.I.A. not been stripped of its powers, we would not be in the mess we're in today, especially the mess of Iran.

How quickly we seem to forget that the C.I.A. masterminded the overthrow of Mosaddegh in 1953, putting the Shah in power. The excesses and the unaccountability of the agency in Iran, and in many other now anti-American countries, have made the mess.

It is not a question of what might have been good for Iran, or what is right or wrong. It is a question of interference. A backlash is inevitable. The greater the power of the C.I.A., the more irans we can expect. Indeed, El Salvador and Nicaragua stand as examples.

CLAUDIA BACH  
Carbondale, Colo.

## Welcoming Vietnam Refugees

The drama of collective violence described in "Vietnam Fallout in a Texas Town" (by Ross Milloy, April 6) is typical of eruptions between segregated communities without bonds of language, memory or religion to bind them. But Seadrift is not the whole story. As a sponsor and director of the Indochinese Refugee Sponsorship Development Project of the Dutchess Interfaith Council, I have seen Vietnamese refugees being welcomed in Dutchess and Ulster Counties. My own committee furnished a complete four-room apartment without any cash outlay except for window shades. Nor does responsibility end with material donations. Sponsors show refugees how to shop and cope, get them jobs and apartments, drive them to medical appointments and language lessons, and often tutor them themselves.

Many feel (do) that we have benefited more than they by these relationships.

HELEN FEIN  
Director, Indochinese Refugee Sponsorship Development Project  
Poughkeepsie, N.Y.



## Preserving and Sharing Art

I want to thank Mary Vespa for her article "Rare Finds in a Museum" (April 20). Although the article dealt only with the plight of photographic collections, its tale of involuntary neglect and deterioration can be generalized to three-dimensional objects, paintings and prints in most American museums of anthropology.

Various ideas have been advanced for rekindling interest in their preservation. At the Peabody Museum, we are experimenting with the country's first large-scale collection-sharing program. During the next three years, the Peabody will make available to nine art, history, science and general museums some 1,200 artifacts, photos, paintings, prints and documents for public exhibition.

FRAN SILVERMAN  
Director, Collection-Sharing Program  
Peabody Museum  
Harvard University  
Cambridge, Mass. ■

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