the punishment—in essence, whether or not to disqualify their principal political opponent from holding public office. Should this occur and Sirimavo Bandaranaike is banned from civic life, there will be serious questions about the future of Sri Lankan politics. Will the price of political opposition be too high? Can democracy function in such an atmosphere? What are the next steps to more arbitrary rule?

Mrs. Bandaranaike is probably the most distinguished citizen of Sri Lanka. Entering politics upon the assassination of her husband, Prime Minister Solomon Bandaranaike, she was elected premier in 1960, becoming the world's first female head of government. Defeated at the polls in 1965, she returned to power in 1970. She is one of the founders of the nonaligned movement of Third World nations, and her international reputation stands high—especially among the newer nations of the Third World. At sixty-three Mrs. Bandaranaike has many years of political life ahead of her; penalties imposed by politically inspired investigations will be ill-received all over the world.

Above all there are three considerations at issue. First, actions of this type put an unbearable strain on one of the few democratic political systems remaining in the Third World. Second, the aura of vindictiveness that always surrounds such policies lingers and initiates a cycle of bitterness which poisons the body politic of a nation. And third, these actions detract from several positive accomplishments of the United party government.

In an era when political liberties and individual rights are contracting around the world, Sri Lanka has stood fast against this trend. If its dignity is to be surrendered to expediency, the world will be disappointed and freedom itself diminished. Thus, for reasons larger than national events and personalities, Sri Lanka is of vital importance at this time—and its present rulers are accountable to global public opinion and to history.

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EXCURSUS 2

Thomas M. Franck on SNAP JUDGMENT ON SNEPP

These are dangerous times, and many Americans are tired of seeing the CIA get kicked around. They suspect that if the agency hadn't been effectively disemboweled in the early '70s by politicians, journalists, and malcontents in its own ranks, perhaps the world wouldn't be treating us now with such cocksure contempt. This touching rebirth of public faith in the CIA has made life hard for the whistle-blowing industry. Even editors, publishers, and booksellers are queasy about exposés by former agents.

The Supreme Court has captured this mood in its decision to discipline ex-agent Frank W. Snepp III for publishing a kiss-and-tell memoir. As Snepp and his defenders in the ACLU and Harvard Law School have lectured their way around the publishing circuit, pointing out the dangers of the *Snepp* decision to those who live by the First Amendment, they have been welcomed with folded arms.

And this is odd, because the Supreme Court, in teaching Snepp a lesson, has framed a pretty horrendous law that may well affect anyone who can read or write. The Court seems to have upheld a prerequisite for CIA employment that requires some applicants to waive their constitutional right of free speech. Such a waiver, the Court maintains, can be enforced.

When Snepp wrote *Decent Interval* in 1978, he failed to submit the manuscript to the CIA's censors, thereby violating his employment contract. The Supreme Court responded by impounding Snepp's royalties and enjoining further publication. Upholding the sanctity of the contract, it sternly warned that the "continued availability of [foreign undercover] sources depends on the Agency's ability to guarantee the security of information that might compromise them." Further, the CIA has a right to impose "reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment....The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."

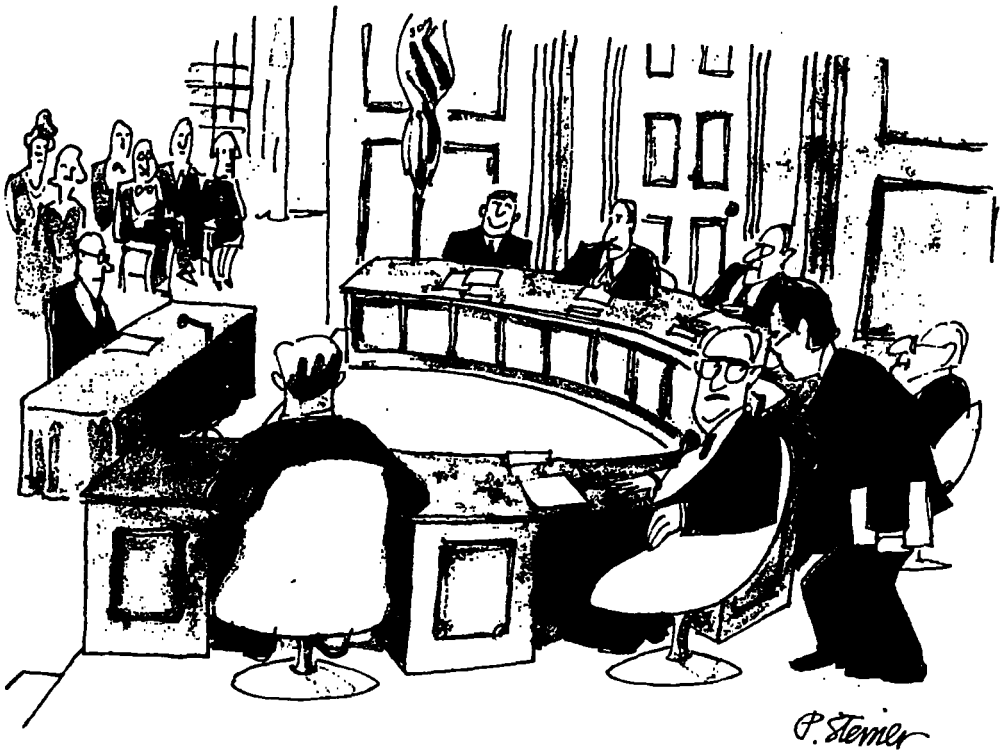
But this, too, is odd because the government admitted that Snepp had used no classified information. Not only did Snepp endanger none of our sources, but he convincingly charged the Agency with recklessly endangering its Vietnamese employees in abandoning them in the scramble to evacuate Saigon.

The *Snepp* case is rooted in two characteristic American peculiarities. Almost alone among nations the U.S. has no Official Secrets Act to criminalize unauthorized disclosures by government employees or ex-employees. And, in the First Amendment, we have a constitutional guarantee of free expression, which the courts have interpreted as prohibiting the censoring or banning of publications except when they pose a clear and present danger to the public safety. Thus the CIA is left with insufficient means to protect its secrets. There are espionage laws, of course, but these are directed for the most part against persons who deliver secrets to a foreign power with intent to injure the United States. They are of no help, since it has become the fashion nowadays to confess secrets to the media rather than to Moscow, and the dominant motive is to absolve oneself, not aid the Politburo.

Nevertheless, the U.S. code does fasten on the director of central intelligence an awesome—and seemingly impossible—responsibility for protecting "intelligence sources and methods from disclosure." With newspapers, TV, and publishers licensed by the First Amendment to lionize the indiscretions of ex-agents, how can this responsibility be discharged? The Agency's hapless answer is "the contract." The version Snepp signed commits him not to publish or divulge, without prior Agency approval, any information "relating to the Agency, its activities or intelligence activities generally."

Almost everything about this contractual approach is absurd. If Snepp had breached national security, the remedy—an injunction and seizing of royalties—would hardly have put the toothpaste back in the tube. But there was no breach of security, and Snepp was penalized for doing something the Constitution regards as useful: criticizing the government. If the intention in suing Snepp was to deter others from circumventing the censors, it seems elementary that a real villain would be little affected by the prospect of losing his book royalties. Evading this dilemma, the Supreme Court in its *Snepp* judgment relegates the entire, crucial First Amendment issue to a superficial footnote. While treating the contract as decisive, the Court fails to scrutinize its constitutionality.

That constitutionality is far from self-evident. In a comparable context the Supreme Court has at least twice held that an employer may not require an employee to waive a



"Find out why Senator Penrose is smiling."

constitutional right as a prerequisite for a job. Its earlier reasoning is sound. If employment preference can be given to those willing to forgo basic rights, all of us may have to forgo them sooner or later in order to work.

No doubt the Supreme Court would conclude that the First Amendment does not protect those who wish to make public the names of U.S. undercover agents or advertise movements of troops and supplies deployed to rescue hostages. But is it equally clear that the Agency may constitutionally require Snepp to submit *everything* for screening? The judges in *Snepp* came close to answering this in the affirmative. In so doing, they may well have been impressed by the Agency's argument that the contract is the only weapon at its disposal. Yet it is a clumsy, essentially useless and harmful weapon that aims at the wrong target.

The CIA's real problem is exemplified not by ex-agent Snepp but by ex-agent Philip Agee, who resigned in 1969 and has since devoted himself to publishing the names of CIA employees, covert operatives, and locals engaged in clandestine activities. Agee, unlike Snepp, openly boasts of an ideological commitment to the destruction of the Agency and all its works. Through his association with the periodical *CounterSpy* and, later, *CovertAction Information Bulletin*, roughly twelve hundred names have been publicized and one named agent has already been assassinated.

If it is the Agees who are the real problem, then the primary responsibility for containing damage rests with the Agency itself. How is it that so many agents turn author and that damaging leaks occur constantly? Is personnel selection and screening all it might be? Agee claims that all of his information was readily available from unclassified rosters and directives, some of which have subsequently been classified. Why were they unclassified? Why were the thefts of top secret CIA operational manuals, discovered during last year's "Snowman" espionage trial, so long undetected? Who declassified the information recently published by the *Progressive* magazine that described the manufacture of nuclear weapons? At least part of the problem is the Agency's own top officials who have cultivated so assiduously the tactic of leaking information favorable to their cause that critics within the ranks have felt free to respond likewise. Not to mention former secretaries of state who feel free to use classified information in their memoirs.

Only if the Agency, after taking administrative steps to tighten its internal security, is still unable to stop leaks endangering national security, does it have a claim to a helping hand from the law. And if such help is needed, it should come not in the form of a spurious contract but of a carefully considered and crafted criminal remedy, properly enacted by Congress to do the job without causing unnecessary damage.

Such a criminal law should do three things: deter or punish those whose disclosures seriously endanger our security, protect whistle-blowers who disclose information useful to the regenerative processes of the system, and make the courts—not the Agency—the arbiter of which is which. To be effective the law would have to define the powers of the Agency as well as the prohibited conduct. This of course is what Congress has been trying to do in writing a comprehensive intelligence charter. At present there are no legislated limits in the 1949 law establishing the CIA. A fairly reasonable list of prohibitions is to be found in Executive Order 12036, which excludes some of the more bizarre methods used in past operations. But since that Order is too easily changed, its strictures should be embedded in concrete legislation.

The trouble with the *Snepp* case is that it ratifies a procedure that was designed to ameliorate a problem but which, instead, creates a worse one. Could this be the Court's way of provoking reform?

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