Snepp Decision Seen Helping

By Fred Barbash
Washington Post Staff Writer

The Supreme Court's government secrecy opinion, issued Tuesday to help the CIA solve a problem with leakers, may also help to solve a similar problem at the Supreme Court.

In the view of many lawyers, the opinion in the Frank Sneep case gave the government broad new powers to restrict release of information not only by intelligence operatives, but also by a wide variety of government employes, including people who work at the Supreme Court.

And it is court employes, particularly clerks, who have been blamed for a series of court leaks in the past two years, one of which produced the best-selling book, "The Brethren."

Many lawyers also feel the court acted with unusual haste, unusual reach and with a phrase at the end of the opinion that reflected unusual vehemence. The opinion, the court said, requires Snepp to "disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk."

"Whether it was the courts purpose or not," said Gerald Hollingsworth, general counsel and vice president of Randon House, Snepp's publisher, "the justices have seemingly fashioned a remedy which could enable the court to reach its own employes leaking its own secrets."

The case was prompted by Snepp's publication two years ago of "Decent Interval," a book based on his experiences as a CIA official in Vietnam. Though the government did not allege that the book revealed secret information, it pursued Snepp for not submitting his manuscript for prepublication screening by the CIA. He was required to do so under a secrecy agreement he signed as a CIA agent, the government contended.

The government moved to seize all of Snepp's earnings from the book (now about $115,000) and to enjoin any further violations of the prepublication screening requirement. It won all it sought, including an extension of the injunction to cover anyone acting "in concert" with Snepp, in this case Random House.

Since Random House is preparing to publish further Snepp writings, according to Hollingsworth, the company now believes that for the first time a publisher has been placed under "prior restraint" against putting out a book.

The court's approval of the District Court's orders in the case went well beyond the CIA, lawyers pointed out, and secrecy agreements by employes.

Government employes with access to "sensitive information" have a trust relationship with their employers, the court said. The trust may be established, in part, by "access to confidential sources and materials," not just to national security secrets.

"Without a dependable prepublication review procedure no intelligence agency or responsible government official could be assured that an employe privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be

Court to Plug Its Own Leaks

disclosed to the world," the majority said.

The remedy imposed, the confiscation of earnings, "is the natural and customary consequence of a breach of trust."

At the court, law clerks and some other employes are privy to the secretive memoranda and conversations which lead to decisions by the justices.

Bob Woodward and Scott Armstrong, authors of "The Brethren," say they relied on hundreds of interviews with clerks to describe those secret deliberations over a seven-year period at the court. Previous leaks, notably an advance on a major Supreme Court opinion to ABC reporter Tim O'Brien, have also been attributed to court employes.

Though there is no law governing secrecy among court employes, Chief Justice Warren Burger has said that one is not required to solve the problem.

In his dissent in the Pentagon Papers case in 1971, Burger wrote: "No statute gives this court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the court to protect the confidentiality of its internal operations by whatever judicial measures may be required."

The Snepp opinion may have been the first judicial measure, some lawyers believe. "A clerk is clearly in a position of trust in dealing with sensitive information," said American Civil Liberties Union lawyer Mark Lynch, who represented Snepp. "I think there's no question that the decision could apply to them."

"I see the decision as in part a reaction to confidences improperly breached" in "The Brethren," said Bruce Fein, an American Enterprise Institute court expert.

"I can't say that conclusively. But in the procedure used by the court, the decision reflected a kind of instinctive hostility" unusual for the justices.

Procedurally, the court chose to issue its unsigned opinion without arguments from either side. According to Eugene Gressman, coauthor of a book on Supreme Court practice, that is uncommon in major cases but not unique. It is, he said, "unfair. You wake up in the morning and find you've lost your case without ever having had the chance to argue it."

In addition, the court gave the government more than it or anyone else had asked for. The Fourth U.S. Circuit Court of Appeals had overturned the seizure of Snepp's earnings as too harsh a penalty. The government told the Supreme Court that if it rejected Snepp's appeal of the rest of the lower court decision, it should also reject the government's appeal of the earnings seizure decision. The court disregarded the government's request.

Justice John Paul Stevens, in a dissent along with Justices William Brennan and Thurgood Marshall, called that action "unprecedented." He described that and the decision in general as an "uninhibited . . . exercise is lawmaking."