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A REPORTER KEEPING CONFIDENCES: MORE IMPORTANT THAN EVER

*David Rudenstine**

This much is agreed upon: the press is essential to self-government. It informs the people, and thus contributes to assuring government accountability to the people, whose informed vote is crucial to conferring legitimacy on the self-governing enterprise. After that there is only debate over the role of the press in our democracy, and that debate is particularly acrimonious when it focuses on the subject of this symposium—namely, the degree to which the law should protect reporters from having to divulge confidential sources upon which their reports depend, or suffer judicially imposed sanctions, such as imprisonment, as the price they must pay for keeping a promise of confidentiality.

The debate over what we popularly term the reporter's privilege is hardly a recent development. In perhaps the first reported case, John Nugent, a reporter for the *New York Herald*, went to jail in 1848 rather than disclose to Congress the name of the individual who gave him a secret draft treaty with Mexico.¹ At the other end of the historical continuum, Judith Miller, a reporter for the *New York Times*, went to prison for eighty-five days in 2005 rather than identify her source to the Valerie Plame special prosecutor, Patrick Fitzgerald.² These two moments, separated by 157 years, highlight the durability of the debate over the right of a reporter to keep confidential a source's identity, an issue over which contemporary scholars, commentators, law makers, reporters, and editors not only continue to disagree, but disagree vigorously. This disagreement runs deep and broad, and includes many

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¹ Stephen Bates, *The Reporter's Privilege, Then and Now 2* (The Joan Shorenstein Ctr. on the Press, Pol., & Pub. Pol'y, John F. Kennedy Sch. of Gov't, Harvard Univ., Research Paper R-23, 2000), available at http://www.hks.harvard.edu/presspol/research_publications/papers/research_papers/R23.pdf; see also DONALD A. RITCHIE, PRESS GALLERY: CONGRESS AND THE WASHINGTON CORRESPONDENTS 28-29 (1991).

² Don Van Natta Jr., Adam Liptak & Clifford J. Levy, *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1; Max Frankel, *The Washington Back Channel*, N.Y. TIMES MAG., Mar. 25, 2007, at 40.

specific issues such as whether the privilege should be absolute or qualified; whether the privilege should be protected by the Constitution or a statute or the federal courts should base a reporter's privilege on federal common law; and whether the privilege belongs to the reporter or the source.

The issue of a reporter's privilege sweeps broadly across the work of reporters. For example, the issue may arise in a libel case in which an injured party wishes to sue not only a reporter and a newspaper, but the source, who contributed to the alleged libelous report and whose identity a reporter refuses to disclose.³ Or it may arise when a grand jury investigating a crime demands that a reporter identify the source of a news report on the assumption that the source may have committed an underlying crime or knows the identity of a person who did.⁴

Although there is little doubt that the news reports resulting in libel actions or grand jury investigations are important to keep the public informed, there is also no doubt that such reports generally pale in comparison to the public's need to be informed about national security matters. These issues, which include military, diplomatic, and intelligence matters, are directly relevant to the nation's security and liberty, vital to the democratic process, and extremely difficult for the public to be informed about.

Since the end of World War II, two trends have combined to make it difficult for the public to be informed about important national security issues. First, during the last sixty years, the executive branch has accumulated enormous power over military, diplomatic, and intelligence matters.⁵ It has done so for many reasons including the fact that the Constitution grants the executive certain responsibilities and powers; the pyramidal structure of the executive culminating in the presidency encourages the accumulation of power and responsibility in the President's two hands as opposed to the hundreds of hands of the Congress; Congress has, with few exceptions, ceded power to the executive at its own expense;⁶ and the federal courts have adopted such

³ Anthony Lewis, Panel Discussion at Cardozo Law School: Are Journalists Privileged? (Apr. 23, 2007), in 29 CARDOZO L. REV. 1353 (2008).

⁴ *Id.* at 1357.

⁵ See generally CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); FREDERICK A. O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007); MATTHEW CRENSON & BENJAMIN GINSBERG, PRESIDENTIAL POWER: UNCHECKED & UNBALANCED (2007).

⁶ Robert M. Pallitto and William G. Weaver explain: "Legislation in the national security area is a classic example of what Theodore Lowi calls 'legiscide,' where Congress grants power and then ineffectively tries to take it back, one little bit at a time." ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 18 (2007) (quoting Theodore J. Lowi, *Presidential Democracy in America: Toward the Homogenized Regime*, 109 POL. SCI. Q. 401, 403 (1994)).

a deferential attitude toward the executive branch in cases involving military, diplomatic, and intelligence matters that they not only permitted but facilitated the emergence of the executive as the overwhelmingly dominant power in contemporary American government.⁷ As a result, the executive exercises enormous control over what the public knows about national security matters.

Second, this enormous shift of responsibility and power to the executive over national security matters has been accompanied by a parallel trend that dramatically enhances the seriousness of the danger created by the current imbalance of power. That parallel trend has witnessed the increasing *secret* exercise of executive national security power.⁸ Thus, since 9/11, the executive has, without public disclosure and debate, engaged in eavesdropping on United States citizens, monitored international banking transactions, tortured individuals subject to executive detention, executed signing statements to disavow the executive's duty to faithfully execute the laws, and authorized renditions—the extraordinary practice of kidnapping and shipping a suspected terrorist to a nation state such as Syria or Egypt—where the suspect will be tortured.⁹ The coupling of enormous power in the hands of the executive branch and its exercise in secret presents a direct threat to the capacity of the people to hold the executive accountable and eats away at the foundation of the democratic process that confers legitimacy on the governing process.

It is within this overall context in which the allocation of power is greatly distorted and then exercised behind closed doors that the need to protect confidential sources in national security reporting must be assessed. It is widely assumed—and it is an assumption that I do not believe can be convincingly challenged—that no meaningful national security reporting would exist without confidential sources.¹⁰ This is true mainly because almost all information pertinent to national security is classified, thus preventing those with lawful access to it from revealing it to the press. It is only because some individuals do make such information public that we have access to it.

Thus, in recent years, it is the press that has disclosed to the public—indeed, on occasion, even to the Congress—secret and highly controversial executive orders, programs, and actions taken by the executive in the name of national security. These reports certainly

⁷ In essence, “the president almost always seems to win foreign affairs.” HAROLD HONGJU KOH, *Why The President Almost Always Wins in Foreign Affairs: The Problem of Judicial Tolerance*, in THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 134, 148 (1990).

⁸ See generally PALLITTO & WEAVER, *supra* note 6.

⁹ See SCHWARZ & HUQ, *supra* note 5, at 97-123.

¹⁰ Max Frankel, Panel Discussion at Cardozo Law School: Are Journalists Privileged? (Apr. 23, 2007), in 29 CARDOZO L. REV. 1360, 1361 (2008).

provide important information to the people. They also hold out the hope that Congress will reclaim at least some of the important responsibility and authority it has ceded to the President in national security matters. In addition, there is even reason to believe that these news reports have prompted the federal judiciary to reconsider the assumptions underlying its traditional deference towards the executive in national security cases and to fashion doctrines that require some accountability of the executive to the courts in the name of the Constitution. Thus, as the role of the press in checking the executive on national security issues has become crucial, the resolution of the precise and narrow question of a reporter's right to keep the identity of sources confidential becomes extremely critical because there will be no meaningful national security reporting absent confidential sources.

At a symposium held at Cardozo during the spring of 2007, Anthony Lewis, Max Frankel, and Victor Kovner—three lions in the press and legal circles—addressed the question of whether reporters should be privileged and, if so, to what extent. Following the symposium, three legal scholars—Professors Eric M. Freedman and Joel M. Gora and Dean Rodney A. Smolla—accepted the invitation of the Cardozo Law Review to submit essays commenting on the symposium presentations. My short essay is intended to introduce the subject, the symposium's transcript, and the essays.

I. LEGAL BACKGROUND

The contemporary legal context began to take shape in 1972 when, in *Branzburg v. Hayes*,¹¹ the Supreme Court first addressed the question of whether the First Amendment to the Constitution protected newsmen from having to appear, to testify, and to disclose the identity of confidential sources before state or federal grand juries. In an opinion written by Associate Justice Bryon White on behalf of a five Justice majority, the Court concluded that requiring newsmen to appear, testify, and disclose confidential sources before a state or federal grand jury did not abridge the First Amendment, provided that the grand jury investigation was instituted and conducted in good faith and did not constitute harassment of the press.¹² Justice Douglas dissented on the ground that the First Amendment protected a newsman from appearing or testifying before a grand jury, “unless the reporter himself is implicated in a crime,”¹³ in which case “the Fifth Amendment stands as

¹¹ 408 U.S. 665 (1972).

¹² *Id.* at 667.

¹³ *Id.* at 712 (Douglas, J., dissenting).

a barrier.”¹⁴ Justice Stewart wrote the main dissent, which was joined by Justices Brennan and Marshall, in which he concluded that:

[W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.¹⁵

If these three opinions were the only opinions in *Branzburg*, the case’s guiding legal rule would not have been uncertain. But Justice Powell, who voted with the majority and actually concurred in White’s opinion, submitted an opinion that confused the legal meaning of the Court’s ruling.¹⁶

In what can only be described as an inaccurate description of Justice White’s sweeping ruling, Justice Powell stated in his opening line that he wished to emphasize the “limited nature of the Court’s holding.”¹⁷ To make matters worse, he stated in his very next sentence—and he did this even though it seemed that Justice White had denied that the First Amendment provided protection to reporters who sought to protect the identity of their sources—that the “Court does not hold that newsmen subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”¹⁸ If Justice Powell meant to offer reporters renewed hope by his opening sentences, he quickly deflated it in a few others that simply repeated Justice White’s qualification that grand jury investigations must be conducted in good faith and that harassment of newsmen will not be tolerated. But it was precisely at that part of his opinion that Justice Powell turned momentary clarity into decades of uncertainty. Powell wrote:

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect

¹⁴ *Id.*

¹⁵ *Id.* at 743 (Stewart, J., dissenting).

¹⁶ *Id.* at 709 (Powell, J., concurring).

¹⁷ *Id.*

¹⁸ *Id.*

to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.¹⁹

According to Powell—and only Powell—a newsman will be protected by the First Amendment when testifying before a grand jury if asked to provide information that has “only a remote and tenuous relationship to the subject of the investigation,”²⁰ or “if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement.”²¹ As is plain, Justice Powell’s reasoning is at odds with Justice White’s and in some respects provides even more protection to a reporter than the dissenting opinion written by Justice Stewart. But Justice Powell’s contributions to legal uncertainty in this important case went further. He added the assertion that a reporter’s claim of privilege should be “judged on its facts”²² on a case-by-case basis “striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”²³

Powell’s opinion in *Branzburg* left the law in a muddle. Powell left it unclear whether a reporter had a right based on the Constitution to protect his confidential source. He did not clarify whether the protection for reporters he spelled out in his concurrence was based on the Constitution or on the common law. He failed to make clear whether the privilege he sought to protect belonged to a reporter or a source. He did not identify the factors he believed a judge should consider and weigh in deciding whether or not to protect a reporter’s source. He did not state whether he thought some values or considerations should be weighed more heavily than others as a judge engages in the balancing exercise Powell prescribed.

Even Justice Stewart could not resist poking fun at the uncertainty and confusion Justice Powell’s enigmatic opinion created. Justice Stewart wrote:

In the cases involving the newspaper reporters’ claims that they had a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell’s concurring opinion, perhaps by a vote of four and a half to four and a half.²⁴

Reporters have attempt to exploit *Branzburg*’s uncertainty in seeking protection in the lower federal courts on either Constitutional or common law grounds, and in lobbying Congress to adopt a federal

¹⁹ *Id.* at 710.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 635 (1975).

shield law. In addition, reporters and their supporters have successfully used the specific defeat in *Branzburg* to persuade state legislatures to adopt state shield laws. The result is that today reporters are broadly protected around the country by state law, but not federal law. As a result, the important outstanding issue is whether reporters—in national security, libel or ordinary criminal cases—will eventually enjoy a qualified statutory or common law privilege at the federal level and, if so, what the specific qualifications will be.

II. THE SYMPOSIUM

It is against this legal background, and the increasing efforts by lawyers and courts to force reporters to disclose their confidential sources, that this symposium occurred. Three exceptionally distinguished individuals—Anthony Lewis, Max Frankel, and Victor Kovner—each presented a compelling perspective on the question of a reporter’s privilege. Although they have had long and nationally important careers and share a perspective that emphasizes the enormous significance of the press in making government accountable, the differences among them on the question of the privilege was breathtaking.

The transcript of the remarks made by Mr. Lewis, Mr. Frankel, and Mr. Kovner is followed by three essays written by long-time students of the law of the press: Joel M. Gora, Eric M. Freedman, and Rodney A. Smolla. Although these three individuals also place great value on the role of the press in making government accountable, they do not agree on the question of a reporter’s privilege any more than the symposium presenters.

As a whole, the transcript and the essays explore the essential questions: Does the United States Constitution guarantee reporters a privilege? Is there a federal common law based privilege? Should Congress adopt a statutory privilege? Should a privilege be absolute or qualified? Does the privilege belong to the reporter or to the source? If the privilege is qualified, what protection should a qualified privilege provide? Who is a reporter? Needless to say, the transcript and the essays do not offer timeless and definitive answers to these bedeviling questions. But they do illuminate them by defining the competing values and interests that make the issues so controversial and important.

In elegant and eloquent words, Anthony Lewis reminds us that, on the one hand, the “press does not always have right and justice on its side,”²⁵ and that, on the other hand, the “press, with all its defects of

²⁵ Lewis, *supra* note 3, at 1353.

haste and short attention span, is often the only defense against abuse of power.”²⁶ In considering the scope of privilege the law should accord to reporters, Mr. Lewis relies most heavily on cases in which an individual’s reputation has been wrongfully harmed by the press which subsequently resists the disclosure of a source who may have been responsible for disseminating false and harmful information. Although Mr. Lewis’s use of an injured individual engenders sympathy for denying reporters wholesale protection of confidential sources, Mr. Lewis is plainly cognizant of the fact that confidential sources are absolutely essential to “[t]he most important press disclosures [which] have had to do with what the government says is national security: the *Pentagon Papers* case, warrantless wiretapping, secret CIA prisons.”²⁷

Mr. Lewis states that he has no “simple answer to the problem of protecting needed press confidentiality”²⁸ and that he does not “believe that there is a bright-line rule that will satisfy both society’s interest in a strong press and its interest in justice.”²⁹ As a result, Mr. Lewis claims that he is “driven, in the end, to a reliance on judges to balance those interests.”³⁰ In other words, because Mr. Lewis holds no hope that Congress will adopt a shield law that will provide adequate protection to the press, he turns to the federal judiciary to develop a common law evidentiary privilege that balances the competing interests and shapes a privilege that provides some protection to journalists and allows them to report fully on important national security matters.

Max Frankel does not share Anthony Lewis’s faith in the capacity of the judiciary to assess the competing interests that arise when courts are asked to coerce reporters into disclosing their sources. In illustrating his perspective, Mr. Frankel uses national security as opposed to libel, which he terms as a “red-herring”³¹ in any effort to define the scope of a reporter’s privilege, as the context in which he assesses the issues. From his perspective, the nation’s security is protected by the disclosure of national security secrets as it is by maintaining them. Mr. Frankel puts the issue in refreshingly forthright language:

A reporter covering the Pentagon, the CIA, foreign affairs and wars simply cannot function unless a large number of officials from the President on down—for both noble and vile reasons—are willing to talk about those secrets on a confidential basis. The price of learning about . . . these awful renditions of prisoners around the world and of torture that we engage in has to be paid by also allowing the Libbys

²⁶ *Id.* at 1354.

²⁷ *Id.* at 1357.

²⁸ *Id.* at 1358.

²⁹ *Id.*

³⁰ *Id.*

³¹ Frankel, *supra* note 10 at 1361.

of this world to pass secrets for less noble reasons.

The only way that reporting can continue to function in this realm of national security is if the law takes care not to legislate the nature of the relationship between the press and its sources.³²

Mr. Frankel argues that the scope of disclosure surrounding national security secrets is a “political contest”³³ which has taken on its current character since the rise of the “garrison state”³⁴ at the onset of the cold war to which the “law has no answer.”³⁵ It is a “contest”³⁶ among the sources, government officials, the press, and the law that amounts to “combat”³⁷ in which the “government tries to protect its secrets”³⁸ while the press tries to “ferret them out,”³⁹ and, at the same time, persuade the public that its publication decisions are in their interest, and therefore deserve to be legally protected.

Victor Kovner, a nationally prominent press lawyer, believes that there is a “real opportunity”⁴⁰ during the fall of 2007, that Congress will adopt a qualified privilege for reporters that President George W. Bush will endorse. Mr. Kovner further believes that a federal statutory shield law will have a “carve out”⁴¹ for national security issues, meaning that the qualified shield will be unavailable to reporters protecting sources in national security news reports. In addition, Mr. Kovner thinks that in the absence of the adoption of a statutory privilege the federal courts “are well on the road”⁴² to establishing a federal common law qualified privilege for reporters. Mr. Kovner is uncertain whether Congress or the courts will act first, but he is certain that “we’re going to get [a qualified privilege] one way or the other.”⁴³

The three essays following the transcript are as varied as the presentations by Mr. Lewis, Mr. Frankel, and Mr. Kovner. In unqualified terms, Professor Eric M. Freedman favors an absolute privilege for reporters.⁴⁴ Professor Joel M. Gora, whose personal history made him both a participant in the struggles involving a reporter’s privilege and an academic observer, reviews the thirty-five

³² *Id.*

³³ *Id.* at 1362.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Victor Kovner, Panel Discussion at Cardozo Law School: Are Journalists Privileged? (Apr. 23, 2007), in 29 CARDOZO L. REV. 1363, 1366 (2008).

⁴¹ *Id.*

⁴² *Id.* at 1368.

⁴³ *Id.*

⁴⁴ Eric M. Freedman, *Reconstructing Journalists’ Privilege*, 29 CARDOZO L. REV. 1381 (2008).

years since the Supreme Court's decision in the *Branzburg* case with puzzlement, if not frustration, as to the meaning of the struggles ignited by Justice White's "distressing" opinion and Justice Powell's enigmatic concurrence.⁴⁵ Contrary to Professor Freedman, Dean Rodney A. Smolla favors the extension of a qualified "newsgathering privilege"⁴⁶ and sets forth five "principles"⁴⁷ that he suggests should "inform the creation of a federal shield,"⁴⁸ and "guide the federal judiciary in its interpretation of such a shield law."⁴⁹

Although substantial distance separates the different positions taken by the three presenters and the three essayists, there is, nonetheless, a less visible, subterranean shelf upon which they all stand as they pursue separate paths through the more visible contemporary political and legal thicket. That important common ground is that the quality of our politically accountable democratic process requires that those who gather and report our news be able to protect at least some sources in some contexts. These six commentators do not agree as to how much protection must be afforded confidential sources to assure that our politically accountable democratic process remains meaningfully vital and responsive, but all of them assume that their position would reinforce those democratic values. Moreover, not one of them suggests that a certain category of confidential sources should be consistently disclosed if such disclosure would directly injure or slowly undermine the capacity of reporters to report the news that is vital to assuring that government is meaningfully accountable to the people.

III. FINAL OBSERVATIONS

In concluding, let me draw your attention to the views of two Supreme Court Justices whose approach to interpreting the Constitution differed sharply, but who shared a notable commitment to a free press. The quotations are drawn from separate opinions submitted in the *Pentagon Papers* case⁵⁰ in which the Nixon administration sought to restrain the press from publishing excerpts from a top-secret, Pentagon history of America's involvement in Vietnam from 1945 to 1968. Although each opinion constitutes a powerful endorsement of the important role of the press in a democratic system, the differences

⁴⁵ Joel M. Gora, *The Source of the Problem of Sources: The First Amendment Fails*, 29 CARDOZO L. REV. 1399 (2008).

⁴⁶ Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism,"* 29 CARDOZO L. REV. 1423, 1429 (2008)

⁴⁷ *Id.* at 1429-30.

⁴⁸ *Id.* at 1429.

⁴⁹ *Id.*

⁵⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

between them are as striking and as important as their similarity.

After lamenting the failure of the Congress and the Courts to check the accretion and exercise of power by the President, Justice Stewart wrote:

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the first amendment. For without an informed and free press there cannot be an enlightened people.⁵¹

Stewart valued the press as a medium for passing along information to the public. The particular importance of the function—the press informing the public—might, from Stewart’s perspective, be more or less important depending upon how effectively the Congress and the courts checked and held the executive accountable. Thus, for Stewart, there was nothing about how the government inherently functioned that made the Congress and the courts only partially adequate in holding the executive accountable. In other words, for Stewart, the system might work so well in checking and balancing power at the highest levels that the press might not have a central role as an antidote to checking the executive’s potential abuse of power.

Justice Black had a fundamentally different perspective, and went much further than Justice Stewart in developing a rationale for strong press freedoms. Black certainly agreed with Stewart that the Congress and the courts performed important functions in checking the executive and holding it accountable. But Black believed that more—and in his mind, the press was that “more”—was required to check the executive and hold it accountable.

Black gave voice to his views in the last opinion he ever wrote, which was his concurrence in the *Pentagon Papers* case. In that opinion, Justice Black returned to themes and values that are central pillars of his judicial legacy, and wrote words that are as poignant today as they were the day he penned them, at a time when they resonated with the public because of war in Vietnam.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government

⁵¹ *Id.* at 728 (Stewart, J., concurring).

and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.⁵²

In Black's view, the Congress and the courts were insufficient because the government lies and it lies to the public about important matters. Moreover, Black assumed that the government vigorously seeks to protect its lies from being disclosed by camouflaging them in the garb of national security and then concealing them from the public. Of course, Black accepted that some national security secrets should remain secret. But he also believed that much information was classified and that many secrets were secrets merely to protect the government from embarrassment and inconvenience. Black did not trust the Congress and the courts to bare these secrets, and whatever misgivings he may have had regarding the press (and he surely had some), he had no choice but to look to the press to bare these secrets to protect the people from governmental lies and deception.

As a society, we must resolve the issues surrounding a reporter's privilege. And yet, so many of the normative claims—though surely not all⁵³—relevant to deciding the scope of protection a reporter should be afforded in protecting a source cannot be empirically assessed with precision. Rather these claims rest on complicated political, social, and economic factors not reliably quantified or calculated. It is within this context of fundamental values and assumptions regarding government and the exercise of its power that we must decide the narrow question of a reporter's privilege. In doing so, we are, whether we recognize it or not, assessing our willingness to trust our free institutions to make us strong, our capacity to perceive danger in measures promoted allegedly to advance security, and our collective commitment to individual liberty and vital democracy within the rule of law. In the end, so much of what we decide about these profound issues, including our willingness to protect reporters, depends on the depth of convictions to our most basic political values—upon nothing less than our democratic faith.

⁵² *Id.* at 717 (Black, J., concurring).

⁵³ As noted *supra*, "There would be no meaningful national security reporting absent confidential sources."