The "Nixon Court" and the First Amendment

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If there was one resounding note in the welter of opinions from the Supreme Court Thursday, it was the low value the Court's new majority places on the flow of information. In three cases involving a newsman's right to protect confidential sources, the Court brushed aside claims that forced disclosure of confidential information and of the identity of sources would lessen substantially the flow of news to citizens. In another case involving an aide to Senator Gravel, the Court denied the existence of any constitutional link between the legislative duties of a Congressman and the information he receives or sends to his constituents. In still another, this one involving Senator Brewster, the Court said that among the things which are not purely legislative activities of Congressmen are "preparing so-called 'news letters' to constituents, news releases, speeches delivered outside the Congress." All these decisions, taken together, indicate that the new majority on the Court is remarkably insensitive to the First Amendment to the Constitution and to what we had always thought were two fundamental principles of a republican form of government—the need of the public to know what is going on in and out of government and the need of the public's representatives to communicate freely with it.

We would begin with the question of the reporter's privilege, perhaps because it cuts to the heart of our business. (The related matters involving the Court's peculiar understanding of the legislative process is also of great importance to the way this country works, or doesn't work, and we will turn to it at a later time.)

The issue that divided the Court, five to four, in the reporter's privilege cases was not that of whether newsmen should have an absolute right to refuse to provide the government with information they have received in confidence. It was, instead, the question of whether the government, when calling a reporter before a grand jury, should have to prove in advance a special need for the particular information the reporter desires to keep to himself. The Court's majority says the government does not have to do that and its holding, we believe, will be costly to the nation in terms of the stories that will never be written about the hopes and plans of political dissenters, the corruption and political deals made inside the government, and the activities of organized crime.

Stories of this kind—the leaking of secret government documents or even of non-secret ones to newsmen by bureaucrats fed up with coverups; the inside tales of the Black Panthers and other such organizations; the exposes of links between government and organized crime—are often obtainable only on the assurance of newsmen that they will not reveal their sources. Whether such information will still be forthcoming, now that the Court has said such assurances do not need to be respected, is an issue of substantial substance to you as well as to us. In this town, for example, will the middle-level public servant who has an honest difference with the official line, or something to say about wrongdoing within the bureaucracy, be as ready in the future to talk frankly in confidence to a newsman? We doubt it. Or will it be possible in the future as it has been in the past for the public to learn as much about the goals and plans of groups like the Black Panthers? We doubt that, too.

The Court's majority, of course, escapes these hard questions by focusing on crime and turning the argument of the press on its head by calling it "the theory that it is better to write about crime than to do something about it." No one we know of has contended that it is better to write about crime than to act against it. The contention of the news media, at its heart, is that it is better for both the public and the government to learn *something* about the forces loose in our society than to learn *nothing*, a contention set out forcefully by Justice Stewart in his dissent, extracts from which appear elsewhere on this page.

The Court's majority also attempts to reassure newsmen that its rejection of their position does not mean a total end to confidential information. It notes that a grand jury's questions must be related to the commission of crime. But it also quotes with approval this description of what a grand jury is:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Given this concept of a "grand inquest," there is little solace in the Court's comment that grand jury investigations conducted in other than good faith would pose "wholly different issues" than those in these cases. Nor is there much comfort in its remark that a prosecutor may not insist on answers if a reporter raises the issue of confidential sources. This is not what you would call a firm position, given the antagonism in recent years between the press and some parts of government.

It is true, no doubt, that the press, as the Court suggests, "has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm." But it would have been far better, and far more in line with the Constitution's commands, for the Court to have brought about an accommodation between the legitimate claims of government prosecutors and the equally legitimate claims of newsmen. Instead, it has chosen to throw them into open conflict. Even while asserting that news gathering is protected by the First Amendment and that "without some protection for seeking out the news, freedom of the press could be eviscerated," the Court has left the news media to protect that freedom as best they can without much help from the First Amendment. We do not believe that is what was intended by the men who wrote that Amendment.

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