"Deep Throat," Justice Jackson and Suicide Pacts

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After "Deep Throat" was identified definitively in early June 2005, I read for the first time former senior FBI official W. Mark Felt's previously little-noticed 1979 memoir, THE FBI PYRAMID FROM THE INSIDE (New York: G.P. Putnam's Sons). Felt's book, which he published while awaiting federal trial for conspiring to violate civil rights by approving illegal house searches, is a spirited defense of the FBI and J. Edgar Hoover.

I was interested, and amused, to read in the book Felt's categorical denials, now known to be false, that he had been WASHINGTON POST reporter Bob Woodward's Watergate source.[1] It also caught my eye that Felt began his very first chapter with this header:

> We must not turn the Bill of Rights into a suicide pact.
> —Mr. Justice Robert H. Jackson
> United States Supreme Court 1941-54

Justice Jackson famously expressed that idea—although he did not use exactly those words—in his dissenting opinion in *Terminiello v. Chicago*. In that landmark free speech case, Jackson dissented from the Supreme Court's decision to reverse on First Amendment grounds the criminal conviction for breach of peace of a notorious public figure (a priest, actually) whose speech in a Chicago auditorium had provoked riot conditions both inside and outside the hall.[2] Jackson's famous "suicide pact" line comes from the conclusion of his dissent:

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the

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[1] *See* W. MARK FELT, THE FBI PYRAMID FROM THE INSIDE 225-26 & 249 (1979); *cf. id*. at 259.

[2] *Terminiello v. Chicago*, 337 U.S. 1 (1949).

> liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[3]

In his 1979 book, Felt associated Jackson's "suicide pact" idea with Felt's own argument that FBI leadership, including himself, had been correct to authorize "black bag jobs"—surreptitious, warrantless FBI entries of private homes to search for useful information—as it investigated the Weather Underground, including some members who had been charged with serious crimes and were fugitives from justice.

In 1980, John W. Nields was the lead federal prosecutor who won Felt's and his co-defendant's criminal convictions for authorizing these FBI break-ins. In a June 2005 op/ed piece, Nields turned to a powerful—and, given Felt's memoir quotation of Jackson, an ironically relevant—source to explain the fundamental illegality of such government conduct:

> In late 1972 and early 1973, during the same period when he was investigating the Watergate break-in, Felt authorized FBI agents in New York and New Jersey to break into and search the homes of friends or relatives of fugitives associated with the Weather Underground, a radical, violent antiwar organization. These friends and relatives were innocent of any wrongdoing. There was no probable cause to conduct the searches. There was no search warrant authorizing them. And they were clearly illegal.
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> … The Fourth Amendment provides that "the right of the people to be secure in their . . . houses [and] papers . . . from unreasonable searches shall not be violated." As the [Felt] trial progressed, it sank in that the Fourth Amendment was not the creation of ivory-tower intellectuals. It was an expression of our deepest instincts. Many of the agents who entered into and searched the people's homes testified at the trial. Their testimony was profoundly disquieting. While they were inside people's houses, they clearly felt more like burglars than law enforcers. As former attorney general and Supreme Court justice Robert Jackson wrote of the Fourth Amendment shortly after serving as chief prosecutor at

[3] *Id*. at 37 (Jackson, J., joined by Burton, J., dissenting).

> Nuremberg: "These, I protest, are not mere second-class rights, but belong in the catalogue of indispensable freedoms."[4]

Nields was quoting from Justice Jackson's dissenting opinion in another 1949 Supreme Court case, *Brinegar v. United States*.[5] Jackson there disagreed with the Court majority's conclusion that federal agents had probable cause to stop and search what turned out to be a bootlegger's car as he used it to haul booze from a wet state into a dry one. Jackson, drawing an explicit connection back to his own experience three years earlier as chief United States prosecutor of Nazi war criminals at Nuremberg, wrote in *Brinegar* as follows:

> Fourth Amendment freedoms … I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights [—i.e., the German people just after their years under Hitler—] to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[6]

In their Jackson-quoting, Felt's book and Nields's op/ed piece each demonstrate the contemporary—and, because of the timeless topics he addressed regularly, the permanent—relevance, and also the beauty, of Justice Jackson's words. But although each writer chose a favorite Jackson line to bolster his own rhetoric, only Nields picked Jackson words that actually, in context and directly, pertain to and thus help to make his point. Felt (or perhaps his ghostwriter Ralph de Tolenado), by contrast, seems to have grabbed a fine Jackson phrase—"suicide pact"—(from BARTLETT'S?) without thinking very much about whether it in fact pertained to the kind of Constitution-violating with which Mr. Felt had been charged.

Nields's Jackson-quoting essay, juxtaposed with Felt's Jackson-quoting book, teaches something that is cautionary and important:

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[4] John W. Nields, *The Contradiction of Deep Throat*, WASH. POST, June 12, 2005, at B9.

[5] 338 U.S. 160 (1949).

[6] *Id*. at 180-81 (Jackson, J., joined by Frankfurter and Murphy, JJ., dissenting).

government officials would do well, before they glibly recite Jackson's eloquent caution against "suicide pacts" to explain away or justify any and every violation of a constitutional protection, to learn about and reflect on the specific contexts in which Jackson did, and the many in which he did not, find that caution to be applicable.

To Jackson, *Terminiello* was, on its unique and compelling facts, the case where reflexive, absolutist legal protection of a speaker whose actions produced genuine breach of peace made no constitutional sense. Less than two months later, by contrast, Jackson saw in *Brinegar* a case of routine government lawbreaking. It was in the latter context that Jackson penned his more generally applicable point—he voted and explained in *Brinegar*, as he did generally, that it is fundamentally American, and not at all suicidal, for a court to enforce the Constitution itself.