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Constitutional Law--When Push Comes to Shove: the Newsman's Privilege Versus the Criminal Defendant's Right to Compulsory Process

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violating the Code of Professional Responsibility. A rule of this type would allow attorneys engaged in the multistate practice of law to appear *pro hac vice* on a regular basis. It would limit appearances only if a judge determined that because of the frequency of appearance, the attorney was in reality a local practitioner.

The *Flynt* decision has sacrificed substantial rights of both litigants and attorneys for minor state interests. It is not clear at this time how far-reaching the decision will be. Those jurisdictions that have previously denied *pro hac vice* appearances only for good cause may continue to do so. However, it will be with the knowledge that the Supreme Court has held that a hearing is a privilege that may be revoked at any time. It is clear that the Supreme Court has reaffirmed state power over all attorneys engaged in the multistate practice of law. If states choose to exercise this power by letting economic and administrative interests take precedence over providing the best legal services available, the consequences may be serious. Needed changes must be made or inequitable decisions such as *Flynt* will be common.

SCOTT J. GOLDSTEIN

CONSTITUTIONAL LAW—WHEN PUSH COMES TO SHOVE: THE NEWSMAN'S PRIVILEGE VERSUS THE CRIMINAL DEFENDANT'S RIGHT TO COMPULSORY PROCESS

*In re Farber*¹

In 1965 and 1966 thirteen people died in a New Jersey hospital under unexplained and peculiar circumstances. An investigation was made at the time by local authorities, but after they satisfied themselves that no criminal action was involved, the matter was dropped.² In the summer of 1975, however, *The New York Times* received a letter suggesting that the deaths ten years earlier had been intentionally caused by a doctor.³ A

1. 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978).

2. White, *Why the Jailing of Farber Terrifies Me*, N.Y. Times, Nov. 26, 1978, § 6 (Magazine), at 27.

3. Address by Myron Farber, Midwest Journalism Conference, in St. Louis (Feb. 10, 1979), University of Missouri School of Law Scholarship Repository, 1979

Times reporter named Myron Farber was assigned to the story and began looking into the situation. The ensuing articles Farber wrote about a doctor who had been killing patients by injecting them with a muscle relaxant prompted a prosecutor to reopen the investigation.⁴ Shortly thereafter, Dr. Mario E. Jasclevich was charged with murdering five patients.⁵

After what was ultimately the longest trial of a single criminal defendant in the history of the United States,⁶ Dr. Jasclevich was acquitted by a unanimous verdict after only three hours of jury deliberation.⁷ The significance of the *Farber* case is not found in the acquittal of Dr. Jasclevich, however, but in the constitutional issues that were raised when Jasclevich's lawyer, in the middle of the trial, asked a county judge to issue subpoenas duces tecum to Farber and *The New York Times*. The defense sought certain materials compiled by the reporter, including notes and recordings of interviews with some two hundred people.⁸ The judge ordered instead that the materials be submitted to him for an *in camera* inspection to determine whether the information was sufficiently relevant to warrant revelation to the defense.

Farber and *The New York Times* refused to supply the subpoenaed material, claiming a newsman's privilege under both the first amendment⁹ and the New Jersey "shield statute."¹⁰ Their defense was rejected and both

4. White, *supra* note 2, at 27; Dworkin, *The Rights of Myron Farber*, THE NEW YORK REVIEW OF BOOKS, Oct. 26, 1978, at 36 ("[Farber] accumulated a great deal of information not previously available, and it is not disputed that this information was the proximate cause of the indictment.").

5. White, *supra* note 2, at 70. The number of murders charged was later reduced to three. The prosecution speculated that Jasclevich's motive had been to discredit other doctors at the hospital who had been challenging his authority as chief surgeon. Time, Nov. 6, 1978, at 48.

6. Farber, *supra* note 3. The trial lasted 34 weeks. White, *supra* note 2, at 70.

7. Time, Nov. 6, 1978, at 48.

8. Farber described the subpoena:

They wanted all notes, all tapes, all recordings, all pictures, all everything from a list of some two hundred or so people. The subpoena made absolutely no distinction between confidential or nonconfidential materials, it made no showing of necessity, it was the most vague kind of thing you can imagine. And it was a huge massive subpoena and it was a subpoena that the Reporters' Committee in Washington later called the broadest subpoena ever served on an American newsman.

Farber, *supra* note 3.

9. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

10. A shield statute gives a newsman a privilege not to disclose confidential sources of information. The twenty-six state shield statutes vary, some giving more protection than others. See note 26 *infra*. New Jersey's shield statute is said to be as strongly worded as any in the country. 78 N.J. at 270, 394 A.2d at 335. It reads in part as follows:

A person . . . employed by news media for the purpose of gathering . . . news for the general public . . . has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, in-

were found in contempt of court.¹¹ Following a complex of proceedings, the Supreme Court of New Jersey eventually granted motions for leave to appeal and for direct certification.¹²

The decision handed down by the New Jersey court will have a significant impact on the newsman's privilege and constitutional law. The *Farber* opinion contains three very important holdings: (1) a newsman has no first amendment privilege to refuse to produce information for an *in camera* inspection, even though confidential sources may thereby be divulged; (2) a newsman's privilege guaranteed by a state shield statute must fall when it clashes with a criminal defendant's right to compel production of witnesses under the sixth amendment; and (3) when such a conflict occurs, a newsman is entitled to a preliminary determination by the trial judge that the information sought by the defense is reasonably likely to be material, relevant, necessary to the defense, and unavailable from any less intrusive source. If the elements of relevancy and unavailability exist, a hearing, including an *in camera* inspection of the materials, is required to determine whether the newsman must ultimately turn the materials over to the defendant. Each of these holdings is controversial, and each may have a far-reaching effect on this area of the law.

cluding, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere:

a. The source, author, means, agency or person from or through whom any information was procured

N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1978) (set out in full at 78 N.J. 269 n.2, 394 A.2d 335 n.2).

11. A fine of \$100,000 was imposed on the *Times*, and Farber was ordered to serve six months in jail and to pay \$1,000. Additionally, compliance was sought by the imposition of a \$5,000 penalty on the *Times* for each day that elapsed until the materials were produced. Farber actually went to jail for forty days and the *Times* eventually paid \$300,000 in fines. Farber never did turn over the information he considered confidential. Farber, *supra* note 3.

12. The procedure is described in the majority opinion:

Appellants' initial motion for direct certification to this Court was denied. The Attorney General, designated by the Court to prosecute the contempt charges against the appellants, moved before the Appellate Division for a remand in order that the trial court might determine whether the news media privilege, asserted by appellants throughout these proceedings, had been waived. This motion was denied and an appeal was taken to this Court. In response to an inquiry by the Court, the Attorney General filed a letter which contained, *inter alia*, a motion for direct certification.

The Attorney General's motions for leave to appeal and for direct certification were granted as was the appellants' motion for direct certification.

78 N.J. at 265, 394 A.2d at 332-33. Also, it may be important to note that two separate justices of the United States Supreme Court denied Farber's motion for a stay of the contempt order. *New York Times Co. v. United States*, 403 U.S. 713, 12 (1978).

The first holding in *Farber*, that a newsman's privilege to refrain from revealing confidential information does *not* emanate from the free speech/free press clause of the first amendment,¹³ is controversial because it adopts the more restrictive of the two interpretations that have been given the 1972 United States Supreme Court case, *Branzburg v. Hayes*.¹⁴ In *Branzburg*, three cases with virtually identical fact situations and issues were joined.¹⁵ In each, a grand jury had subpoenaed a newsman and ordered him to testify about crimes he had been permitted to witness as a result of promises of confidentiality. Each newsman claimed that the free speech/free press clause of the first amendment provided a privilege to refuse to reveal confidential information and sources. The reporters further contended that the ability of the press to gather information would be impaired if sources who wished to remain anonymous knew that a newsman could be forced to reveal his identity.¹⁶ The *Branzburg* Court, however, held that requiring newsmen to appear and testify before grand juries does not abridge the freedom of speech and press guarantees of the first amendment.¹⁷

13. The *Farber* majority stated:

Appellants . . . contend . . . that this privilege to remain silent with respect to confidential information and the sources of such information emanates from the "free speech" and "free press" clauses of the First Amendment In our view the Supreme Court of the United States has clearly rejected this claim and has squarely held that no such First Amendment right exists.

78 N.J. at 265, 394 A.2d at 333.

One of the *Farber* dissents reinforced this interpretation by stating: "I subscribe to the [majority's] view that the newsman's privilege is not predicated on the First Amendment." 78 N.J. at 295, 394 A.2d at 348. In fact, a New Jersey court had already interpreted *Branzburg* as allowing no constitutional protection to newsmen for confidentiality of their sources. *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972), cert. denied, 410 U.S. 991 (1973).

14. 408 U.S. 665 (1972).

15. In one situation, a newsman had interviewed several individuals who used marijuana, and had watched them make hashish. After promising them confidentiality, he wrote an article about the drug situation in the town. In another, after promising not to reveal what he saw or heard, a newsman was allowed to come inside a Black Panther headquarters on the night a police raid was expected. While inside the headquarters, he was believed to have learned information concerning instances of arson and other turmoil that were occurring in the area. In the third situation, a black newsman had spent over a year winning the trust of the Black Panther Party and had developed a working relationship with the militant group during a time when a Panther leader had made a public speech declaring the intent of the group to kill then President Richard Nixon.

16. 408 U.S. at 728-36 (Stewart, J., dissenting) (Justice Stewart lists the surveys and affidavits provided to the *Branzburg* Court, all of which indicate that a severe chilling effect would occur.).

17. Five justices joined in the majority opinion, although one of them, Justice Powell, added a separate concurrence making *Branzburg* difficult to interpret. See Eckhardt & McKey, *Galder v. Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confiden-*

Courts and commentators who have analyzed *Branzburg* disagree whether the Court concluded that *no* constitutional newsman's privilege exists to refuse information to the judiciary,¹⁸ or whether the Court recognized a limited privilege.¹⁹ The majority in *Farber* seemed to favor

tial Sources, 14 IDAHO L. REV. 21, 70 (1977) ("Justice Powell's concurring opinion has been characterized as 'opaque' and 'enigmatic' and like the rest of the case has generated speculation and differing interpretations.") (footnotes omitted).

New York University Professor Ronald Dworkin has written:

The Supreme Court's decision in *Branzburg v. Hayes*, though its full force is debatable, plainly held that a reporter may be forced to reveal his sources when that information would be crucial to a defendant's case, as determined by a trial judge. So even now reporters cannot, or should not, flatly promise an informer confidentiality. Any such promise must be qualified, if the reporter is scrupulous, by the statement that under certain circumstances, not entirely defined by previous court decisions, and impossible to predict in advance, a court may legally compel disclosure.

Dworkin, *supra* note 4, at 35.

18. *United States v. Liddy*, 354 F. Supp. 208, 214 (D.D.C. 1972) ("[W]ith the Supreme Court's decision of *Branzburg* it may be said that a right to gather the news has been explicitly acknowledged. While acknowledging this corollary right, however, the Court rejected the claim that such a right implies a privilege to protect the identity of news sources."); *Caldero v. Tribune Pub. Co.*, 98 Idaho 288, 293, 562 P.2d 791, 797, *cert. denied*, 434 U.S. 930 (1977) ("Our reading of *Branzburg* is to the effect that no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version.") (strong dissent contra); *Dow Jones & Co. v. Superior Ct.*, 364 Mass. 317, 320, 303 N.E.2d 847, 849 (1973) ("In short, we are asked to rule that journalists have a qualified privilege to refuse to reveal confidential information which is admittedly relevant to court proceeding. We adhere to our prior holding that the First Amendment imports no such privilege, qualified or absolute . . . [citing *Branzburg*]"); *In re Bridge*, 120 N.J. Super. 460, 462, 295 A.2d 3, 6 (1972), *cert. denied*, 410 U.S. 991 (1973) ("In *Branzburg* the Court laid down a broad rule that the First Amendment accords a newspaperman no privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence."); Note, 10 IDAHO L. REV. 235, 244 (1974) ("*Branzburg* has, for the moment, put to rest any claim by journalists to a testimonial privilege grounded on the First Amendment.").

19. *Herbert v. Lando*, 568 F.2d 974, 978 (2d Cir. 1977), *rev'd on other grounds*, 99 S. Ct. 1635 (1979) ("This court has elaborated on the privilege established by *Branzburg*") (strong dissent contra); *Baker v. F. & F. Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ("The Court in *Branzburg* . . . applied traditional First Amendment doctrine, which teaches that constitutional rights secured by the First Amendment cannot be infringed absent a 'compelling' or 'paramount' state interest . . . and found such an overriding interest in the investigation of crime by the grand jury which '[secures] the safety of the person and the property of the citizen.' "); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) ("[T]he [*Branzburg*] Court's discussion in both the majority opinion of Justice White and the concurring opinion of Justice Powell recognized[] a privilege which protects information given in confidence to a reporter . . . "); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert. denied*,

417 U.S. 938 (1974) (“[I]t appears to us that *Branzburg*, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach . . . that the court will look to the facts on a case-by-case basis in the course of weighing the need for testimony in question against the claims of the newsmen that the public’s right to know is impaired.”) (footnotes omitted); *Zerilli v. Bell*, 458 F. Supp. 26, 28 (D.D.C. 1978) (“The compelled disclosure of journalist sources clearly impinges on the First Amendment, as it undeniably jeopardizes a journalist’s ability to obtain information on a confidential basis.”); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198-99 (D.D.C. 1978) (“The newsmen’s privilege is a ‘fundamental personal right’ well founded in the First Amendment [citing *Branzburg*] Generally speaking, the privilege protects the newsmen from disclosing sources. But the privilege is a qualified one: where sources have relevant information that the interests of justice require be disclosed, and the need is compelling, an obligation may be placed on the newsmen to reveal sources in spite of an implied or actual prior pledge of confidentiality.”); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1302 (M.D. Fla. 1975) (interpreting *Branzburg* as holding that news gathering qualifies for first amendment protection, and thus in civil suit plaintiff cannot get source from newsmen unless plaintiff has compelling need); *Winegard v. Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978) (“The foregoing [excerpt from *Branzburg*] effectively negates Winegard’s claim to the effect there is no such thing as a constitutionally based newsperson’s privilege Although this court is persuaded there exists a fundamental newsperson privilege we are equally satisfied it is not absolute or unlimited.”); *State v. Sandstrom*, 224 Kan. 573, 574, 581 P.2d 812, 814 (1978), *cert. denied*, 99 S. Ct. 1265 (1979) (“We believe a newsperson has a limited privilege of confidentiality of information and identity of news sources, although such does not exist by statute or common law. The United States Supreme Court recognized the privilege in *Branzburg v. Hayes*”); *State v. St. Peter*, 132 Vt. 266, 269-70, 315 A.2d 254, 255 (1974) (“[T]he language and attitude of the *Branzburg* majority does not indicate an entire absence of concern for the news-gathering function so relevant to the full exercise of the First Amendment Even more noteworthy, the concurring opinion of Mr. Justice Powell suggests that the First Amendment supports enough of a privilege in newsgatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct.”); *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974) (“We believe that, as a news-gathering mechanism, a newsmen’s privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment. Unknown at common law, it is a *privilege* related to the First Amendment and not a First Amendment *right*, absolute, universal, and paramount to all other rights. The Supreme Court has held that the privilege must yield to the government’s right to investigate and indict by grand jury [citing *Branzburg*]”) (the court did not require disclosure of reporter’s source because criminal defendant had not made a showing that identification of the source was material); *Zelenka v. State*, 83 Wis. 2d 601, 617, 266 N.W.2d 279, 286 (1978); *Eckhardt & McKey*, *supra* note 17, at 23 (“Since *Branzburg*, a large (and rapidly growing) number of courts have given virtually unanimous endorsement to the principle that, absent a compelling public or private justification, any attempt to compel disclosure of confidential sources violates the first amendment.”); *Goodale*, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 741 (1975) (“It seems clear that five of the nine justices in *Branzburg* would not demand a reporter’s testimony in every instance; thus they granted a ‘qualified newsmen’s privilege.’”).

the "no privilege" interpretation,²⁰ expressly stating that it undertook no balancing of the societal interests involved.²¹ Courts which interpret *Branzburg* as acknowledging a limited privilege weigh and balance the interests of the parties on a case-by-case basis.²² Prior to the *Farber* decision, most recent cases which had considered the issue adopted the view of a limited constitutional privilege to refuse to disclose confidential information.²³ The *Farber* court's departure from that stance may well be a foreshadow of cases to come.²⁴ If *Farber's* holding that a newsman has no

20. See note 13 *supra*. It could be argued, however, that the majority opinion did not categorically deny a newsman's first amendment privilege to refuse to disclose confidential sources. Under this narrow reading of *Farber*, the court could be viewed as saying only that the journalist does not have a constitutional privilege to refuse to disclose sources *when his claimed privilege conflicts with the sixth amendment* right of a criminal to compulsory process. Under such a reading, *Farber* could be seen as recognizing a qualified newsman's privilege. In any event, *Farber* clearly stands for the proposition that when a criminal defendant's right to compulsory process of witnesses conflicts with the newsman's claim of privilege, the newsman will not be protected by a constitutional privilege.

21. 78 N.J. at 268, 394 A.2d at 334.

22. *E.g.*, *State v. Sandstrom*, 224 Kan. 573, 576, 581 P.2d 812, 815 (1978), *cert. denied sub nom. Pennington v. Kansas*, 99 S. Ct. 1265 (1979); Eckhardt & McKey, *supra* note 17, at 108 ("All of the courts recognizing first amendment protection against disclosure have employed some form of balancing test.").

23. See authorities cited notes 18 & 19 *supra*; Goodale, *supra* note 18, at 742 ("An examination of the surprising number of cases decided in the two-year period since *Branzburg* provides an insight into the practicability and viability of a qualified newsman's privilege. Although counting noses is not persuasive, a majority recognize a qualified privilege . . ."). See also Eckhardt & McKey, *supra* note 17, at 24, 63-64, 79, 97.

24. One observer has stated:

A clear trend, however, seems to be developing: that the press, having failed to convince judges of the direct linkage between gathering news and publishing news can no longer rely on receiving constitutional protection for the investigation and editorial processes. The final product—the newspaper article or editorial, the television broadcast—may be protected, but the methods used to seek out and produce that end product are not.

Bolbach, *The Farber Case: What Does It Mean For Freedom of the Press?*, THE CHRISTIAN CENTURY, Nov. 29, 1978, at 1158.

The *Farber* case would have presented the United States Supreme Court with the perfect opportunity to state categorically whether a newsman has any first amendment privilege to refuse to disclose confidential sources. Most commentators feel newsmen are fortunate that the Court denied certiorari. "From a journalist's point of view, it may be just as well that this court chose to duck the *Farber* case, given the cold shoulder the Justices have turned toward press claims of special privilege in recent decisions." Time, Dec. 11, 1978, at 68. "It seems . . . clear . . . that the present Court is even less willing than the *Branzburg* Court to recognize any constitutional protections afforded newgathering." Bolbach, *supra* at 1155. "When it comes to decisions regarding the press, the Nixonburger Court's generally chilly attitude—and Burger's personal loathing of the media—has become increasingly apparent. This includes its decision not to decide the case involving *New York Times* reporter Myron Farber The

privilege predicated on the first amendment²⁵ is accepted, a newsman in a state without a shield statute²⁶ will enjoy no privilege at all; no such privilege is found at common law.²⁷

It is an elementary principle of federal supremacy that a state statute must yield when it conflicts with the Constitution.²⁸ Nonetheless, the second holding of the New Jersey court that a state shield statute must bow when it comes into conflict with a criminal defendant's sixth amendment right is controversial because it involves the application of a relatively new development in constitutional law to a fresh fact situation. The *Farber* interpretation of the sixth amendment²⁹ as granting a criminal defendant the right to force disclosure of a reporter's source is one that had not previously been definitively expressed.³⁰ In fact, the Supreme Court had

ominous silence was accurately interpreted by Columbia law professor Benno Schmidt: 'When journalists rely on the First Amendment in these cases, they'd better face the fact that they aren't going to get much help from the Supreme Court.' " Sherrill, *Injustices of the Burger Court*, Playboy, April 1979, at 120, 230. These views are supported by the fact that in *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978), the Supreme Court reaffirmed its belief that confidential sources will not dry up if reporters can be forced to reveal their identities:

Nor are we convinced, any more than we were in *Branzburg* . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

25. New York University Professor Ronald Dworkin notes that there are policy reasons for allowing newsmen confidentiality of their sources, but no constitutional privilege. Because this is not a clash between the sixth and first amendments, "[t]he rhetoric of the popular debate over *Farber*, which supposes that the press has rights that must be 'balanced' against the defendant's rights, is profoundly misleading." Dworkin, *supra* note 4, at 35.

26. The twenty-six states that currently have shield statutes are listed in Comment, *Search of the Newsroom: The Battle for a Reporter's Privilege Moves to New Ground*, 44 MO. L. REV. 297, 297 n.2 (1979). Missouri has no shield statute at this time.

27. *United States v. Liddy*, 354 F. Supp. 208, 214 (D.D.C. 1972); *State v. Sandstrom*, 224 Kan. 573, 574, 581 P.2d 812, 814 (1978), *cert. denied sub nom. Pennington v. Kansas*, 99 S. Ct. 1265 (1979); *Brown v. Commonwealth*, 214 Va. 755, 757, 204 S.E.2d 429, 431 (1974); Note, 11 DUQ. L. REV. 657, 659 (1973) ("Any attempt to assert a common law privilege of a right to confidence has never met with success.") (footnotes omitted).

28. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

29. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI.

30. Several commentators have speculated, however, that even there were a constitutional privilege for a newsman not to disclose his sources, this privilege would yield to a criminal defendant's sixth amendment rights. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 50 (1969); Gunther, *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 146 (1972); Tining, *Newsmen's Privilege: A Survey of the Law in California*, 4 PAC. L.J. 880, 882 (1973); Note, *Piercing the Newsmen's Shield:*

not directly construed the sixth amendment compulsory process clause until 1967 when it decided *Washington v. Texas*.³¹

In that case, a Texas statute declaring that persons charged as co-participants in a crime could not testify in favor of each other was in issue, and the plaintiff and a witness had both been charged with the murder of an acquaintance. At the time of defendant's trial, the witness had already been convicted, and if allowed to take the stand, he would have testified that he, not the defendant, had committed the crime. The Supreme Court found the statute unconstitutional on grounds that it denied the defendant his sixth amendment right to compulsory process. The Court said:

The right to offer the testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense.³²

The *Farber* opinion was brief in its analysis of a defendant's right under the compulsory process clause to ascertain the names of anonymous sources from whom a reporter has derived information. The court simply wrote, "[J]ascalevich] claims to come within the favor of [this] constitutional provision—which he surely does."³³ The court also pointed out that

The Supreme Court and the States Assess Privilege Legislation, 3 CAP. U.L. REV. 53, 76 (1974).

31. 388 U.S. 14 (1967). Before *Washington*, the Supreme Court had mentioned the compulsory process clause only five times—twice as dictum, and three times when it was found unnecessary to construe the clause. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 586 n.47 (1978). The compulsory process clause should not be confused with the confrontation clause, which has been construed many times. *Id.* at 586.

32. 388 U.S. at 19.

33. 78 N.J. at 272, 394 A.2d at 336. The following hypotheticals may make the holding of the case clearer:

Hypothetical 1: Mysterious deaths at hospital. Reporter talked to hospital staff and patients and was told that Dr. X had committed the murders. Reporter wrote story about the murders. Prosecution subpoenas reporter to disclose the sources and information. Reporter claims privilege. Result: reporter wins because the sixth amendment affords rights to an accused, but not to a prosecutor. 78 N.J. at 273, 394 A.2d at 337.

Hypothetical 2: Mysterious deaths at hospital. Reporter talked to hospital staff and patients after deaths and wrote story about deaths. Dr. X, who feels he has been defamed, sues reporter and newspaper and seeks to discover the reporter's source. Reporter claims privilege. Result: reporter wins since shield statute provides privilege, and the non-criminal plaintiff seeking the identity of the source has no sixth amendment right to the information.

Hypothetical 3: Mysterious deaths at hospital. Reporter had been in the hospital and had seen Dr. X inject patients with fatal dose of drug. Reporter writes story about what he saw. Reporter claims privilege when prosecution subpoenas him to testify as to what he saw. Result: by the terms of many shield

Jascalevich sought to use the evidence to prepare and present his defense.³⁴ Discovering the identity of a reporter's anonymous source could indeed prove to be very valuable to the defendant. The anonymous source might prove to be a witness who would testify that the defendant was innocent, and that the reporter had twisted the source's version of the facts. It is possible, too, that an anonymous source never existed, other than in the imagination of the newsman.

Farber's third holding that a newsman is entitled to a hearing when a privilege pursuant to a state shield statute clashes with the constitutional right of compulsory process is somewhat confusing. The problem is caused by use of the terms "preliminary determination"³⁵ and "hearing," very similar concepts but here designating two distinct required events. Newsmen do not like the *Farber* result³⁶ because, they say, there is no hearing before a reporter must turn the material over to the judge; there is only an ill-defined preliminary determination. The preliminary determination is merely a finding by a trial judge that a criminal defendant has shown by a preponderance of the evidence that it is *likely* that the information sought by the subpoena will be material, necessary, relevant to his defense, and unavailable from any less intrusive source. In fact, the majority and both dissents agreed that this procedure should be required.³⁷ The quarrel is whether this determination should be made by the criminal defendant, the newsman, or the judge. A criminal defendant is entitled to discover relevant information that he needs for his defense, but he is not constitutionally entitled to go on a fishing expedition.³⁸ Similarly, a reporter should not be the one to determine the scope of his own privilege.³⁹ It is a

statutes, including New Jersey's, the reporter must testify because he was an *eyewitness* to an act involving physical violence or property damage. In addition, some courts that recognize a constitutional newsman's privilege have held that this privilege protects only sources, and not reporters who have been eyewitnesses to crimes. *E.g.*, *People v. Dan*, 41 App. Div. 2d 687, 688 (N.Y. 1973) (newsmen eyewitnessed killings during Attica prison riots).

34. *But see* Dworkin, *supra* note 4, at 35: "[I]t has been suggested that [Jascalevich's lawyer] made his request [for the confidential information] not because he believed he would discover anything useful to his client but because he hoped that the request would be refused, so that he could later claim, on appeal, that the trial was unfair."

35. Also called "threshold determination." 78 N.J. at 276, 394 A.2d at 338.

36. *Farber*, *supra* note 3.

37. 78 N.J. at 292, 394 A.2d at 346-47 (Pashman, J., dissenting), 352 (Handler, J., dissenting). What the majority and the dissents do not agree upon is whether it was appropriate for the New Jersey Supreme Court to rule that even though the trial judge had not made the required preliminary determination, the appellate court should affirm on the ground that the facts showed the result of such a determination to be quite inescapable.

38. The *Farber* majority stated: "[T]his opinion is not to be taken as a license for a fishing expedition in every criminal case where there has been investigative reporting, nor as permission for an indiscriminate rummaging through newspaper files." 78 N.J. at 277, 394 A.2d at 339.

39. The concurring judge in *Farber* proclaimed: "[R]espondent's claim to a

judge familiar with legal concepts of preponderance of evidence, relevance, materiality, and compelling need, who should view the material and rule whether a defendant shall have it.⁴⁰ A preliminary determination is really only a safeguard to ensure that a judge considers such issues before production is ordered, and a requirement that a record of findings be made for appellate review.

Assuming the defendant satisfies the court that the requested material passes the preliminary determination test, the hearing thereafter would be to determine the relevance, materiality, and overbreadth of the evidence requested by the subpoena.⁴¹ However, it must be emphasized that an *in camera* inspection comes as a part of this hearing.⁴² Therefore, the judge has available the materials themselves as a basis for resolution of these issues, so he will no longer have to "ponder the relevance of the unknown" or make his decision "in a vacuum."⁴³ Newsmen feel that they should not

final adjudication without an *in camera* scrutiny by the court upon which to base its decision would project the absurd proposition that the press, and not the courts, should be the final arbiter of the constitutional mandate." 78 N.J. at 282, 394 A.2d at 341.

An analogy may be drawn to *United States v. Nixon*, 418 U.S. 638 (1974), in which the Court recognized a qualified privilege of confidentiality for conversations the President has with his advisors. The President, like the press in this case, wanted to be the one who decided what was confidential. The Court held, however, that the judiciary, not the President, was the final arbiter of a claim of executive privilege. 418 U.S. at 706.

40. Reporters, however, do not like the thought of turning over their confidential materials to a judge. Farber said:

In twelve years reporting at the *Times*, I have never encountered a person who provided me information in confidence who said to me, 'If push comes to shove, you can show it to a judge and let him be the arbiter of whether it is going to be passed on. Never have I! When people tell you that this is between us, this is in confidence, they mean precisely that.

Farber, *supra* note 3.

A recent statement by Theodore H. White, journalist and author, gives some indication of the attitudes held by newsmen which give rise to reporters' reluctance to give confidential information to judges:

[E]very veteran reporter knows that not all judges are spiritual descendants of Holmes, Brandeis and Warren. All too many judges, wrapped in the black robes of court, are graduate politicians, neither scholars nor Solons; and, as one descends the hierarchy from the Federal to state and local levels, one finds more and more of them are hacks. Appointments to the bench, in New Jersey as elsewhere, are born of politics; they are influenced by ethnic and racial groups, by labor and business interests, by political clubhouse connections, snobberies of bar associations and law schools—occasionally even by the Mafia. To extend to all these men, through the precedent of the *Farber* case, the same right to squeeze information, confidences and hearsay out of reporters converts the Sixth Amendment into an institution of judicial extortion.

White, *supra* note 2, at 78.

41. 78 N.J. at 274, 394 A.2d at 337.

42. *Id.* at 276, 394 A.2d at 338.

43. *Id.*

be forced to turn over their information for even an *in camera* examination. The criminal defendant, on the other hand, wants all of the information without any editing by the judge. The *Farber* court, convinced that irreparable damage would be caused to newsmen if confidential information were available indiscriminately to the criminal defendant, settled on a compromise solution whereby the reporter must turn over his materials to a judge so the judge can decide whether the reporter has to turn the materials over to the defendant.

The three holdings of *In re Farber* will certainly have an effect on the law of newsman's privilege, but that effect will not necessarily be entirely negative. Although courts in other states are not bound by *Farber*, the most damaging blow inflicted to newsmen by the decision is its apparent interpretation of the *Branzburg* case: the denial of a newsman's privilege derived from the first amendment. Thus, in light of *Farber*, in states which have no shield statutes and which similarly recognize no constitutional newsman's privilege, newsmen are in danger of being subject to fishing expeditions in both civil and criminal cases.⁴⁴ These states might require no preliminary determination or hearing since the *Farber* court was convinced it should implement these protections only because of the strong legislative policy evidenced by the shield statute. Without a constitutional privilege, there is a real possibility that prosecutors could use newsmen as an "investigative arm of the government."⁴⁵ That is, prosecutors could subpoena them every time a story was written about an illegal activity; it is probable that in many cases the investigative reporter, who will probably refuse to divulge the information, rather than the criminal suspect, would be the first to go to jail.⁴⁶

In re Farber's holding that the compulsory process clause of the sixth amendment triumphs over a testimonial privilege granted by a state shield statute could prove to be a significant aspect of the opinion. Although the court's holding was limited to the statutory newsman's privilege, other testimonial privileges derive from comparable statutes.⁴⁷ Soon, these may

44. In the hypotheticals *supra* note 33, assuming the incident occurs in a state with no shield statute, the reporter would not be protected in any of the examples.

45. *Branzburg v. Hayes*, 408 U.S. 665, 709 (Powell, J., concurring).

46. Eckhardt & McKey, *supra* note 17, at 131 ("[W]ith very few exceptions, reporters have over the years preferred to accept even indefinite coercive jail sentences rather than to breach assurances of confidentiality.").

47. Indeed, of all the testimonial privileges, including lawyer-client, accountant-client, doctor-patient, priest-penitent, and husband-wife, only the privilege against self-incrimination comes from the Constitution. Some testimonial privileges have always been merely statutory. Examples are the physician-patient privilege, *Klinge v. Lutheran Medical Center*, 518 S.W.2d 157, 164 (Mo. App., D. St. L. 1974), the accountant-client privilege, RSMO § 326.151 (1978), and the priest-penitent privilege, 8 J. WIGMORE, EVIDENCE § 2394, at 870 (1961), and the husband-wife privilege, 8 J. WIGMORE, EVIDENCE § 2394, at 870 (1961). For a discussion of the testimonial privileges, see C. MCCORMICK, EVIDENCE §§ 72-143 (2d ed. E. Cleary 1972). Other privileges have