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Protecting News Sources

IN CALIFORNIA a week ago Friday, four newsmen who have been convicted of contempt of court were packed off to the Fresno County jail. How long they will be there no one knows, because their case involves a test of wills—theirs and that of a judge. The newsmen are determined not to reveal how they got access to a grand jury transcript that a trial judge had ordered sealed. The judge is apparently equally determined to make them talk so that he can learn how that order was violated or evaded. So it looks as though the four will stay in jail until the judge decides to let them out. This is a senseless confrontation, with ramifications—and lessons—that reach far beyond Fresno.

This case arose in the fall of 1974 after a Fresno city councilman was indicted on bribery and conspiracy charges. In an effort to guarantee him a fair trial, Judge Denver Peckinpah ordered that the grand jury transcript, which is normally made public in California, be sealed and that no officers of the court make any part of it public. Two months later, after the judge had transferred the trial to Oakland, the Fresno Bee published several stories based on the grand jury testimony. Its editors say they withheld those stories for a month because of concern about prejudicial pretrial publicity but decided to publish them once the trial was transferred out of their circulation area. The judge, displeased with the stories, called four newsmen—two reporters and the paper's managing editor and ombudsman—into court and demanded that they tell him how they got the transcript. They testified that they did not have the transcript and that no officer of the court, so far as they knew, had violated his order. But they refused to reveal their source, relying on the First Amendment and on a California "shield" law, which says that a newsman cannot be held in contempt of court for refusing to reveal a confidential source. Rejecting both defenses, the judge found them in contempt and his decision was upheld by the California Court of Appeal. Both the California Supreme Court and the U.S. Supreme Court have refused to review the case.

The first thing that strikes us about this test of wills is that it serves no practical purpose. The stories had no impact at all on the councilman's right to a fair trial. The judge had guaranteed as much by transferring the trial to another jurisdiction and, indeed, could have achieved the same goal by the same action without the unusual gag order. The only purpose of the inquiry into the source of the stories is to vindicate a judge's power to enforce his own orders. The information sought has nothing to do with a fair trial. The argument has to do with who can be charged with contempt for violating the judge's order or, as the judge seems to think, with stealing the transcript out of his files. Even if the California appellate court is right in saying that the Sixth Amendment's fair trial clause is pre-eminent and that any First Amendment claim must be subordinated to it (a holding we think is wrong, both historically and philosophically), the confrontation in this case is not between the rights that flow from the two amendments. It is between an asserted First Amendment right and the power of a judge to vindicate an unnecessary order. He would make mincemeat out of the First Amendment in order to demonstrate judicial power.

This is not unlike the situation rapidly coming to a head in the House of Representatives where the Committee on Standards of Official Conduct is insisting that Daniel Schorr tell where he got a copy of the Select Intelligence Committee's final report. Why the House Committee thinks it should trample on the First Amendment to find this one fact, which is not now particularly relevant to anything, is a mystery to us. The judge in Fresno should have dropped the inquiry months ago. It is probably too much to expect the ethics committee to call off its investigation at this point. But it is not too much to ask the committee to abandon its pursuit of Mr. Schorr once it has established, for the record, that he is not going to reveal his source. To pursue either case to the point of a constitutional confrontation is to invite, for no good reason, the inevitable damage that occurs whenever two fundamental constitutional principles are brought into head-on collision. When that happens, one or the other must thereafter be diminished.