Testimony of

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October 19, 2005

TESTIMONY PREPARED FOR THE OCTOBER 19 HEARING
OF THE SENATE COMMITTEE ON THE JUDICIARY
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Chairman Specter, Ranking Member Leahy and members of the committee, thank you for the opportunity to testify today in support of a federal shield law.

I am Dale Davenport, editorial page editor of The Patriot-News in Harrisburg, Pennsylvania. I joined the newspaper as a reporter in 1972 after completing my military service, and I later worked as an assistant city editor, city editor and managing editor before taking my current position in 1988.

Confidential sources are essential to our ability to inform the public. That's true not just in Washington or New York, but across the country.

And it's certainly true in Harrisburg, where in April 1993 there was a move afoot in the Pennsylvania Legislature to abolish the Pennsylvania Crime Commission, an agency that for 25 years had been investigating corruption, but which had no prosecutorial powers. Each year it would publish its findings, but the prosecution of any of its allegations of criminality was the responsibility of the appropriate district attorney or, in certain cases, the attorney general of Pennsylvania. The attorney general at the time, Ernie Preate, testified in support of the effort to disband the commission, arguing that his office, under a more recently passed statute, had assumed the power to investigate the cases which had been the commission's purview.

Just as the effort was gaining steam, reporters Pete Shellem and Peter J. Shelly of The Patriot-News learned and reported that the Crime Commission had subpoenaed the financial records of Attorney General Preate's campaign committee. Its objective was to determine if he had arranged for reduced charges and no jail time for several of his contributors who had been caught in a crackdown on illegal video pokers machines. Preate denied any wrongdoing and said he had returned contributions he had received from video poker operators. The Legislature proceeded to terminate the Crime Commission's funding.

Reporters Shellem and Shelly continued to report the story of the Preate investigation, despite continued denials by the attorney general, who was preparing to run for governor in 1994, and ridicule by other politicians who accused the newspaper of a vendetta. Then the U.S. attorney for the Middle District of Pennsylvania became involved. Two years later, Preate resigned, pleaded guilty to a charge of mail fraud, and served 14 months in prison.

Shellem and Shelly relied heavily on confidential sources for their stories. Without the ability to assure their sources that their identities would remain hidden, their stories could never have been written, and it's anyone's guess whether the case against Preate would have concluded in the attorney general's admission of guilt.

What is a confidential source?

When I began my first newspaper job 42 years ago as a summer vacation relief reporter for a 10,000-circulation morning daily in my hometown, the term "confidential source" hadn't been coined - or at least it had not yet become part of the journalism lexicon in Central Pennsylvania. But as I learned the ropes as a reporter, I encountered a large number of people who helped me get information for my stories who clearly didn't expect me to put their names in the paper as the sources of that information. Some of them wouldn't have wanted me to identify them as a source, out of embarrassment or fear or for some other reason. A lot of these folks were simply doing their jobs, or thought they were, by pointing me in the direction of a document or an official source, or confirming for me some detail of the story that I had learned elsewhere.

I can't recall ever establishing a formal agreement with anyone not to identify him or her in print, although the phrase "Don't quote me" probably came up in conversations, because I still get that a lot today.

So who were these early sources? They were clerks in the row offices in the courthouse. It was the admitting nurse at the hospital. They were numerous police officers; an ambulance driver; the secretary in the school district headquarters. The mother of one of my high school classmates was the county coroner's assistant and made a totally reliable but unofficial source.

Throughout my career I have had more sources of this sort than I could ever count. And the longer a journalist works at one place or covers one beat, the more he or she comes to rely on these folks. And the more these folks come to trust the journalist and help him or her with a story.

Then there are friendships that build with time, and people whom you know and who know you, and who are willing to share information to which they have access, either officially or unofficially. I also couldn't count the times that someone I know has said to me, "You don't know where you heard this, but ..."

All of these people represent what we now call confidential sources. All of us in the news business have them - lots of them. If we had to rely only on official sources for news stories, there would be nothing but the official line in our news stories, and the free press, as we know it in America, wouldn't exist.

In fact, these sources are so numerous and we use them so routinely that we may not immediately think of them as confidential sources. And it's rare that we are even asked about them. Only when the stories begin to get sensitive, when we begin to gather information that someone doesn't want us to report, might that someone ask us, "Who told you about this?"

Another reason we may not refer to someone as a source is that often we don't publish what this person has told us, but, instead, we seek official confirmation of it. Because of professional and public concern about the use of anonymous sources in news stories, we insist on reporting on the record whenever possible. More often than not, what these confidential sources provide us is context, the kind of background that helps us to tie the facts together or to put them in order to accurately represent what happened, or to pick out the most significant aspects of the story.

Today we have a well-defined and well-understood reporter-source relationship known as "background." It draws its name from its original purpose, though we use what we learn differently these days.

Of course, people who speak to journalists "on background" are confidential sources.

Situations such as Judith Miller's make headlines because they involve stories of great moment in the course of the nation's history and include high-level government figures. There are people of stature or rank in Harrisburg who share information with journalists in strict confidence, too, but the stories that result aren't usually the ones about which journalists are called to testify.

Much more often, reporters and editors are subpoenaed to testify about stories that are entirely on the record. The lawyers want to know how the reporter assembled the facts, how he or she decided what to put into the story, what was left out. And these questions form a continuum that leads invariably to the question of identity of the reporter's sources.

Here's the situation for journalists today.

In the U.S. District Court for the Middle District of Pennsylvania in Harrisburg, a trial is under way in a civil action brought by 11 residents of the Dover Area School District in rural York County against the Board of School Directors. The school board about a year ago adopted a policy that directs ninth-grade science teachers to tell their students that some people believe life is so complex that it had to be created by an "intelligent designer." The residents allege that the policy violates the Establishment Clause of the First Amendment to the U.S. Constitution.

Two reporters covered the public meeting at which the school board adopted the policy, one for each of the two newspapers in the city of York. During the discovery phase of the litigation, counsel for both the plaintiffs and the defendants issued subpoenas to compel the reporters to testify in depositions about the stories they wrote. The plaintiffs' attorneys wanted the reporters to certify accuracy and authenticity of the clippings that would be entered in evidence. Defense counsel, however, sought to have at least one of the reporters produce her notes, drafts of her stories, e-mails and any other unpublished materials she used in preparation of her stories. The intent, according to the order of Judge John E. Jones III that denied the defendants access to such materials, was to show that her coverage was biased and included false information.

What her reporting had to do with the issue at hand - whether the school district's science policy violates the Constitution - escapes me. Nevertheless, Judge Jones ordered an in camera review of this material before ruling it out of bounds.

However, as of the date that this testimony is being submitted - October 17, 2005 - the two reporters remain under subpoena to testify at trial, if called, about what they saw and heard at the meeting at which the policy was adopted, as it was published in their newspapers. In upholding the subpoenas, the judge specifically barred questions about confidential sources or any topic other than the published articles.

A few observations on this case.

? News coverage of this issue is irrelevant to the central issue of constitutionality of a specific government action. There is no compelling reason for reporters to testify as witnesses when the action being challenged occurred at an open meeting attended by several other members of the public. Reporters should be the last resort, not the first option. Otherwise, our reporters would spend half their time in court testifying about what they have already written and had published in the newspaper.

? While this is a civil matter, the defendants - who sought to examine unpublished material, reporters' notes, etc. - in fact are a government agency. They did not seek the identity of confidential sources, but they sought material that may well have contained the identity of confidential sources in the broader context that I have defined. In addition, once witnesses are sworn to testify as to how they covered a story, the identity of sources, including confidential sources, can become part of the continuum of testimony about the newsgathering process. Even putting aside confidential sources, being examined under oath about the decisions made in the newsgathering process is invasive and inappropriate.

? In considering the motions to quash the subpoenas of the reporters, the trial judge ruled three separate times, narrowing the scope of questioning each time, specifically barring questions concerning confidential sources, but in the end allowing the plaintiffs' counsel to call the

reporters and defense counsel to cross-examine. And absent a statute on which to base his rulings, the judge was forced to consider the issue of reporters' privilege as defined in case law, including the 1972 U.S. Supreme Court decision in Branzberg v. Hayes, as well as other cases in the Third Circuit. If there were a federal statute in place that defined conditions and strict limits for journalists' testimony, clear and consistent standards would apply to all such inquiries. It would be less likely for reporters to be called to testify in the first place. A statute also would provide a clear basis for appeal.

? Both of these reporters are independent contractors, what we call correspondents or "stringers." They are not employees of the newspapers. They were fortunate that the newspapers that contracted with them for coverage agreed to provide them with legal counsel. Others are not so fortunate, and the lack of a clear and consistent standard would make their burden even heavier.

What else is happening in Pennsylvania?

Our experience in Pennsylvania is that prosecutors and lawyers representing clients in civil cases are much more likely to seek to examine the newsgathering process, which of course opens the issue of confidential sources, on such stories as this, rather than the investigative stories that clearly make use of confidential sources. When clippings or broadcast videotape are sought as evidence to be entered at trial, the trend is to subpoena reporters and editors to produce them and verify, as witnesses under oath, their authenticity, as well as to explain how they were gathered. It's this examination that produces a chilling effect on the newsgathering process and, in the case of independent contractors like those involved in the Dover School Board case, can impose an onerous burden on the journalists to secure legal counsel to challenge the demand for materials. Demands for unpublished materials - reporters' notes, unpublished drafts and scripts of stories, video that was not broadcast - are even more intrusive into the process.

Pennsylvania is one of 31 states with a shield law (42 Pa.C.S.A. §5942). It states:

"No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit."

While this statute appears to provide absolute protection of confidential sources, and historically has been interpreted also to protect unpublished materials in most cases, courts in recent years have seemed more willing to consider the arguments from prosecutors and other legal counsel seeking the testimony of journalists regarding the newsgathering process. In a recent case, the Pennsylvania Supreme Court held that so long as a source has been identified in a news story, any material provided by that source, though unpublished, is no longer protected under the Shield Law.

However imperfect, the Pennsylvania shield law does provide protection for confidential sources. But without a federal shield law, that protection can be illusory. When reporters agree to protect the confidentiality of a source, they don't know if they will be called to testify in state court or in federal court. In state court, they usually can protect their promise. In federal court, they may not be able to. The lack of federal protection makes it difficult for journalists to rely on state shield laws in the real world.

Conclusions.

There are few instances where the testimony of a journalist is relevant to a legal proceeding involving issues unrelated to the gathering or dissemination of news, much less essential to its prosecution. The question of where a journalist obtained information is even less important,

except in those rare cases where public safety may be imperiled.

Nevertheless, lawyers increasingly are seeking journalists' testimony, which not only interferes with the free flow of information by disrupting the immediate work of those journalists, but has a chilling effect on the everyday sources who provide the glue for accurate reporting of news stories.

A federal statute such as S. 1419 is clearly needed to protect news reporting by clearly defining those few exceptions where a journalist could be compelled to disclose previously undisclosed information or the identity of someone who provided it.

The intent of a shield law is not to protect journalists. A shield law protects the thousands upon thousands of ordinary Americans who facilitate the free flow of information - mostly in anonymity and mostly by choice - that journalists deliver to the public.

Thank you again for the opportunity to testify in support of this bill.